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CALIFORNIA REPORTER

IN VOLUME

115 PACIFIC REPORTER

SECOND SERIES

18 Cal.2d 232

FOLEY et al. v. SONOMA COUNTY FARMERS' MUT. FIRE INS. CO.

Sac. 5464.

Supreme Court of California.
July 3, 1941.

1. Insurance 🔑323(3)

A dwelling may be "unoccupied", though not "vacant", within provision of fire insurance policy exempting insurer from liability for loss of or damage to personalty in dwelling house while vacant or unoccupied, as such terms are neither synonymous nor complementary, but term "vacant" is associated with removal of inanimate objects from dwelling, while term "unoccupied" is associated with abandonment of dwelling as customary abode by its former occupants.

See Words and Phrases, Permanent Edition, for all other definitions of "Unoccupied" and "Vacant".

2. Insurance 🔑323(3)

It is not physical presence of either inanimate objects or human occupants alone in dwelling house, but habitual use of such objects by human occupants, that renders such house an "occupied dwelling" not covered by provision of fire insurance policy exempting insurer from liability for loss of or damage to personalty in described dwelling house while vacant or unoccupied.

See Words and Phrases, Permanent Edition, for all other definitions of "Occupied Dwelling".

3. Insurance 🔑323(4)

To constitute "occupancy" of dwelling house, so as to avoid application of provision in fire insurance policy exempting insurer from liability for loss of or damage to personalty in dwelling house while vacant or unoccupied, it is not essential that dwelling be continuously used by a family, and house will not be considered "vacant" or "unoccupied" during family's absence therefrom for health, pleasure, business or convenience for reasonable periods.

See Words and Phrases, Permanent Edition, for all other definitions of "Occupancy".

4. Insurance 🔑323(4)

A mere temporary absence of occupants of dwelling house from such premises, with intention to return thereto, does not render dwelling "unoccupied" within provision of fire insurance policy exempting insurer from liability for loss of or damage to personalty in dwelling while vacant or unoccupied.

5. Insurance 🔑323(4)

A dwelling house will not be regarded as "occupied dwelling", so as to render inapplicable provision of fire insurance policy exempting insurer from liability for loss of or damage to personalty in such house while vacant or unoccupied, unless it is home or dwelling place of some person living and sleeping therein habitually, not every night, but usually and ordinarily, and returning thereto as place of abode after temporary absences.

6. Insurance 🔑323(4)

A person's home does not cease to be "occupied dwelling" when he is temporarily absent therefrom, so as to render applicable provision in fire insurance policy exempting insurer from liability for loss of or damage to personalty in such dwelling while unoccupied, as it is not occupant's physical presence therein, but habitual recurrence of such presence, which renders dwelling occupied.

7. Insurance 🔑323(4)

A provision in fire insurance policy, exempting insurer from liability for loss of or damage to personalty in described dwelling house while unoccupied beyond period of 10 consecutive days, did not identify term "unoccupied" with occupants' temporary absence, but continued operation of policy for additional 10 days in event dwelling was rendered unoccupied through its abandonment as customary abode by its former occupants.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Ellen Foley and another against the Sonoma County Farmers' Mutual Fire Insurance Company on a fire insurance policy. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Prior opinion, 108 P.2d 939.

Geary & Tauzer, J. N. DeMeo, and H. W. A. Weske, all of Santa Rosa (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Rutherford, Rutherford & Rutherford and Wallace Rutherford, all of Napa, for respondents.

TRAYNOR, Justice.

Defendant appeals from a judgment of the trial court in favor of plaintiff, Ellen Foley, in an action upon a policy of fire insurance.

The defendant issued to Ellen Foley a "California standard form of county fire insurance policy" covering a dwelling house in Sonoma county and furniture, family stores, wearing apparel and like articles within the dwelling house for the period from October 17, 1933, to October 17, 1936. The policy contains a clause that: "Unless otherwise provided by agreement indorsed hereon, or added hereto, this company shall not be liable for loss or damage occurring * * * while a building herein described, whether intended for occupation by owner or tenant is vacant or unoccupied beyond the period of ten consecutive days." The present case concerns only the insurance on the furniture and other described articles since the policy, so far as it concerned the house, was assigned with the consent of the defendant to the vendees to whom plaintiffs on April 20, 1934, conveyed the real property under an agreement by which the plaintiffs were to occupy the house for a period of three and one-half years without the payment of rent.

On October 15, 1934, the plaintiffs left the premises with the intention of remaining away three or four days in order to visit a daughter in Pittsburg, California. The plaintiffs there decided to visit another daughter in Stockton, California. On the evening of October 28, 1934, while they were still at Stockton, the dwelling house and the personal property contained therein were destroyed by fire of unknown origin.

It was stipulated that there was no notice to, or consent by, the defendant, concerning the plaintiffs' departure from the premises. At the time of the fire, the plaintiffs had been away from the premises from the 15th to the 28th of October, a period of thirteen days. Defendant contends that their absence during that period rendered the dwelling unoccupied and served to suspend the operation of the policy under the clause relieving the defendant of liability in the event the dwelling is vacant or unoccupied for more than ten consecutive days.

[1] A dwelling may be unoccupied even though it is not vacant; the terms are neither synonymous nor complementary. They are used in the present clause as alternatives and not in conjunction. The term "vacant" is associated with removal of inanimate objects from a dwelling; the term "unoccupied" is associated with the abandonment of that dwelling as a customary abode by its former occupants. See cases collected in 43 Words and Phrases, Perm.Ed., pp. 344-355; 26 Corpus Juris 213; 14 R.C.L. 1103.

[2] In the present case the question of vacancy does not arise as there was no removal of inanimate objects from the dwelling. The occupants left their furniture and furnishings intact, thus corroborating their avowed intention of returning to them within a few days. The issue therefore turns upon the meaning of unoccupied. The vacancy of a dwelling does much to strengthen the conclusion that it is unoccupied, as the presence of furnishings does much to strengthen the conclusion that it is occupied. But a dwelling which is not vacant is not necessarily occupied, and inanimate objects cannot of themselves render a dwelling occupied. It is neither the physical presence of inanimate objects alone, nor the physical presence of human occupants alone which characterizes an occupied dwelling. It is the habitual use of the inanimate objects by the human occupants that animates the dwelling and renders it occupied, that transforms four walls into a home. In such a home the human occupants move freely in and out so that their physical presence within four walls is rarely continuous.

[3-5] Recognizing the dynamic relationship of human beings to their dwellings, courts throughout the country have held that temporary absence of the occupants does not render a dwelling unoccu-

pied. "To constitute occupancy of a dwelling house, it is not essential that it be continuously used by a family. The family may be absent from it, for health, pleasure, business, or convenience, for reasonable periods, and the house will not, on that account, be considered as vacant or unoccupied." Moody v. Amazon Ins. Co. 52 Ohio St. 12, 38 N.E. 1011, 1013, 26 L.R.A. 313, 49 Am.St.Rep. 699. "A mere temporary absence of the occupants from the premises, there being an intention to return, will not render the building unoccupied, so as to void the policy." Republic Ins. Co. v. Watson, Tex.Civ.App., 70 S.W.2d 441, 443. "The authorities without a single exception agree that a dwelling house will not be regarded as occupied unless it is the home or dwelling place of some person living and sleeping there habitually, not every night, but usually and ordinarily, who, when temporarily absent, returns to it as a place of abode." Continental Ins. Co. of New York v. Dunning, 249 Ky. 234, 60 S.W.2d 577, 579. See, also, Snyder v. Fireman's Fund Ins. Co., 78 Iowa 146, 42 N.W. 630, 631; Hill v. Ohio Ins. Co., 99 Mich. 466, 58 N.W. 359; Herrman v. Adriatic Fire Ins. Co., 85 N.Y. 162, 167, 39 Am.Rep. 644; Williams v. Pioneer Co-Op. Fire Ins. Co., 183 App.Div. 826, 171 N.Y.S. 353, 355; Smith v. Aetna Ins. Co., Mo. App., 269 S.W. 682, 685; Home Fire Ins. Co. v. Peyson, 54 Neb. 495, 74 N.W. 960; cf. Kinneer v. Southwestern Mutual Fire Ins. Ass'n, 322 Pa. 100, 185 A. 194; Hudson Ins. Co. v. McKnight et al., Tex.Civ. App., 58 S.W.2d 1088.

[6] It is thus generally accepted that a person's dwelling constitutes not the boundaries but the focal point of his life. He does not cease to have a home when he is temporarily absent therefrom, nor does his home cease to be an occupied dwelling. It is not his physical presence but the habitual recurrence of that presence which renders a dwelling occupied. See cases collected in 43 Words and Phrases, Perm. Ed., pp. 344-355; 26 Corpus Juris 213; 14 R.C.L. 1103; Mauck v. Northwestern National Ins. Co., 102 Cal.App. 510, 283 P. 338; Covey v. National Union Fire Ins. Co., 31 Cal.App. 579, 161 P. 35.

[7] Defendant concedes that if there is no clause specifying how long a dwelling may be unoccupied the term unoccupied is not identified with the temporary absence of the occupants. It seeks, however, to make that identification when the period of nonoccupancy is specified. There is no more basis for such an identification in the second instance than in the first, for specifications as to the period of nonoccupancy set no limits on the periods of temporary absence. The term unoccupied is not thereby redefined and under its customary definition it does not characterize the dwelling in question. The insurance covered a dwelling and the personal property therein provided the dwelling be not occupied "beyond the period of 10 consecutive days." The introduction of this phrase can no more change the meaning of the term unoccupied than it can change the meaning of the terms dwelling or personal property. Far from imposing a limitation on temporary absences it has the effect of continuing the operation of the policy for an additional ten days in the event the dwelling is rendered unoccupied through its abandonment as a customary abode by its former occupants.

The judgment is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; SHENK, J.; CARTER, J.; EDMONDS, J.; SPENCE, J., pro tem.

18 Cal.2d 210

FLYNN v. CITY AND COUNTY OF SAN FRANCISCO.

S. F. 15996.

Supreme Court of California.

July 2, 1941.

1. Licenses ⚷6(2)

The City and County of San Francisco has the power under its freeholders' charter to levy license taxes for revenue purposes on every kind of business except that conducted by seller or manufacturer of goods, wares or merchandise who operates at a fixed place of business in city and who is not required to secure a permit in accordance with, or under authority of any local health, sanitary, or other ordinance under the police power. St.1931, pp. 2991, 2992, § 24.

2. Taxation ⚷1

The character of a tax must be determined by its incidents and from the natural and legal effect of the language employed in the act imposing the tax.

3. Municipal corporations 🔑120

The nomenclature of an ordinance of the City of San Francisco was of minor importance in determining character of tax or license fee imposed by the ordinance, since the court would look beyond the title or bare legislative assertion that the ordinance was for a license to see and determine the real object, purpose and result of the ordinance.

4. Licenses 🔑1
Taxation 🔑1

Tax levied by reason of ownership of property is a "property tax" rather than "occupation tax".

See Words and Phrases, Permanent Edition, for all other definitions of "Occupation Tax", and "Property Tax".

5. Licenses 🔑3

The mere right to own and hold property cannot be made the subject of excises.

6. Automobiles 🔑28, 73

Where city levied ad valorem taxes on all property including taxicabs and trucks, an ordinance purporting to impose a license tax on trucks and taxicabs based entirely on number and type of trucks or cabs owned without reference to use or operation thereof, imposed a "property tax" and was void as providing for "double taxation" of the trucks and cabs. Pol.Code, § 3607; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Double Taxation".

7. Taxation 🔑47(1)

The constitutional provision that all property in the state shall be taxed in proportion to its value prohibits double taxation of property. Const. art. 13, § 1.

8. Taxation 🔑47(1)

Duplicate or triplicate taxation levied at the same time and for the same purpose and upon the same property is void whether levied according to the standard of valuation or benefits, since such taxation is destructive of that equality and uniformity which the Constitution requires for validity of every tax.

9. Taxation 🔑538

A voluntary payment of taxes which have been illegally levied precludes right of recovery.

10. Municipal corporations 🔑977

Whether payment of taxes was "voluntary" so as to preclude recovery of taxes paid must be determined from terms of ordinance under which taxes are imposed, the circumstances attendant on payment and a consideration of consequences which might follow upon nonpayment.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary".

11. Payment 🔑80

Where by reason of the peculiar facts, a reasonably prudent man finds that in order to preserve his property or protect his business interests, it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, the payment may be recovered.

12. Automobiles 🔑50, 102

Where evidence established that motivating cause of payments of purported license fees imposed on trucks and taxicabs by city ordinance, which was invalid because imposing double taxation, was fear of infliction of penalties outlined in coercive provisions of the ordinance and emphasized by periodic and forceful threats and demand warnings by city, the payments were not "voluntary" and could be recovered, notwithstanding lack of formal protests. Pol. Code, § 3607; Const. art. 13, § 1.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by Frank X. Flynn against the City and County of San Francisco, to recover various amounts paid as and for license taxes during years 1931 to 1935, inclusive. From an adverse judgment, the defendant appeals.

Affirmed.

John J. O'Toole, City Atty., and Walter Dold, Deputy City Atty., both of San Francisco, for appellant.

Henry C. Clausen, of San Francisco, for respondent.

CURTIS, Justice.

Plaintiff, upon two hundred fifty-five assigned causes of action, brought this suit against the City and County of San Francisco to recover various sums paid as and for license taxes during the years 1931 to 1935, inclusive. The judgment was for the plaintiff, and the defendant City and County has appealed.

For the sake of brevity on the trial of this action it was stipulated and the court found that plaintiff's assignors could properly be segregated into three groups, classified according to ownership of the following vehicles: "miscellaneous trucks," "trucks for hire" and "taxicabs". License taxes were collected from these persons under authority of ordinance No. 5132, New Series, adopted in 1920 and entitled "An Ordinance Imposing License Taxes on Certain Businesses, Callings, Trades or Employments within the City and County of San Francisco". We are concerned here with the license provision relating to trucks, section 73, as amended in 1920 and 1925 by the respective ordinances No. 5191 and No. 6584, New Series, and the license provision relating to taxicabs, section 54, as amended in 1925 by ordinance No. 6586, New Series, whereby the levies in question were based on the number and type of vehicles owned. In the trial court plaintiff urged that these ordinance sections were invalid for the following reasons: (1) the license taxes were imposed for revenue rather than for regulation only, a levy alleged to be beyond the power of the city and county to authorize under its present charter; and (2) the collection of these amounts constituted double taxation, oppressive and unfair, for at all times in addition to the stated license taxes, the City and County of San Francisco exacted an ad valorem property tax on the same vehicles. Plaintiff also claimed that the payments here in question were made under compulsion. The lower court upheld these contentions and declared the taxes were paid involuntarily, but because of the bar of subdivision 1 of section 339 of the Code of Civil Procedure, recovery by plaintiff was limited to $29,782.20, representing the sums so collected from plaintiff's assignors within two years of filing suit.

The chief controversial issue to be determined on this appeal is that of the validity of these ordinance provisions challenged on two grounds: (1) their alleged illegal imposition of a license tax for purposes of revenue as distinguished from regulation; and (2) their asserted authorization of double taxation in contravention of the state Constitution.

[1] With respect to the first proposition, we refer to our recent decision in West Coast Advertising Company v. City and County of San Francisco, 1939, 14 Cal. 2d 516, 95 P.2d 138, wherein, after a complete review of the pertinent authorities in this state, we determined the matter in favor of the municipality in concluding that San Francisco has the power under its freeholders' charter to levy license taxes for revenue purposes on any and every kind of business except that conducted by a seller or manufacturer of goods, wares or merchandise who operates at a fixed place of business in said city and county and who is not required to procure a permit "in accordance with or under authority of any local health, sanitary or other ordinance under the police power". § 24 of the San Francisco Charter, Stats. 1931, pp. 2973, 2991, 2992. Therefore, no further comment on that subject is necessary other than the statement that we adhere to the views there expressed. The question of whether or not any of respondent's assignors come within the protection of the foregoing exemption as expressed in section 24 of the Charter need not be considered here, since it is our opinion that the constitutional inhibition against double taxation of property is decisive of the issue of validity of these ordinance provisions in their application to all three groups of taxpayers above mentioned. It is therefore to this second objection raised by respondent that we now turn our attention.

In support of his contention that these sections of the San Francisco License Ordinance impose double taxation, respondent urges that since these assessments are based on ownership of certain designated vehicles, they are for the same purpose and determined in the same manner as the regular ad valorem taxes levied by the appellant on all property owners. Appellant resists this argument by claiming that these exactions are, in fact, occupational license taxes for the privilege of engaging in a business wherein the specified vehicles may be used on the public streets in the course of regular commercial activities.

The pertinent language of the provisions of ordinance No. 5132, New Series, amended as aforesaid, bearing on this particular question, is as follows:

"Section 73. Every person, firm or corporation owning any truck, box wagon, tank wagon, hay wagon, lumber truck, motorcycle or other vehicles, whether drawn by horses, propelled by motors or used as a trailer, shall pay a license fee therefor, as follows:"

Briefly stated, the schedule of amounts to be paid is fixed according to the size and type of the listed vehicles, with the exception of motorcycles, which are subject to the prescribed fee if used commercially and which are not involved in this case.

"Section 54. Every person, firm or corporation owning any public passenger vehicle, whether drawn by horses or propelled by any motive power, except railroad cars, shall pay a license tax therefor, as follows:"

The assessments vary according to the seating capacity available in the specified vehicles.

Examination of the express wording of these sections reveals that the levies depend entirely on the factor of ownership; no mention is made of use or operation of the vehicles, with the exception above mentioned as to motorcycles. In the face of this clear language referable to ownership as the single determinant of these assessments, we do not consider these sections susceptible of the construction advanced by appellant. The decisions relied upon by appellant such as Geis v. State, 126 Md. 265, 94 A. 909; Harder's Fire Proof Storage & Van Company v. City of Chicago, 235 Ill. 58, 85 N.E. 245, 14 Ann.Cas. 536; City of Chicago v. American Tile & Gravel Roofing Co., 282 Ill. 537, 118 N.E. 730, and City of Buffalo v. Goodman, 77 Misc. 355, 136 N.Y.S. 568, were concerned with enactments designed to impose license fees on vehicles used or operated on the streets in connection with business activities. For instance, in the case of Harder's Fire Proof Storage & Van Company v. City of Chicago, supra [235 Ill. 58, 85 N.E. 246, 14 Ann. Cas. 536], the ordinance under review provided that it was unlawful for any person "to use * * * any wagon or other vehicle in the transportation of persons or property upon the streets, avenues or alleys of the city unless such wagon or vehicle be licensed," and accordingly it was held valid as a proper regulation of the use of the streets.

[2-6] The character of a tax must be determined by its incidents, and from the natural and legal effect of the language employed in the act. Dawson v. Kentucky Distilleries & Warehouse Co., 255 U.S. 288, 292, 41 S.Ct. 272, 65 L.Ed. 638; Ingels v. Riley, 5 Cal.2d 154, 159, 53 P.2d 939, 103 A.L.R. 1. The nomenclature is of minor importance, for the court will look beyond the mere title or the bare legislative assertion that the provision is for a license to see and determine the real object, purpose and result of the enactment. 37 C.J. 172; Smith v. Mahoney, 22 Ariz. 342, 348, 197 P. 704. A tax levied by reason of ownership of property is a tax on property rather than an occupation tax (4 Cooley on Taxation, 4th Ed., § 1676, p. 3382; Dawson v. Kentucky Distilleries & Warehouse Co., supra, 255 U.S. at page 294, 41 S.Ct. 272, 65 L. Ed. 638; Thompson v. Kreutzer, 112 Miss. 165, 167, 72 So. 891; Thompson v. McLeod, 112 Miss. 383, 73 So. 193, L.R.A. 1918C, 893, Ann.Cas.1918A, 674), and it reasonably follows that the mere right to own and hold property cannot be made the subject of excises. Craig v. E. H. Taylor, Jr., 4 Sons, 192 Ky. 36, 39, 232 S.W. 395. Here we unquestionably have a situation where the same persons paid taxes on their vehicles twice, to the same taxing power, during the same period, based each time upon ownership of the same property, and each time for the same purpose, namely, revenue. Under such circumstances these so-called license taxes clearly fall within the terms of section 3607 of the Political Code, which provides that double taxation of property shall not be permitted.

[7, 8] Though the state Constitution does not forbid double taxation expressly, it does provide by article XIII, section 1, that "all property in the State * * * shall be taxed in proportion to its value", which language has been construed to prohibit double taxation of property. Bank of California, Nat. Ass'n, v. Richardson, 175 Cal. 813, 165 P. 152; Bank of California, Nat. Ass'n v. Roberts, 173 Cal. 398, 160 P. 225; People ex rel. Burke v. Badlam, 57 Cal. 594; Spring Valley Water Co. v. County of Alameda, 24 Cal.App. 278, 141 P. 38; City and County of San Francisco v. Mackey, C.C., 21 F. 539, affirmed C.C.Cal. 1884, 22 F. 602. As was stated in the early case of People v. Parks, 58 Cal. 624, "Duplicate or triplicate taxation levied at the same time, and for the same purpose and upon the same property * * * is void, whether levied according to the standard of valuation or benefits. Such taxation is destructive of that equality and uniformity which the Constitution requires for the validity of every tax." In harmony with this line of decision, we do not see how a tax on a person's vehicles based distinctively on ownership can be supported, when by the same authority and for the same purpose the same vehicles were taxed by value as a part of his whole property. This is a very different thing from one tax upon property and another upon the business.

though the latter may indirectly reach the property. Manifestly, under the prevailing circumstances, the exaction of the assessments in question was violative of the indispensable principle of equality and uniformity commensurate with taxation of property "in proportion to its value".

As we have concluded that these ordinance provisions had the effect of imposing an additional property tax upon respondent's assignors in contravention of article XIII, section 1, of the state Constitution, and for that reason they cannot be sustained, we have no occasion to consider here whether they would also be invalid for other reasons advanced by respondent.

[9-11] Since it is well established that a voluntary payment of taxes which have been illegally levied precludes the right of recovery, the next inquiry is whether or not the collections in question were effected by compulsion. The character of the payments—voluntary or involuntary—is to be determined from the terms of the ordinance under which the taxes are imposed, the circumstances attendant upon payment and a consideration of the consequences which might follow upon nonpayment. Vitale v. City of Los Angeles, 13 Cal.App.2d 704, 706, 57 P.2d 993. Ordinance No. 5132, New Series, provided an elaborate system for enforcement of these collections, including penalties for delinquencies running to a maximum of 50 per cent, the right to bring civil actions for the recovery of such taxes and to have writs of attachment issued therein, and criminal liability to the extent of a fine of $500 or imprisonment for a term of six months, or both such fine and imprisonment. It appears from the record that postal cards were sent at intervals from the tax collector's office for the purpose of warning the persons subject to these assessments of the penalties and civil and criminal liabilities; and there were some arrests and prosecutions. Furthermore, appellant admits that during the year 1933 in the course of a drive calculated to expedite these tax payments, the following acts of coercion were committed: trucks not bearing the prescribed license plates were stopped on the city streets, their drivers were escorted to the tax collector's office and were forced to notify their employers they were so held until such time as the money arrived to satisfy the demands made. Appellant urges, however, that otherwise there was no compulsion, and the payments were voluntary because made without the filing of formal protests and because the tax collector had no power to execute the threats of seizures, confiscations or sequestrations. Maxwell v. County of San Luis Obispo, 71 Cal. 466, 12 P. 484; Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176. Decidedly apropos to the argument thus advanced is the following language from Young v. Hoagland, 212 Cal. 426, 430, 431, 298 P. 996, 998, 75 A.L.R. 654:

"* * * That case [Brumagim v. Tillinghast, supra] may have stated the rule of the common law at the time of its pronouncement in regard to voluntary payments, but the rule, as thus announced, has been greatly relaxed in more recent decisions in favor of the recovery of money improperly exacted by a defendant. 21 R.C.L. p. 147. 'Among the instances of the relaxation of the strictness of the original common law rule is the case of payments constrained by business exigencies, that is payments of illegal charges or exactions under apprehension on the part of the payers of being stopped in their business if the money is not paid. It has been stated that the general rule with regard to duress of this character is that where, by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, he may recover it.' 21 R.C.L. pp. 154, 155. Upon this same subject we find the following statement in 20 California Jurisprudence, page 964: 'The underlying principle (that money paid under compulsion may be recovered) is said to be that, by the performance of or threat to perform some unlawful act whereby plaintiff will suffer loss, the defendant has induced the plaintiff, under circumstances sufficient to control the action of a reasonable man, to pay money which he would not otherwise have paid.' * * *"

[12] The foregoing recital of the admitted facts in the instant case sufficiently demonstrates that the motivating cause of the payments was fear of infliction of the penalties outlined in the coercive provisions of this well-implemented ordinance and emphasized by periodic and forceful threats and demand warnings by the appellant. Under such evidence of compulsion the payments may properly be characterized as involuntary and made under pressure of the

law's duress (Carpenter v. Shaw, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478; Ward v. Board of Com'rs of Love County, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751; Barker Bros., Inc., v. City of Los Angeles, 10 Cal. 2d 603, 610, 76 P.2d 97; Vitale v. City of Los Angeles, 13 Cal.App.2d 704, 706, 57 P. 2d 993; Home Telephone & Telegraph Co. v. City of Los Angeles, 40 Cal.App. 492, 496, 181 P. 100), and such coercive action on the part of appellant rendered formal protests unnecessary. 20 Cal.Jur., p. 968; 3 Cooley on Taxation, 4th Ed., p. 2584, § 1297; Whyte v. State of California, 110 Cal.App. 314, 316, 294 P. 417; Grimes v. County of Merced, 96 Cal.App. 76, 82, 273 P. 839. We are therefore of the opinion that these taxes were illegally collected from respondent's assignors by virtue of the ordinance provisions herein declared invalid, and that respondent is entitled to recover the sums so paid within two years prior to the filing of this action.

The judgment is affirmed.

We concur: GIBSON, C. J.; TRAYNOR, J.; SHENK, J.; EDMONDS, J.; CARTER, J.

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18 Cal.2d 218

HOLLY SUGAR CORPORATION v. McCOLGAN.

S. F. 16536.

Supreme Court of California.

July 2, 1941.

Rehearing Denied July 30, 1941.

1. Taxation ⚷98

Stocks, bonds, and other intangible property have taxable situs, under fiction of mobilia sequuntur personam, at owner's domicile.

2. Taxation ⚷98

A stockholder is not "owner" of corporation's property, and state having jurisdiction of any of such property does not have pro tanto jurisdiction of his shares of stock for taxation purposes.

See Words and Phrases, Permanent Edition, for all other definitions of "Owner".

3. Taxation ⚷98

A stockholder becomes "owner" of corporate property and earnings only on corporation's declaration of dividends or liquidation, and his resulting gain or loss has its source in the stock, which, by reason of identity or association with owner's person, has its taxable situs at his domicile.

4. Taxation ⚷98

Intangible property may acquire situs for taxation other than at owner's domicile, if it has become an integral part of some local business.

5. Taxation ⚷98

A business situs of intangible property for taxation arises from owner's employment of wealth represented thereby as integral portion of business activity of particular place, so that property becomes identified with economic structure of such place and loses its identity with owner's domicile.

6. Taxation ⚷98

For intangible property to acquire "business situs" for taxation other than at owner's domicile, there must be a general, or more or less continuous, course of business or series of transactions within state wherein property is physically located, as distinguished from mere sporadic and isolated transactions.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Situs".

7. Taxation ⚷98

A foreign corporation's mere allegation that its acquisition of more than majority of shares of domestic corporation's total outstanding capital stock gave foreign corporation control of domestic company's policies and operations, without amplification as to manner in which foreign corporation's management of domestic corporation functioned or localization of foreign corporation's stockholding, does not establish integration of domestic corporation's operations with foreign corporation's activities as required to assign "business situs" to stock for taxation.

8. Taxation ⚷397

The organic unity of operation of foreign and domestic corporations, engaged in same type of business, after foreign corporation purchased majority of shares of domestic corporation's stock, with object of controlling domestic company's policies and operations and using it as mere adjunct, agency, or instrumentality of foreign corporation in conduct of unitary business, requires that business be regarded in aggregate and its value estimated, not in parts, but as whole for franchise tax purposes. St.

1929, p. 24, § 10, as amended by St.1931, p. 2226.

9. Taxation 🔑397

A foreign sugar corporation's holding of majority of shares of domestic sugar corporation's stock, purchased by foreign corporation with object of controlling domestic corporation's policies and operations and using it as mere adjunct, agency, or instrumentality of foreign corporation in conduct of unitary business, was integral part of such business, so as to require that loss sustained on liquidation of domestic corporation be included in tax base for purpose of ascertaining portion of foreign corporation's net income derived from business done within state under Franchise Tax Act. St.1929, p. 24, § 10, as amended by St.1931, p. 2226.

10. Pleading 🔑32

A written instrument, on which cause of action is founded, may be pleaded in haec verba, rather than according to its legal effect, either by setting forth a copy thereof in body of complaint or by attaching copy thereto as exhibit and incorporating it therein by proper reference.

11. Pleading 🔑312

An instrument, made part of complaint by reference and attached thereto as exhibit, but not constituting the contract on which complaint is based, may not supply substantial allegations essential to statement of cause of action, unless pleading is framed for such purpose.

12. Appeal and error 🔑518(4)
Pleading 🔑311

In foreign corporation's action for amount of additional franchise tax, alleged to have been illegally assessed and collected, a distinct reference in complaint to attached verified protest, made by plaintiff against payment of tax, for avowed purpose of setting forth grounds of its objection thereto, had effect of incorporating recitals of such protest into body of complaint as fully as if directly made in principal pleading, so that truth of allegations of complaint, together with those of annexed exhibit, was admitted by general demurrer to complaint, and both documents are parts of record before Supreme Court on appeal from judgment sustaining demurrer.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Holly Sugar Corporation against Chas. J. McColgan, State Franchise Tax Commissioner, to recover the amount of an additional corporation franchise tax paid by plaintiff under protest. From a judgment for defendant after sustaining a general demurrer to the complaint, plaintiff appeals.

Reversed, with directions.

For prior opinion, see Cal.App., 106 P.2d 208.

Morrison, Hohfeld, Foerster, Shuman & Clark, H. W. Clark, and W. T. Fitzgerald, all of San Francisco, for appellant.

Earl Warren, Atty. Gen., and H. H. Linney, Valentine Brookes, and James J. Arditto, Deputies Atty. Gen., for respondent.

CURTIS, Justice.

This action was brought to recover from the state an additional corporation franchise tax in the amount of $6,100.58, alleged to have been illegally assessed and collected for the taxable year ending March 31, 1935, and paid by plaintiff under protest. A general demurrer to the complaint was sustained without leave to amend.

The facts giving rise to the present controversy are as follows: Plaintiff, Holly Sugar Corporation, is a New York corporation, having its principal office in Colorado and qualified to do business in California and other states. Its principal business consists of growing sugar beets and marketing and refining the sugar therefrom. Prior to January 1, 1928, plaintiff acquired 4173.4 shares of the capital stock of Santa Ana Sugar Company, a California corporation, at a cost of $1,808,253. The number of shares so purchased constituted 70 per cent of the total outstanding capital stock of the Santa Ana Sugar Company, and after the acquisition of this stock the plaintiff "controlled the policies and operations of the said Santa Ana Sugar Company," which was engaged in California in growing sugar beets and marketing and refining the sugar therefrom. On May 1, 1928, the Santa Ana Sugar Company paid a dividend of $111,188.24 from surplus accumulated prior to March 1, 1928, and thereby reduced, for franchise tax purposes, the cost of said 4173.4 shares to $1,697,064.76. During the fiscal year ending on March 31, 1934, the Santa Ana Sugar Company was completely liquidated, and plaintiff received as a liquidating dividend certain properties of the fair market value of $530,191.17.

Thus, the plaintiff, Holly Sugar Corporation, "suffered an uncompensated loss of $1,166,873.59 in the transaction". The franchise tax commissioner refused to consider this loss in computing the tax, and an additional assessment was levied in the amount of $5,759.79, which together with $340.79 interest thereon, plaintiff paid under protest—the total exaction being $6,100.58. A copy of the verified protest setting forth the grounds of plaintiff's objections was attached to the complaint, marked "Exhibit A", and incorporated by reference.

The tax subject of dispute was levied under the provisions of section 10 of the California Bank and Corporation Franchise Tax Act (Stats.1929, p. 19; amended by Stats.1931, p. 2226), which, so far as here involved, read as follows: "If the entire business of the bank or corporation is done within this state, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this state, the tax shall be according to or measured by that portion thereof which is derived from business done within this state. The portion of net income derived from business done within this state, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation."

The precise question raised by this appeal has not heretofore been presented to this court. The single issue to be determined is whether, under the terms of the Franchise Tax Act, the appellant, a New York corporation having its principal office in Colorado, but qualified to do business in California, and having control of the policies and operations of a California corporation through ownership of 70 per cent of the latter company's capital stock, is entitled to deduct a loss sustained on liquidation of the domestic company, whose business within the state was the same in character as the unitary business of appellant within and without the state. If under these circumstances or conditions, appellant should not be allowed to include such stock loss in computing the net income for measure of the California franchise tax, then the demurrer was properly sustained; otherwise not.

In support of its position appellant advances two arguments (1) that under the terms of the act, the franchise tax for a foreign corporation doing business within and without the state is to be measured by application of the allocation formula to the entire net income, however, or wherever derived, in order to ascertain the portion attributable to business done in California; and (2) that in any event the integration of the operations of the Santa Ana Sugar Company with the activities of appellant's multistate sugar business fixed the situs of the stock loss in California and established the propriety of the claimed deduction. It is our opinion that the force and logic of this latter contention are decisive of this appeal in favor of appellant and eliminate any necessity for treatment of the first proposition, with its attendant considerations of statutory interpretation. At this point with the controversial issue so limited in scope, both appellant and respondent agree that the function of the apportionment principle outlined in section 10 is to assign to California the portion of unitary net income "derived from business done within this state".

[1-3] It is well settled that stocks, bonds and other intangible property have a taxable situs, under the fiction of mobilia sequuntur personam, at the domicil of the owner. Miller v. McColgan, 17 Cal.2d 432, 110 P.2d 419. The stockholder is not the owner of the property of the corporation, and the state which has jurisdiction of any of the corporate property has not pro tanto jurisdiction of his shares of stock. Rhode Island Hospital Trust Co. v. Doughton, 270 U.S. 69, 81, 46 S.Ct. 256, 70 L.Ed. 475, 43 A.L.R. 1374. The shareholder becomes the owner of the corporate property and earnings only upon the corporation's declaration of dividends or liquidation, and the resulting gain or loss for the shareholder has its source in the stock, which by reason of identity or association with the person of the owner, has its situs at his domicil. Miller v. McColgan, 17 Cal.2d 432, 110 P.2d 419. In reliance upon these fundamental principles of taxation, respondent insists that the stock loss sustained by appellant, a foreign corporation, because of the liquidation of the California company, has no relation to the jurisdiction of this state insofar as its taxing power is concerned, and

respondent declares this was the basis for his disallowance of the deduction claimed by appellant in its tax report.

[4-6] As an exception to the general rule embodied in the legal maxim mobilia sequuntur personam, it is equally well settled that intangible property may acquire a situs for taxation other than at the domicil of the owner if it has become an integral part of some local business. First Bank Stock Corp. v. Minnesota, 301 U.S. 234, 57 S.Ct. 677, 81 L.Ed. 1061, 113 A.L.R. 228; Wheeling Steel Corp. v. Fox, 298 U.S. 193, 56 S.Ct. 773, 80 L.Ed. 1143; Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395, 27 S.Ct. 499, 51 L.Ed. 853; State Board of Assessors v. Comptoir National, 191 U.S. 388, 24 S.Ct. 109, 48 L.Ed. 232. Business situs arises from the act of the owner of the intangibles in employing the wealth represented thereby, as an integral portion of the business activity of the particular place, so that it becomes identified with the economic structure of that place and loses its identity with the domicil of the owner. City of New Orleans v. Stempel, 175 U.S. 309, 20 S.Ct. 110, 44 L.Ed. 174. This principle of economic integration with local commercial activities as definitive of business situs was recognized in this state in Hinckley v. County of San Diego, 49 Cal.App. 668, at pages 671, 672, 194 P. 77, at page 78, where it was said: There must be "something like a general, or more or less continuous, course of business or series of transactions within the state where the property is physically located, as distinguished from mere sporadic and isolated transactions".

[7-9] In harmony with this line of decision, it is plain that the mere allegation of a foreign corporation that its acquisition of more than a majority of the total outstanding capital stock of a domestic company gave it control of the policies and operations of the local company, without amplification as to the manner in which its management of the domestic corporation functioned or the localization of its stockholding, does not satisfy the test of integration essential to an assignment of business situs to corporate stock. But reference to the record reveals that appellant's stockholding in the Santa Ana Sugar Company cannot reasonably be characterized as an extraneous investment separate and apart from the California business of the Holly Sugar Corporation, for both these companies were engaged in precisely the same type of enterprise—"growing sugar beets and marketing and refining sugar therefrom"—which fact furnishes support to appellant's claim that its ownership of 70 per cent of the capital stock of the domestic company was not for the purpose of passive participation in the latter's affairs in the customary and usual manner, but was with the object of controlling the policies and operations of the domestic corporation and using it as a mere adjunct, agency or instrumentality of the Holly Sugar Corporation in the conduct of the unitary business. This combination of circumstances effectively corroborates appellant's assertion of integration of the activities of the two companies into one indivisible, composite whole, each portion giving value to every other portion. It is the existence of this organic unity of operation which necessitates that the business be regarded in the aggregate and its value be estimated not in parts, but taken as a whole. Butler Brothers v. McColgan, 17 Cal.2d 664, 111 P.2d 334. Full consideration of the facts disclosed by the record before us constrains us to conclude that the stockholding in question was an integral part of appellant's unitary sugar business and that the formula principle of allocation requires that the loss sustained on liquidation of the California company be included in the tax base for the purpose of ascertaining that portion of appellant's net income "derived from business done within this state". However, respondent's objection to the propriety of this inference because of the alleged insufficiency of the pleadings compels our treatment of this additional point before making disposition of this appeal.

[10-12] Appellant has presented the salient facts bearing upon the unitary nature of its business in the following manner: In the complaint Holly Sugar Corporation alleged that the Santa Ana Sugar Company was a California corporation, that it [plaintiff] owned 70 per cent of the local company's capital stock, and that after such acquisition it [plaintiff] "controlled the policies and operations of the said Santa Ana Sugar Company". In the verified protest, in addition to a reiteration of the claim of stock ownership and control of the Santa Ana Sugar Company, the Holly Sugar Corporation asserted that its "business in the states of Colorado and California and other states" consisted of "growing sugar beets and refining and marketing sugar therefrom", and that the "Santa Ana

Sugar Company, until its liquidation, was engaged in the State of California in growing sugar beets and in refining and marketing sugar therefrom". The verified protest was related to the complaint in the following language: "A copy of said protest is hereto attached, marked 'Exhibit A', and hereby referred to and made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph." Respondent, nevertheless, insists that the allegations of this exhibit were not incorporated in the complaint, are not admitted by the demurrer, and are not part of the record, so that the statements in the protest relative to the business activities of the two sugar companies can have no influence on the determination of this appeal.

It is well settled that a written instrument which is the foundation of a cause of action may be pleaded in haec verba, rather than according to its legal effect, either by setting forth a copy in the body of the complaint or by attaching a copy as an exhibit and incorporating it by proper reference. Silvers v. Grossman, 183 Cal. 696, 700, 192 P. 534; Santa Rosa Bank v. Paxton, 149 Cal. 195, 198, 86 P. 193; Lambert v. Haskell, 80 Cal. 611, 613, 22 P. 327. It is equally well established that an instrument which is made part of the complaint by reference and attached as an exhibit, but which does not constitute the contract upon which the complaint is based, may not supply substantial allegations essential to the statement of a cause of action unless the pleading is framed for that purpose and with that end in view. Silvers v. Grossman, supra, 183 Cal. at page 700, 192 P. 534; Santa Rosa Bank v. Paxton, supra, 149 Cal. at page 198, 86 P. 193; Estate of Cook, 137 Cal. 184, 191, 69 P. 968. The instant case comes precisely within this exception. The complaint directly refers to the protest not simply as evidence of compliance with the requisite procedural formality before bringing suit, but as a means of "setting forth the grounds upon which plaintiff rests its claim", and for that express object a copy of the necessary document was incorporated by use of the apt words of reference above quoted. Furthermore, the protest was made under oath, which circumstance imports verity to its contents and removes any question as to the pleader's intent to make its own the averments contained in the attached exhibit. Respondent's reliance upon the two cases of City of Los Angeles v. Signoret, 50 Cal. 298, and People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435, lends no force to its position, for each of those opinions concerned defects of allegation not present in the instant pleading. The decision in City of Los Angeles v. Signoret, supra, was fully explained and distinguished in Ward v. Clay, 82 Cal. 502, 505, 506, 23 P. 50, 227, and Lambert v. Haskell, supra, 80 Cal. at pages 613, 614, 22 P. 327, and no further comment upon the points of differentiation need be made here. In People v. Reid, supra, this court, as reason for its rejection from consideration averments contained in affidavits attached to a petition, made the following significant observation at pages 260, 261, of 195 Cal., at page 462 of 232 P., 36 A.L.R. 1435: "There is nothing in the petition which indicates that the petitioner intended to adopt and make his own the allegations contained in the affidavits, or that he intended to himself allege under oath the existence of the facts there recited." In the instant case the complaint's distinct and definite reference to the attached verified protest for the avowed purpose of setting forth the grounds of objection to payment of the additional tax has the effect of incorporating into the body of the complaint the recitals of the exhibit as fully and to the same extent as if they were, in fact, directly made in the principal pleading. Accordingly, the truth of the allegations of the complaint together with those of the annexed exhibit is admitted by respondent's general demurrer, and both documents form part of the record before this court.

In light of the foregoing considerations, we are of the opinion that appellant's statement of facts reasonably supports an inference that the stock in question acquired in California a taxable situs by economic integration with appellant's unitary business in this state. Therefore, the judgment from which this appeal was taken is reversed, with directions to the trial court to overrule the demurrer and permit the respondent to answer if he so desire.

We concur: SHENK, J.; CARTER, J.; MOORE, J.; WHITE, J.; PULLEN, J.

HIGGINS v. EXETER OIL CO., Limited, et al.

Civ. 6593.

District Court of Appeal, Third District, California.

July 9, 1941.

Rehearing Denied Aug. 8, 1941.

Hearing Denied Sept. 4, 1941.

1. Landlord and tenant 🔑80(1)

The persuasive elements of a "sublease" are provisions for exclusive possession, a fixed term, a fixed rental, and right of reentry in event of covenant broken.

See Words and Phrases, Permanent Edition, for all other definitions of "Sublease".

2. Mines and minerals 🔑74

A contract, by which lessee under oil and gas lease employed another oil company to drill for oil on leased tract at expense of drilling company, which was to be reimbursed from proceeds of oil produced and, after being reimbursed in full for such expenditure, to receive a percentage of proceeds of oil produced, was not a "sublease" conveying an interest in the realty, so as to work a forfeiture of lease for violation of provision against subletting or assigning without lessor's consent.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Mamie Higgins against the Exeter Oil Company, Limited, and others, to quiet title to a tract of land based upon an alleged violation of a provision in an oil and gas lease forbidding assigning or subletting without consent of the lessor. From a judgment in favor of defendant notwithstanding jury's verdict for plaintiff, plaintiff appeals.

Judgment affirmed.

Hearing denied; CARTER, J., dissenting.

Owen Meredith and Faries & McDowell, all of Los Angeles, for appellant.

Thos. J. Casey and Don S. Irwin, both of Los Angeles, for respondents.

PER CURIAM.

This is an action to quiet title to a tract of land based upon an alleged violation of a provision in an oil and gas lease forbidding assigning or subletting without the consent of the lessor. The issues were tried before a jury who returned a verdict for plaintiff. Thereafter defendants moved for judgment notwithstanding the verdict, and the motion was granted. This appeal is from the judgment entered by the court after the verdict had been set aside.

In 1924 plaintiff was the owner of a five acre tract and executed this oil and gas lease thereon to the Associated Oil Company. The Associated Oil Company drilled three producing wells which it operated until 1931 when it sold its interest in the leasehold to the Cypress Petroleum Oil Company, who thereafter with the consent of the owner, assigned the lease to the Exeter Oil Company, Ltd., one of the defendants herein.

In 1938 the Exeter Company attempted to negotiate a sublease to the Barnsdall Oil Company, and a sublease was prepared and submitted to Mrs. Higgins for her consent and approval. This she refused to grant, and according to the contention of appellant the proposal was abandoned and the sublease destroyed.

Thereafter a contract of employment was entered into between the Exeter and the Barnsdall Companies wherein the Barnsdall Company was employed to drill for the Exeter Company one well only, upon the Higgins property. Upon learning of this arrangement, Mrs. Higgins wrote to the Exeter and the Barnsdall Companies, contending the employment of the Barnsdall Company was a subterfuge. However, the Barnsdall Company went upon the land and successfully completed a well producing some thirteen hundred barrels of oil daily, and the Exeter Company tendered to Mrs. Higgins checks aggregating in excess of $9,000 as her proportion of the royalty therefrom, which she refused to accept.

Thereafter Mrs. Higgins, acting under a provision of the assigned lease, wherein it was provided that the lease should not be assigned in whole or in part or any part of the leased premises sublet without her consent in writing first had, notified the Exeter Company that the lease was terminated, and brought this action to recover the possession of the real property and to terminate the rights therein of the Exeter Oil Company, Ltd., and the Barnsdall Oil Company.

The primary question to be determined on this appeal is whether the so called contract of employment of Barnsdall by

Exeter Company constituted a sublease conveying an interest in this real property.

The agreement or letter, as it is referred to by the parties, is too long to set forth in detail, but generally it recited that Exeter Oil Company, the writer thereof, was the owner of an oil and gas lease upon the described property, and desired to hire Barnsdall Company to drill and thereafter operate for the Exeter Company, an oil and gas well to a designated depth upon certain conditions. Among those conditions and terms were that the Barnsdall Company could, if unsuccessful in the first well, either terminate this contract or commence another well; it was required to comply with all governmental regulations; carry on the work in a workmanship manner, and permit no waste of gas or oil. The Barnsdall Company was authorized to enter upon the premises and to construct thereon derricks, tanks, pipe lines and roads which might be necessary for the performance of the contract, and to furnish all materials and equipment necessary for the performance of the work; to keep a written record and log of its operations, and to do all work done thereunder at the cost of the Barnsdall Company, subject to reimbursement as follows; from all gas and oil sold from the well, one-sixth should be deduced as the land owner's share or royalty. The remaining five-sixths should be paid to the Barnsdall Oil Company until that company had been fully reimbursed for moneys advanced in the drilling and operation of the well, and after being so reimbursed the lessee was to pay to the Barnsdall Company the costs of operation and sixty per cent of the remaining five-sixths. The letter then specified what were to be considered proper costs and disbursements, including insurance premiums. In case of default the Exeter Oil Company could, after notice, terminate the contract, and it was expressly provided that the Exeter Oil Company was not by this letter conveying or assigning any interest in the premises, that it was not a partnership nor joint adventure, and that all work done by the Barnsdall Company was to be at their own sole cost and expense.

[1] From the foregoing survey it will be seen that the letter contained no words of transfer or assignment of any estate in any real property; that the Exeter Oil Company did not transfer or surrender its right of possession of the premises; no interest in the oil was granted, the compensation being from the proceeds of the oil and gas. The employment was limited to one well, and all oil and gas belonged to Exeter Company and was to be sold by it to whomever it might select. The Exeter Company retained possession of the premises, and there was lacking those persuasive elements of a sublease,—exclusive possession, a fixed term, a fixed rental and right of reentry in event of covenant broken.

In Lowy v. McKeon Drilling Co., et al., 125 Cal.App. 367, 13 P.2d 783, involving an oil lease, it was held that a drilling contract which gave a portion of the oil proceeds for drilling services conveyed no interest in the land. Also an agreement to receive an interest in the royalty conveyed no interest in the realty (In re Lathrap, 9 Cir., 61 F.2d 37), nor did a crude oil contract, whereby one was given the right to buy all the oil produced from a given well or from a particular parcel of land, convey an interest in the land. Richfield Oil Company v. Hercules Gasoline Company, 112 Cal.App. 431, 297 P. 73.

Appellant relies strongly upon Frasier v. Witt, 62 Cal.App. 309, 217 P. 114. There we find a grant of exclusive possession, a fixed term, a fixed rental, and a covenant for reentry, all absent from the letter here under examination. In Sherwin v. Bogosian, 112 Cal.App. 359, 296 P. 641, also relied upon by appellant the court pointed out some of the elements which differentiate it from the agreement in the Okahara case, In re Okahara, 191 Cal. 353, 216 P. 614, and which distinguishes it from the case at bar.

We are also referred to Spaulding v. United States, 9 Cir., 97 F.2d 697, when an oil company was granted the right to go upon the lands and develop wells, the oil so produced to belong to the owner of the lands, the owner agreeing to pay to the oil company a stipulated percentage of the cash returns from the sale of the oil. There the court did not hold that an interest in the land was assigned, but merely held that for tax purposes the oil company had acquired a depletable interest in the oil and gas in the leased property. We have also examined Weintraub v. Weingart, 98 Cal.App. 690, 277 P. 752; Crowell v. City of Riverside, 26 Cal.App.2d 566, 80 P.2d 120; Levey v. Hockwald, 6 Cal.App. 417, 92 P. 872, cited by appellant, but find each is readily distinguishable from the present problem.

[2] Appellant attaches some importance to the provision in the letter whereby title is retained by Barnsdall Company in all materials and equipment furnished in drilling the well until that company had been fully reimbursed for the cost thereof, after which the Exeter Company became the owner of an undivided 40 per cent interest therein. We are unable to find anything in this other than a business arrangement between a contractor and an owner for their mutual protection, negotiating at arms length, one to obtain an experienced oil driller to produce a well, the other willing to undertake the work but wanting to protect itself for the risks involved. Naturally both were concerned as to the security of payment, the proper location of the well, the right of free and unimpeded ingress and egress to the work, a mutual accounting and full disclosure of oil produced and the cash proceeds derived therefor. The language of the agreement, the contention of the two oil companies, and the implied finding of the trial court all impel us to that conclusion.

The judgment is affirmed.

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45 Cal.App.2d 783

HALL et al. v. DEKKER et al.

Civ. 13105.

District Court of Appeal, Second District, Division 2, California.

July 9, 1941.

Rehearing Denied Aug. 4, 1941.

Hearing Denied Sept. 4, 1941.

1. Corporations 🔑315

A complaint, which alleged that former employees of florist company, in which plaintiffs owned all the stock, organized a florist company and engaged in direct competition with plaintiffs' company, that newly organized company was promoted by one who had formerly owned 50 per cent. of stock in plaintiffs' company, and who was serving as director thereof, and that such director helped to finance newly organized company worked for it, and, having obtained a list of plaintiffs' customers, solicited many of them and obtained orders from them for flowers, contained essential allegation for a cause of action for "unfair competition".

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair Competition".

2. Corporations 🔑315

A director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of corporation of which he is an officer or director.

3. Corporations 🔑319(7)

Evidence that former employees of florist company, in which plaintiffs owned all the stock, organized a florist company and engaged in direct competition with plaintiffs' company, that one, who had formerly owned 50 per cent. of stock in plaintiffs' company, and who was serving as director thereof, assisted in organizing newly formed company while serving as director and officer of plaintiffs' company, and that such director, having obtained a list of plaintiffs' customers, solicited many of them and obtained orders from them for flowers, established "unfair competition", so as to authorize judgment granting plaintiffs' damages and injunctive relief.

4. Appeal and error 🔑1010(1)
Trial 🔑330(5)

A judgment will not be reversed for insufficiency of evidence or defects in other counts of a complaint if a judgment is sustained by one count of the complaint, which count in turn is supported by substantial evidence.

5. Corporations 🔑319(7)

In action for damages and an injunction predicated upon a cause of action alleging unfair competition, wherein one of defendants filed a cross-complaint for amount due on a note and for breach of contract whereby plaintiffs purchased such defendant's stock in florist company, agreeing to pay such defendant $20 per week until note given for stock was paid, evidence was insufficient to support finding that defendant's conduct in promoting a competing business prevented plaintiffs from paying note, so as to authorize judgment that defendant was not entitled to recover $20 per week so long as note remained unpaid.

6. Contracts 🔑173

Where covenants of a contract are to be performed at different times, they are "independent", and breach by one party of his covenant does not excuse performance by other party of his covenant or relieve him of liability for damages for a breach thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent".

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Buford W. Hall and another against Jacob Dekker, Beatrice M. Detweiler, and others, to recover damages and an injunction predicated upon a cause of action alleging unfair competition, wherein the defendant Dekker filed a cross-complaint to recover amounts due upon a note and for breach of contract with plaintiffs. From a judgment for plaintiffs upon the cause of action based upon alleged unfair competition, and from an insufficient judgment in favor of defendant Dekker on cross-complaint, the defendants appeal.

Judgment in favor of plaintiffs affirmed, and judgment in favor of defendant Dekker on his cross-complaint modified, and as so modified affirmed.

Carson B. Hubbard, of San Francisco, and Austin Clapp, of Huntington Park, for appellants.

C. P. Von Herzen and Burton B. Crane, both of Los Angeles, for respondents.

McCOMB, Justice.

From 1) a judgment in favor of plaintiffs in an action to recover damages and for an injunction predicated upon a cause of action alleging unfair competition, and 2) a judgment in favor of defendant Dekker on a cross-complaint to recover the amounts due upon a promissory note and for breach of a contract with plaintiffs Hall, after trial before the court without a jury, defendants appeal.

The evidence being viewed most favorably to plaintiffs (respondents), the essential facts are:

May 25, 1930, plaintiffs Hall commenced a floral business in the city of Los Angeles. Their principal activity was the shipping of flowers to retail florists in Texas and other states. In 1930 they employed defendant Dekker to operate and manage their Los Angeles business. In September of 1931, said defendant became a partner with plaintiffs Hall, and the business was continued until November 1, 1934, under the name of Buford W. Hall Wholesale Florists. On the date last mentioned plaintiffs Hall and defendant Dekker incorporated the business under the name of Buford W. Hall Wholesale Florists. Each partner received one-third of the capital stock of the corporation. Defendant Dekker was elected vice-president of the corporation.

In 1935 defendant Dekker purchased from Buford W. Hall sufficient stock to give him a fifty per cent stock ownership of the corporation. On November 5, 1937, the parties entered into the following agreement:

"Agreement for Sale of Stock.

"This agreement, made and entered into this 5th day of November, 1937, by and between Jacob Dekker, hereinafter referred to as the Party of the First Part, and Buford W. Hall and Johnnie Harris Hall, his wife, Parties of the Second Part,

"Witnesseth:

"That whereas, the parties hereto are the owners of all the issued capital stock of the Buford W. Hall Wholesale Florists, a corporation, duly organized and existing under and by virtue of the laws of the State of California, and the said Parties of the Second Part desire to purchase from the Party of the First Part all of the stock in said corporation now held by him,

"Now, Therefore, it is hereby agreed by and between the parties hereto as follows:

"That the Party of the First Part agrees to sell to the Parties of the Second Part and the Parties of the Second Part agree to purchase from said Party of the First Part the fifty (50) shares of the capital stock of Buford W. Hall Wholesale Florists, a California corporation, for the sum of sixteen thousand dollars ($16,000.00), payable in the following manner, to wit: Two thousand dollars ($2,000.00) on or before the 15th day of November, 1937, and three thousand dollars ($3,000.00), or more, on the 15th day of June of each year thereafter until said sum of sixteen thousand dollars ($16,000.00) shall have been paid in full.

"Said deferred payments shall bear interest at the rate of four per centum (4%) per annum, payable on the 15th day of January, and the 15th day of June of each year, commencing January 15th, 1938, and said interest payments shall be in addition to the payments of principal hereinbefore provided for.

"It is further agreed that as part of said purchase price the said Parties of the Second Part shall pay to the Party of the First Part in addition to said sum of sixteen thousand dollars ($16,000.00), and interest, the sum of twenty dollars ($20.00) per week until all payments hereinabove referred to shall have been made as herein provided.

"It is understood and agreed that a promissory note signed by the Parties of the Second Part in favor of the Party of the First Part shall be executed herewith and that all of the issued capital stock of said corporation shall be deposited by the Parties of the Second Part with the Party of the First Part as collateral security for the payment of said note.

"In Witness Whereof, the parties hereunto have hereunder subscribed their names on the date in this agreement first above written.

"Jacob Dekker
"Party of the First Part
"Buford W. Hall
"Johnnie Harris Hall
"Parties of the Second Part."

November 8, 1937, defendant Dekker, a director of Buford W. Hall Wholesale Florists, Inc., was elected to the office of secretary-treasurer for the ensuing year. He signed the minutes as secretary and again on January 29, 1938, he signed the minutes of the corporation as secretary, and so far as the record discloses he is still a director of the corporation.

January 15, 1938, defendant Beatrice M. Dettweiler acting on behalf of her minor son Arthur Dettweiler, defendant Walker Dekama acting on behalf of his minor son Ebbo Dekama, and defendant Kiyomi Takata organized a corporation under the name of United Wholesale Florists of California, Inc. for the purpose of shipping flowers to wholesale and retail dealers in California and elsewhere (this being the same business in which plaintiffs were engaged). The city of Los Angeles was its principal place of business. Defendants Beatrice M. Dettweiler, Walker Dekama, and Kiyomi Takata were formerly employees of plaintiffs. This latter corporation was promoted and inspired by defendant Dekker, who helped to finance the corporation, worked for it, and, having obtained a list of plaintiffs' customers, solicited many of them and obtained orders from them for flowers.

(1) *Defendants' Appeal from the Judgment in Favor of Plaintiffs.*

Defendants contend, among other propositions, *that the evidence fails to disclose a cause of action against them.*

[1, 2] This proposition is untenable. The third count of plaintiffs' complaint contained the essential allegations for a cause of action for unfair competition. It is the established law that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director (Red Top Cab Co. v. Hanchett, 48 F.2d 236, 238; Hussong Dyeing Mach. Co. v. Morris, N.J.Ch., 89 A. 249, 250). Vice Chancellor Leaming thus accurately states the rule in Hussong Dyeing Mach. Co. v. Morris, supra, at page 250 of 89 A.: "* * * It was not lawfully possible for the defendant, while a director and treasurer of complainant corporation, to enter into an opposition business in his own behalf of such a nature that it would cripple or injure the corporation that he represented, * * *."

[3] In the present case there is substantial evidence to sustain the findings of fact set forth above, which when applied to the rule of law hereinbefore mentioned, disclosed that defendant Dekker, while a director and officer of plaintiff corporation, unlawfully assisted in organizing defendant corporation and aided his codefendants in entering into a competing business with that in which plaintiffs were engaged, knowing that to do so would injure plaintiff corporation, and which in fact did deprive plaintiff corporation of business and thus caused it monetary injury.

[4] It is unnecessary for us to discuss the other errors urged by defendants relating to the judgment against them, for the reason that the rule is established that a judgment will not be reversed for insufficiency of the evidence or defects in other counts of a complaint if a judgment is sustained by one count of the complaint, as in the present case, which count in turn is supported by substantial evidence (Martin v. Los Angeles Turf Club, Inc., 39 Cal.App. 2d 338, 349, 103 P.2d 188).

(2) *Defendant Dekker's Appeal From the Judgment on His Cross-Complaint.*

[5] Defendant Dekker urges *that there is no substantial evidence to sustain the trial court's finding of fact on his cross-complaint, which reads as follows:*

"That the acts and conduct of the defendant, Jacob Dekker, in promoting a competing business to that of the plaintiffs and the solicitation of the plaintiffs' customers was and is unlawful and by reason of such acts and conduct of the said defendant, the time during which the promissory note of the plaintiffs, Buford W. Hall and Johnnie Harris Hall, hereinbefore described, remained unpaid, was extended and delayed during the pendency of this action and by such acts and conduct the defendant, Jacob Dekker, prevented the plaintiffs from paying and discharging said promissory note until said acts and conduct were determined judicially to be unlawful and in violation of the defendant, Jacob Dekker's, agreement not to compete, and the amount of plaintiffs' loss and damages were determined by the court, and in equity and good conscience the said defendant is not entitled to the sum of $20.00 per week under said agreement hereinabove described."

This proposition is tenable. In the foregoing finding of fact the trial court found that the "acts and conduct" of "defendant, Jacob Dekker, prevented the plaintiffs from paying and discharging said promissory note." The promissory note referred to is the one mentioned in the agreement of November 5, 1937, between the parties, which is set forth in full above. On this finding of fact the trial court predicated its conclusion that defendant Dekker was not entitled to recover $20.00 per week so long as the promissory note remained unpaid.

An examination of the record fails to disclose any substantial evidence to support the portion of the finding of fact just mentioned. Therefore, the trial court was in error in not giving judgment on the cross-complaint in favor of defendant Dekker for the accrued and unpaid installments of $20.00 per week which plaintiffs Hall had agreed to pay to him until the promissory note which they had given in the sum of $16,000 was paid in full.

[6] The law is settled that where covenants of a contract are to be performed at different times, they are independent, and the breach by one party of his covenant does not excuse the performance by the other party of his covenant or relieve him of liability for damages for a breach thereof (Fresno Canal & Irr. Co. v. Perrin, 170 Cal. 411, 416, 149 P. 805).

For the foregoing reasons 1) the judgment in favor of plaintiffs is affirmed, and 2) the judgment in favor of defendant Dekker on his cross-complaint is modified to provide that he recover the amount of accrued and unpaid installments under the agreement of November 5, 1937, in the sum of $20.00 per week as set forth in the second cause of action of his cross-complaint.

As thus modified the judgment on the cross-complaint is affirmed.

MOORE, P. J., concurred.

45 Cal.App.2d 698

MYTINGER v. WEIR et al.

Civ. 11580.

District Court of Appeal, First District, Division 1, California.

July 2, 1941.

Rehearing Denied Aug. 1, 1941.

Hearing Denied Aug. 28, 1941.

1. Appeal and error 🔑867(2)

On appeal from order granting plaintiff's motion for new trial after jury's verdict for defendants on ground that evidence was insufficient to justify jury's implied finding that plaintiff was guilty of contributory negligence, only question necessary to consider is whether evidence shows such fact as matter of law and trial court thus abused his discretion in granting motion.

2. Appeal and error 🔑989

On appeal from order granting new trial after jury's verdict, question is not whether there was any evidence to sustain verdict, but whether there was conflict in evidence on material issue.

3. Appeal and error 🔑1015(2)

Where evidence on material issue was conflicting, trial court's order granting new trial after jury's verdict is conclusive on appeal.

4. Automobiles 🔑244(43)

Undisputed facts that motorist drove across obstructed highway intersection at unlawful speed, without observing traffic coming from right until his automobile and vehicle coming from right were in intersection and few feet apart, established his "contributory negligence", barring recovery for injuries sustained in collision with such vehicle, as matter of law. Vehicle Code, § 1 et seq., St.1935, p. 93.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

5. Appeal and error 🔑994(3)

In personal injury suit, contradictions in plaintiff's testimony were for consideration by trial court on plaintiff's motion for new trial after jury's verdict for defendants, not by District Court of Appeal on appeal from order granting such motion.

6. Appeal and error 🔑1015(2)

In action for injuries sustained in collision between automobile driven by plaintiff and defendant's automobile driven by co-defendant at highway intersection, questions as to circumstances of entry into intersection, right of way, opportunity to observe automobiles approaching intersection, and position of stop sign were for trial court to decide on conflicting evidence and cannot be considered by appellate court on appeal from order granting plaintiff's motion for new trial after jury's verdict for defendants.

7. Appeal and error 🔑1015(2)

In action for injuries sustained in collision between automobile driven by plaintiff and defendant's automobile driven by co-defendant at highway intersection, evidence and inferences therefrom *held* sufficiently uncertain and conflicting, particularly as to propriety of plaintiff's action in accelerating speed after entering intersection and immediately before impact, to preclude appellate court from disregarding plaintiff's substantial evidence on appeal from order granting her motion for new trial after jury's verdict for defendants.

8. Appeal and error 🔑1015(2)

To sustain trial court's order granting plaintiff's motion for new trial on ground of insufficiency of evidence to sustain jury's verdict for defendants, District Court of Appeal need only find substantial conflict in evidence on issues involved.

9. Appeal and error 🔑843(2)

Where order granting plaintiff's motion for new trial on ground of insufficiency of evidence to sustain jury's verdict for defendants is affirmed on appeal, newly discovered evidence and misconduct of counsel, also urged as grounds for new trial, need not be considered, in view of conclusion on main issue.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Caroline Mytinger against Mrs. W. B. Weir, Leon Darras, and another for personal injuries. From an order granting plaintiff's motion for a new trial after a jury's verdict for named defendants, such defendants appeal.

Affirmed.

Hoge, Pelton & Gunther, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

Ross & Ross, of Redwood City, and Theodore M. Stuart, of San Francisco, for respondents.

WARD, Justice.

This is an action to recover damages for personal injuries received in an automobile accident. The appeal is by defendants Mrs. W. B. Weir and her chauffeur Leon Darras from an order granting plaintiff's motion for a new trial following a jury verdict in their favor. The motion was granted upon the ground of the insufficiency of the evidence to sustain the verdict, the court specifically finding that "The evidence is insufficient to justify or warrant the jury's implied finding that the plaintiff was guilty of contributory negligence."

Plaintiff, accompanied by guests, was driving her station wagon north on the highway known as "The Alameda" in San Mateo County. Defendant Darras, operating his employer's car, was driving west on Stockbridge avenue which intersects the said highway at approximately a right angle. A third car, driven by a Mr. Peterson, along The Alameda was approaching the intersection from the north. A collision at the intersection between plaintiff's car and that being driven by Darras threw the former across the highway sideways where it came into contact with the front end of the Peterson car. Peterson was named as a defendant in the action, but the case was dismissed as to him before the end of the trial.

[1-3] Under the specification contained in the order granting a new trial, the only question necessary to consider on appeal is whether the evidence shows that plaintiff was guilty of contributory negligence as a matter of law, and whether there was thus an abuse of discretion by the trial court in granting the motion upon the specified ground. Hall v. Desser, 8 Cal.2d 29, 63 P.2d 809. Some of the citations relied upon by appellants would be applicable were the purpose of this review to ascertain whether there was any evidence to sustain the verdict, but on an appeal from an order granting a new trial the test is whether there is a conflict upon a material issue. If so, the action of the trial court is conclusive on appeal. Bonner v. Los Angeles Examiner, 17 Cal.App.2d 458, 62 P.2d 427; Gallardo v. Luke, 33 Cal.App. 2d 230, 91 P.2d 211.

[4] The main question raised by appellants is as follows: "Is it contributory negligence as a matter of law for a motorist to drive across an obstructed intersection without taking any observation of traffic coming from the right and with a vehicle thus coming from the right possessing the right of way, at a rate of speed in violation of the Motor Vehicle Code, St. 1935, p. 93, and in deliberate avoidance of any observation of such traffic until both machines are in the intersection, and a few feet apart?" If such facts appear undisputed in the record, at least collectively, an affirmative answer must be given.

[5-7] Certain contradictions appear in plaintiff's testimony, a matter for the trial court to consider, but the record discloses and the physical facts show that the collision between the station wagon and the car driven by Darras occurred in the northeast quadrant of the intersection, the front of the appellants' car colliding with the right side of the station wagon toward its rear.

Defendant Peterson testified that as he approached the intersection "I saw some cars come together. I had looked ahead temporarily, I suppose either to the right or left and when I looked up again, I saw a collision"; that the noise was "loud" and "appalling"; "I saw the station wagon lifted in the air. * * * The station wagon was propelled, by the force of the collision, right across my right-of-way, and it smashed the front of my car. I was over as far as I could get, on my right-hand side. I had not reached the edge of Stockbridge when I was smashed, that is the edge of the pavement." Plaintiff testified that she "didn't know that country very well"; that when she was about one-tenth of a mile away she did not know she was approaching an intersection, but that she saw appellants' car as she "entered the intersection" at a speed of eighteen to twenty miles an hour; that it was at least twice as far away from the intersection as her car. Appellants contend that this evidence is valueless, but the circumstances of entry into the intersection, including the question of right of way, together with the opportunity of observing cars approaching the intersection,—matters on which the evidence is conflicting,—and the position of a stop sign were questions for the trial court to decide. At least there is sufficient uncertainty and conflict in the evidence and the inferences to be drawn therefrom, particularly the propriety of plaintiff's action in accelerating the speed of her car after entering the intersection and immediately before impact, to preclude a reviewing court from disregarding the substantial evidence offered by respondent. The trial court had an opportunity to weigh the conflicting evidence with due regard to the manner and appearances of the witnesses, etc., and to determine therefrom whether in view of all the evidence in the case a new trial was justified. Gallardo v. Luke, supra.

[8] In Henderson v. Braden, 35 Cal. App.2d 88, 95 P.2d 625, relied upon by appellants, the defendant stopped his truck at an intersection, and when proceeding onward in conformity with traffic regulations decedent's car was hit by the truck. A jury returned a verdict for defendant. A motion for a new trial was granted in general terms. On appeal it was presumed that the order was not based upon the ground of the insufficiency of the evidence. It was contended that the decedent was guilty of contributory negligence as a matter of law. In the present case, plaintiff testified that when she first saw appellants' car it was twice as far away from the intersection as hers; that her attention was immediately directed to the Peterson car, and that before she could apply the brakes she was hit by appellants' machine. The possibility of seeing a stop sign, the speed of the cars and the matter of which car entered

the intersection first were disputed questions of fact. The facts in the two cases are not analogous. In addition, the motion for a new trial in the present case was granted upon the ground of the insufficiency of the evidence. It is only necessary, in order to sustain the order, to find a substantial conflict on the issues involved in the evidence. In Henderson v. Braden it was held that plaintiff was guilty of contributory negligence as a matter of law.

[9] Newly discovered evidence and misconduct of counsel for appellants were also urged as grounds for a new trial. In view of the conclusion reached on the main issue, consideration of the additional grounds becomes unnecessary.

The order appealed from is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

45 Cal.App.2d 779

In re KAMINSKI'S ESTATE.
GROS v. GROSTEIN et al.

Civ. 12971.

District Court of Appeal, Second District, Division 1, California.

July 9, 1941.

1. Wills 🔑386

In will contest, trial court's finding upon conflicting evidence that, with exception of names of witnesses, document was entirely written, dated, and signed by hand of testatrix, was conclusive on appeal.

2. Wills 🔑133

The testatrix' name written by herself in first line of holographic will, rather than at the end thereof, constituted a proper signature.

3. Wills 🔑130

Formal provisions, including the appointment of an executor, were unnecessary in a holographic will.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Proceeding in the matter of the estate of Belle Kaminski, deceased, wherein a will contest was initiated by Louis Gros against Milton Grostein and others. From a judgment admitting the will to probate and directing that letters testamentary be issued to Milton Grostein, the contestant appeals.

Judgment affirmed.

Geo. H. Crandell, of Seattle, Wash., and Earl F. Crandell, of Los Angeles, for appellant.

Loewenthal & Elias, of Los Angeles, for respondents.

YORK, Presiding Justice.

Belle Kaminski died leaving an instrument testamentary in character. After a contest initiated by appellant, who is a brother of decedent, the trial court found said instrument to be a valid holographic will, and with the exception of two names appended thereto, that "said document was entirely written, dated and signed by the hand of the testatrix herself".

From the judgment admitting said document to probate as the last will and testament of said decedent, and directing that letters testamentary be issued to respondent Milton Grostein, another brother of testatrix, this appeal is prosecuted.

Said testamentary instrument reads as follows:

"Last will and testament of Belle Kaminski, Dec. 8-1937 of Los Angeles, Cal. Age 70 yrs. old & being of sound & disposing mind and memory & not acting under menace fraud or undue influence of any person whatever, do make publish and declare this my last will & testament in the manner following, that is to say

"Patsy Gene Grostein	$5000
"Rena Weil	3000
"Henry Grostein	5000
"Milton Grostein	5000
"Mollie Snyder	500
"Gregg F. Bridges	1000

for pleasures he gave me while on earth.

"Milton Grostein to get my share of the Grostein estate & anything else left of my bonds etc.

"My clothes etc. give away to whom you please.

"Chloroform my dog when I am gone. Rena & Milton do with everything else you think fit.

"Tell no one of this will.

"My diamond watch to Patsy Gene, also the bow-knot pin. My ring one stone to Rena & one to Milton.

"If necessary give Louie 5.00.
"Witnesses. W. Bert Raymond
"Phylenna Palmer

"Have my body cremated & the ashes sent to Lewiston with Milton & a very small marker is all."

It is urged by appellant that the evidence is insufficient to support the findings of the trial court to the effect (1) that the document was entirely written, dated and signed by the testatrix herself; (2) that the document is a completed and finished document and that the signature appearing on the first line was intended by the deceased as a signature of execution; (3) that the document was intended by deceased to be her last will; (4) that the document is an holographic will; and also that the court erred in admitting the document to probate as the last will and testament of Belle Kaminski.

[1] In connection with his first point, appellant contends that the "most credible evidence, as well as the document itself, is conclusive" of the fact that the words, "If necessary give Louie 5.00" and "Witnesses", were not written by deceased.

Of the several witnesses examined upon the subject of testatrix's handwriting, among whom was a handwriting expert, appellant was the only one who testified to an opinion that the questioned portion of the will was not written by testatrix. When asked to state upon what he based his opinion that these words were written in a different handwriting than the balance of the will, appellant replied: "All I know is it is different. It is a different handwriting. It is much plainer. It is written plainer and it is much—Well, that is all I can say."

The record discloses that the will was found, after testatrix's death, in her safe deposit box when it was opened by the bank manager in the presence of respondent Milton Grostein and a representative of the state inheritance tax department; that the questioned portion was contained in the document when it was removed from the box, a copy of which, made by the bank immediately upon its removal from the safe deposit box, having been introduced in evidence at the trial herein; and that the original will was forwarded to the head office of the bank and thereafter deposited with the county clerk.

The contest initiated by appellant raised the issue of the authenticity of the handwriting of testatrix, and the finding by the trial court upon conflicting evidence that "with the exception of the names 'W. Bert Raymond', and 'Phylenna Palmer', appearing on said document, said document was entirely written, dated and signed by the hand of the testatrix herself", must be deemed conclusive on appeal. Estate of Jepson, 178 Cal. 257, 172 P. 1107. In the cited case it is stated at page 260 of 178 Cal., at page 1108 of 172 P.: "A court of appellate jurisdiction cannot be expected to assume the role of a handwriting expert, for the purpose of setting aside a finding made by the trial court, and based, not only upon its own inspection and comparison of the original writings, but upon the opinions of witnesses peculiarly qualified, either by special study of the subject or by familiarity with the handwriting of the decedent."

[2] Appellant also contends that the name of testatrix written by her in the first line of the purported will does not constitute a proper signature.

This question was raised in Estate of Kinney, 16 Cal.2d 50, 104 P.2d 782, involving a will in which the name of decedent was written at the beginning thereof only. It was there held, at page 52 of 16 Cal.2d, at page 783 of 104 P.2d: "As to a holographic will the statute requires that it be 'entirely written, dated and signed by the hand of the testator himself'. Sec. 53, Prob.Code, formerly sec. 1277, Civ.Code. Unlike a witnessed will, which must be 'subscribed at the end thereof' (sec. 50, Prob.Code, formerly sec. 1276, Civ.Code), the authenticating signature of the testator is not required to be at the end, but may be found elsewhere in the body of the testamentary document. [Citing numerous authorities.] * * * It is for the probate court in the first instance to say whether the document was 'signed' by the decedent, and its determination will not be disturbed unless it is without support in the evidence. [Citing authorities.] Whenever it has appeared that a holographic testamentary instrument was a completed declaration of the decedent's desires, such an instrument has been admitted to probate although the decedent wrote his name only in the beginning of the declaration. This has been so even where there was no expression by the testator affirmatively adopting the name so placed as his signature to the will. Completeness alone has been held sufficient evidence of the adoption of the name so placed as the authenticating signature of the testator and as a compliance with the statute which requires the will to be 'signed.'" Citing authorities.

[3] The writing here involved was written with studied care, and appears to be a complete testamentary expression of testatrix's desires. It was so found by the trial court. Formal provisions, including the appointment of an executor, were not necessary to the completed will. Estate of Kinney, supra, citing Estate of Brooks, 214 Cal. 138, 4 P.2d 148.

A careful examination of the entire record has satisfied us that appellant's attack upon the trial court's findings is entirely without merit.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

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45 Cal.App.2d 809

QUIRK v. DAVIS STANDARD BREAD CO. et al.

Civ. 2930.

District Court of Appeal, Fourth District, California.

July 9, 1941.

Appeal and error 🔑773(2)

Where no briefs were filed for appellants in the District Court of Appeal and no appearance made on their behalf in response to notice of motion to dismiss the appeal, and respondent's counsel stated that counsel for appellants had advised him that appellants would not oppose dismissal, appeal was dismissed pursuant to court rule. Rules for the Supreme Court and District Courts of Appeal, rule 5, § 1.

◆

Appeal from Superior Court, Orange County; Harry C. Westover, Judge.

Action by Thomas Kinley Quirk against the Davis Standard Bread Company and others. From a judgment for plaintiff, defendants appeal.

Appeal dismissed.

No appearance for appellants.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is a motion to dismiss the appeal under the provisions of rule V, section 1 of the Rules for the Supreme Court and District Courts of Appeal.

The clerk's and reporter's transcripts were filed in this court on March 25, 1941. No briefs have been filed and no appearance was made on behalf of the appellants in response to the notice of motion to dismiss the appeal. When the motion was heard counsel for the respondent stated that counsel for the appellants had informed him that no opposition would be made to the granting of the motion.

The appeal is dismissed.

We concur: MARKS, J.; MUNDO, Justice pro tem.

WEINER v. ROOF et al.

Civ. 2760.

District Court of Appeal, Fourth District, California.

July 3, 1941.

Hearing Granted Aug. 29, 1941.

1. **Vendor and purchaser** 🔑334(2)

The fact that written contract to purchase a lot contained a clause restricting representations to those therein set forth did not preclude purchaser from rescinding contract for false representations of vendor's selling agent and recovering the money paid.

2. **Appeal and error** 🔑1212(1)

In purchaser's action to rescind land purchase contract and recover money paid, where Supreme Court on former appeal sent the cause back for retrial on sole issue regarding disposition made of money which trustee had received from the purchaser, no other question remained for decision in the trial court.

3. Trusts 🔑356(2)

Where purchaser was entitled to rescind land purchase contract and recover money paid, on ground of misrepresentations by vendor's agent, but money received from purchaser had been disbursed by trustee in accordance with terms of trust and by applying greater portion of it on payment of notes which beneficial owner owed trustee bank payment of which was secured by beneficial owner's interest in the trust, the trustee bank could not be held personally liable to purchaser.

4. Trusts 🔑372(3)

Where purchaser was entitled to rescind land purchase contract and recover money paid, on ground of misrepresentations by vendor's agent, but money received from purchaser had been disbursed by trustee in accordance with terms of trust and by applying greater portion of it on payment of notes which beneficial owner owed trustee bank payment of which was secured by beneficial owner's interest in the trust, evidence sustained finding that trustee had paid over to the beneficial owner all money trustee had received from the purchaser.

5. Trusts 🔑9

The dual relationship of trustor and beneficiary of trust is permissible.

6. Trusts 🔑372(3)

In action by purchaser to rescind land purchase contract and recover money paid from trustee, and from trustor and beneficial owner, evidence supported finding regarding allocation made of the money actually paid by the purchaser.

7. Appeal and error 🔑1212(1)

Where on former appeal of purchaser's action to rescind land purchase contract and to recover money paid, the case was reversed by the Supreme Court so that it might be determined whether the unjust enrichment doctrine might be applied against trustee bank, when it was made to appear that trustee did not hold any money paid by purchaser there was no unjust enrichment of the trustee, and no personal judgment could be rendered against it, notwithstanding alleged fact that there was considerable property still in the trust and other purchasers were still paying into the trust.

8. Execution 🔑41

Where purchaser of lot in subdivision under trust rescinded purchase and recovered judgment for money paid, judgment debtor's interest, if any, in the subdivision trust was subject to levy and sale under execution.

9. Appeal and error 🔑1097(1)

In action by purchaser to rescind land purchase contract and to recover money paid, the "law of the case" was established on first appeal, and transcript and briefs on former appeal could not be reviewed on second appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

10. Appeal and error 🔑837(2)

In action by purchaser to rescind land purchase contract and to recover money paid, where judgment was reversed on first appeal and cause sent back for trial on one issue, transcript and briefs on former appeal could not be considered in regard to matters not included in that issue.

11. Appeal and error 🔑837(2)

In action by purchaser to rescind land purchase contract and to recover money paid, transcript and briefs on former appeal not offered in evidence, nor marked for identification at second trial could not be considered on second appeal.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Theodore Weiner against J. B. Roof and others to rescind a land purchase contract and to recover money paid. From a judgment in favor of defendant Citizens National Trust & Savings Bank of Los Angeles, plaintiff appeals.

Affirmed.

I. Gralla, of Los Angeles (Henry O. Wackerbarth, of Los Angeles, of counsel), for appellant.

Chandler & Wright, of Los Angeles (John F. Gilbert and Oliver S. Northcote, both of Los Angeles, of counsel), for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of the Citizens National Trust and Savings Bank of Los Angeles, hereinafter called the bank, in an action to rescind a contract of purchase of a lot in Los Angeles county, and to recover the money paid on the purchase price.

This controversy grew out of a subdivision trust in which one Connolly was trustor, the Farmers and Merchants National Bank of Los Angeles was trustee, and Connolly and J. B. Roof, Incorporated, were beneficiaries. The Citizens National Trust and Savings Bank of Los Angeles succeeded to the office of trustee in 1929 and thereafter operated under its own declaration of trust, dated June 14, 1929. All prior contracts of purchase, including plaintiff's, were assigned to this bank. Plaintiff had purchased a lot in one of the subdivisions under the trust and had made payments to the original trustee. He paid the bank, as trustee, $1,890.

Plaintiff brought suit against J. B. Roof, J. B. Roof, Incorporated, and the bank to rescind his contract of purchase because of fraud, and to recover the money he had paid on the purchase price of the lot. He was successful in his action and recovered judgment against J. B. Roof and J. B. Roof, Incorporated, in the sum of $3,807.01 and against the bank in the sum of $1,890. The bank alone appealed from that judgment which was reversed as to it with the following directions:

"That portions of the judgment awarding plaintiffs $1,890 as against the appellant Citizens National Trust and Savings Bank, as trustee, is reversed, with directions to the court below to permit said appellant, if it be so inclined, to offer evidence as to the disposition of the money paid to it by the respondent, and the court is further directed, upon such showing being made, to make its findings and enter judgment as between said two parties in conformity with the views herein expressed." Weiner v. Roof, 10 Cal.2d 450, 74 P.2d 736.

On the second trial the evidence was confined solely to the question of the disposition of the money paid to the bank by Weiner, and whether or not the bank retained any part of that money so that it could be held personally liable for the money so remaining in its possession under the "unjust enrichment" doctrine, which doctrine was first announced in California in Speck v. Wylie, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760, which was decided after the first trial of this action. This doctrine is now well established in California. See Greenberg v. Du Bain Realty Corp., 2 Cal.2d 628, 42 P.2d 628; Id., Cal.App., 35 P.2d 579; Graham v. Los Angeles First National Trust & Savings Bank, 3 Cal.2d 37, 43 P.2d 543; Harnischfeger Sales Corporation v. Coats, 4 Cal.2d 319, 48 P.2d 662; Weiner v. Roof, supra; Longway v. Newbery, 13 Cal.2d 603, 91 P.2d 110; Curtis v. Title Guarantee, etc., Co., 3 Cal.App.2d 612, 40 P.2d 562, 42 P.2d 323; Wagaman v. Clifford F. Reid, Inc., 5 Cal.App.2d 168, 42 P.2d 678; California Mutual Co. v. Voigt, 5 Cal.App.2d 204, 42 P.2d 353; Tullis v. Title Guaranty & Trust Co., 11 Cal.App.2d 391, 54 P.2d 65.

[1] The rule was thus applied to the facts of this case in Weiner v. Roof, supra [10 Cal.2d 450, 74 P.2d 737]: "The fact that respondent's [Weiner's] written contract to purchase a lot contained a clause restricting the representations to those therein set forth, did not preclude the respondent, under the foregoing rule, from rescinding the contract for the false representations of the selling agent and recovering the money paid thereunder from the principal or any trustee to whom the same had been paid. However, inasmuch as the rule in Speck v. Wylie, supra, is grounded upon unjust enrichment, and was announced subsequent to the trial of this cause, we are of the view that the appellant, as trustee of the money paid to it by respondent, should be afforded the opportunity of showing, as it asserts it can, that it has paid over to the beneficial owner the money for which judgment has been taken against it. Such a showing, if made, will disclose that the appellant, an innocent party to the fraud, has not been unjustly enriched and will preclude the entry of a monetary judgment against it under the rule mentioned."

[2] On the second trial the evidence was confined to the disposition made of the money which the trustee had received from plaintiff. This was properly done under the order of the Supreme Court on the former appeal which sent the cause back for retrial on that sole issue. 10 Cal.2d 450, 74 P.2d 736. Under this order no other question remained for decision in the trial court.

The only witness examined at the second hearing was an officer of the bank who testified that the $1,890 received from plaintiff had been disbursed by the trustee by depositing part of it in different accounts in the bank in exact accordance with the terms of the trust and by applying the greater portion of it on the payment of a note of $225,000 which Connolly owed the bank, payment of which was secured by his interest in the trust. This same witness testified that when plaintiff made his last payment the trust had expended over $7,000 more than it had received, which sum the trust had borrowed from the bank.

[3, 4] With this evidence before him the trial judge very properly found that the trustee had paid over to the beneficial owners all the money it had received from plaintiff and rendered judgment for the bank.

Plaintiff attacks the evidentiary support of this finding on several grounds. His principal argument is based on the fact that the money was not actually paid to the beneficiaries themselves, but was deposited in accounts in the bank and was applied on the Connolly note.

[5] The fact that there was not a manual tradition of the money to the beneficiaries and an actual deposit of it in the various accounts by them and actual payments made by Connolly on his note cannot assist plaintiff. If the trustee had actually handed Connolly the money to which he was entitled and Connolly had then delivered the money to the bank to be applied on his note, the legal effect of the situation would not be changed. When the trustee, under express authority of the trust, applied the money on the note, that money passed out of the trust and was in fact paid to a beneficiary under the trust. But, plaintiff argues, Connolly was trustor and not a beneficiary under the trust so these payments were not made to a beneficiary. This argument overlooks the clear terms of the trust under which Connolly was both trustor and a beneficiary. Such dual relationship is permissible. Atkinson v. Foote, 44 Cal.App. 149, 186 P. 831; Touli v. Santa Cruz County Title Co., 20 Cal.App.2d 495, 67 P.2d 404. The same reasoning applies to the other allocations made of the Weiner moneys by the trustee.

Plaintiff argues that the finding as to the allocation of the money received from him is contrary to the evidence. He points to evidence that $97 was allocated to the general account, $549 to the improvement release account, and $1,292.40 to the bank release account, which figures vary from those found by the trial court, and which sums total $1,938.40.

[6] It is true that there is such evidence in the record but it relates to the allocation of the unpaid balance on the Weiner contract at the time the bank took over the trust, if that balance had then been paid. There is other evidence supporting the finding of the allocations made of the $1,890 actually paid by plaintiff, which evidence sufficiently supports the challenged finding.

[7] Plaintiff urges that he is entitled to a personal judgment against the bank because there is considerable property still in the trust and because other purchasers are still paying into the trust on their contracts.

This argument cannot assist plaintiff. The order of the Supreme Court on the former appeal precludes such relief here. The case was reversed so that it might be intelligently determined whether or not the doctrine of unjust enrichment might be applied against the bank. When it was made to appear that the trustee did not hold any money paid by plaintiff there was no unjust enrichment of the trustee and no personal judgment could be rendered against the bank. Weiner v. Roof, supra.

[8] If it is true, as argued by plaintiff, that the trust still has assets of considerable value, he is not without his remedy. He has his judgment against J. B. Roof and J. B. Roof, Incorporated, the latter a beneficiary under the trust. Its interests in the trust, if any, may be subject to levy and sale under execution.

Plaintiff devotes a considerable portion of his brief to a review of the evidence on the first trial and to the change of position of the bank on the second trial. This change of position was made necessary by the decision of Speck v. Wylie, supra, which overruled earlier cases. Weiner v. Roof, supra.

[9-11] He asks us to review the transcripts and briefs on the former appeal. There are several reasons why we may not do this. First, the law of the case was established on the first appeal, assuming that doctrine still has vitality in California. See England v. Hospital of Good Samaritan, 14 Cal.2d 791, 97 P.2d 813. Second, the judgment against this defendant was reversed and the cause sent back for retrial on one issue which did not include these

questions now argued here. Weiner v. Roof, supra. Third, we do not have the records on the former appeal. They were not offered in evidence nor were they marked for identification at the second trial.

The judgment is affirmed.

We concur: BARNARD, P. J.; KELLY, J., pro tem.

In re MITCHELL'S ESTATE.

Civ. 11634.

District Court of Appeal, First District, Division 1, California.

July 2, 1941.

Rehearing Denied Aug. 1, 1941.

Hearing Granted Aug. 28, 1941.

1. Executors and administrators 🔑239

An order instructing executors to pay to broker commission on sale of realty owned by decedent's estate was appealable. Probate Code, §§ 760, 1240.

2. Executors and administrators 🔑239

On appeal from order instructing executors to pay commission to real estate broker on sale of realty owned by decedent's estate, all conflicts in evidence were resolved in favor of broker.

3. Executors and administrators 🔑221(5)

Evidence sustained finding that broker was procuring cause of sale of realty belonging to decedent's estate, which would entitle broker to recover commission for the sale upon proof of compliance with provision of Probate Code relating to contracts by executor with an agent to secure purchaser for property of an estate. Probate Code, § 760.

4. Executors and administrators 🔑97

The right of broker to collect commission for sale of realty belonging to a decedent's estate depends upon whether the services are performed pursuant to a contract of employment conforming to statutory requirements. Probate Code, § 760.

5. Executors and administrators 🔑97

The essential requirements of written contract between an executor and a real estate broker providing for sale of realty belonging to decedent's estate are that it shall provide for payment of a commission and that the commission shall be paid out of the proceeds of the sale of the realty, and failure to comply with such requirements renders the contract unenforceable against the decedent's estate. Probate Code, § 760.

6. Executors and administrators 🔑97

Where letter written by vice president of executor bank, relied on by real estate broker as a written contract of employment required by statute in order to entitle broker to recover commission for sale of realty belonging to estate, did not refer to the matter of commission, the alleged contract failed to meet the mandatory requirements of Probate Code and was unenforceable against the estate. Probate Code, § 760.

7. Executors and administrators 🔑97

Neither executor of decedent's estate nor real estate broker, authorized by the executor to sell property of the estate, had right to enter into a contract which would be binding on the estate unless it conformed to provisions of Probate Code relating to such a contract. Probate Code, § 760.

* * *

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the estate of James McL. Mitchell, deceased, wherein confirmation of a sale of certain land by Phillip I. Manson and others, executors, was opposed by O. L. Hamilton, who claimed a real estate broker's commission on the sale. From an order allowing the commission and instructing the executors to pay it, the executors appeal.

Reversed.

Thos. A. Allan, of San Francisco, for appellants.

Stanley Pedder and Kenneth Ferguson, both of San Francisco, for respondents.

KNIGHT, Justice.

The estate of James McL. Mitchell, deceased, was the owner of a 1,400 acre ranch in Santa Clara county, which was sold to Mrs. Rose Doudell for a purchase price of $30,600. The respondent, O. L. Hamilton, a real estate broker, claimed a commission of 5% on the sale, and objections were filed to the confirmation of the sale upon the ground that the petition therefor contained no request for the allowance of said commission. The sale was confirmed, but the probate court directed the executors to impound the sum of $1,530 to await the determination of the claim for said commission. As a result of the hearing had thereafter the court made an order allowing the commission and instructing the executors to pay the same. From the order so made the executors have appealed.

[1] Respondent at the outset contends that the order is not appealable, citing In re Estate of Seng, 52 Cal.App. 149, 198 P. 809, and In re Estate of Smith, 63 Cal.App. 474, 218 P. 636. But those cases were decided prior to 1931, at which time those portions of sections 963, 1616, 1664, and 1701 of the Code of Civil Procedure enumerating the probate decrees and orders which were appealable, were re-enacted into section 1240 of the Probate Code, and in 1935, St. 1935, p. 1972, said section 1240 was amended by adding to the probate orders therein made appealable orders "instructing or directing an executor or administrator". It is quite obvious that the amendment so inserted is broad enough in its terms to include therein an order instructing an executor or administrator to pay a real estate commission allowed pursuant to the provisions of section 760 of the Probate Code.

With respect to the merits of the appeal, two main issues are involved, first, whether the claim for commission is founded on a valid written contract, and secondly, whether the evidence is legally sufficient to support the trial court's finding that respondent was the procuring cause of the sale.

[2] Resolving all conflicts in the evidence in favor of respondent, the facts of the case may be stated as follows: On December 1, 1938, about a year after Mitchell's death, respondent wrote to the appellant bank asking if the ranch was for sale, and if it was, that he be given authority to show it. On December 2, 1938, the bank replied that it was not in a position to discuss the sale of the property until the inheritance appraisal was made. On February 7, 1939, the bank wrote the following letter to respondent: "We refer to your letter of December 1, 1938, in which you inquired of the James McL. Mitchell ranch near Morgan Hill. We would be pleased to list this property with you for sale. For your information, the inheritance appraisal on this property is $34,000. Any sale would be subject to court approval, and all offers should be accompanied by a check for not less than 10% of the offered price. Before taking any client to the property, it will be necessary to make an appointment with Mrs. Mitchell who is now residing on the premises." The letter was signed by P. S. Scales, vice president of the bank. The property was likewise listed for sale with other San Jose real estate agents. On February 20, 1939, A. C. Geisenhoff, a real estate broker operating in Santa Clara county, showed Mrs. Doudell, her son John, who did the business for his mother, and another son named Ray, a ranch known as the Pritchard ranch, which was located near the Mitchell property. John Doudell said they would like something with more open land, and Geisenhoff first pointed out the Armsby ranch, adjoining the Pritchard ranch, and then called their attention to the Mitchell ranch, which was next to the Armsby ranch, saying that on account of Mitchell's death the preceding fall he believed the place would be sold. John Doudell asked him to check up on the matter and let him know. Geisenhoff immediately contacted a real estate broker named Bray who was familiar with the property, and was informed by Bray that he and Hamilton were working together on the sale of the Mitchell ranch, and had authority to show it. Thereupon Geisenhoff and Bray made arrangements with Hamilton to work on the sale of the ranch as Hamilton's agents. Two days later and on February 23, Geisenhoff and Bray took the Doudells out to the Mitchell ranch and showed them over the property. Bray either exhibited or told the Doudells about the letter from the bank, and explained to them the procedure necessary to bid in the property. In this regard he informed them of the appraised valuation, and that the bid would have to be 90% of the appraised value, and accompanied by a check for 15%. The Doudells said they thought the property was too expensive, and some discussion was had as to how the ranch could be subdivided and some of it sold. On the following day, February 24, 1939, John Doudell, without advising Bray or Geisenhoff of his intention so to do, called at the bank in San Francisco and opened negotiations with the executors for the purchase of the property. His conversation was had with Mr. Neuman, connected with the real estate department of the bank; and Doudell's version of the conversation was as follows: "* * * I told him that Mr. Bray and Mr. Geisenhoff had went with me to the Mitchell Ranch. I told him they were real estate men, and I asked him, if I bought this

property, if I would have to pay them a commission. He said: 'I don't believe so.' I said: 'Will the bank have to pay a commission?' And he said: 'I don't think so.' He said: 'Just a minute', and he opened his desk underneath there, and he pulled some papers out, and he looked them over, and he said: 'What are these gentlemen's names?' And I told him. He said: 'We don't know those gentlemen.' He said: 'I feel sure that you would not have to pay any commission.'" In answer to the question as to whether he told Mr. Neuman that there was no broker involved in the matter he said that he had not; and continuing he stated: "I told him that Mr. Geisenhoff and Mr. Bray had went out there, and we had looked the ranch over, but I did not consider them my brokers, but being real estate men I was wondering if I bought the ranch if they would come back on me for the commission." The Doudells continued to discuss with Geisenhoff and Bray the possibilities of the purchase of the Mitchell ranch and other properties up to about March 23, 1939. In the meantime, however, and on March 8, 1939, without advising said real estate brokers, Mrs. Doudell entered into a contract with the executors to purchase the Mitchell ranch for the price stated. The real estate brokers did not learn of these dealings with the bank until shortly before April 5, 1939, on which date they called at the bank and informed Mr. Scales of the negotiations which had been carried on between them and the Doudells, and made claim for the allowance of the commission. The next day said brokers called on the Doudells and informed them what they had learned, and requested John Doudell to write to the bank and tell "the truth" as to what part they had taken in the sale. Doudell replied that he would prefer to call at the bank for that purpose, and made an appointment to do so the following day, but failed to keep his appointment. On April 10, 1939, the executors' return of sale of the property came on for hearing, at which time objections were filed to the confirmation upon the ground that the return of sale did not provide for the payment of said commission.

[3, 4] The facts above narrated are legally sufficient in our opinion to support the probate court's finding that respondent was the procuring cause of the sale. Justy v. Erro, 16 Cal.App. 519, 117 P. 575; Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653. But as held in the case of Wilson v. Fleming, 106 Cal.App. 542, 289 P. 658, 661, the right to collect a commission for the sale of property belonging to the estate of a deceased person depends upon whether the services were performed pursuant to a contract of employment which conforms to statutory requirements; and we are unable to sustain the conclusion that the contract here relied on meets those requirements.

[5] The law governing in such cases is embodied in section 760 of the Probate Code, which is a re-enactment of the first two paragraphs of former section 1559 of the Code of Civil Procedure, and is as follows: "The executor or administrator may enter into a *written* contract with any bona fide agent to secure a purchaser for any real or personal property of the estate, *which contract shall provide* for the payment to such agent out of the proceeds of a sale to any purchaser secured by him of a commission, the amount of which must be fixed and allowed by the court upon confirmation of the sale; and when said sale is confirmed to such purchaser, such contract shall be binding and valid as against the estate for the amount so allowed by the court. By the execution of any such contract no personal liability shall attach to the executor or administrator, and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed by the court." (Italics ours.) It will be noted that two of the essential requirements of such a written contract are that it shall provide for the payment of a commission and that the commission shall be paid out of the proceeds of the sale of the property; and as held in effect in Wilson v. Fleming, supra, failure to comply with such requirements renders the contract unenforcible against the estate.

[6] In the present case the letter dated February 7, 1939, written by the vice president of the executor bank listing the property for sale with respondent, is relied upon by respondent as constituting the contract of employment, and admittedly nowhere therein, nor elsewhere in any of the correspondence preceding it, is there any provision whatever for the payment of a commission out of the proceeds of the sale of the property. In fact no reference at all is made anywhere in any of the correspondence to the matter of a commission. Nor did the probate court find that the written contract contained any such provision. It found merely that the executors, on or about

February 7, 1939, employed respondent in writing to procure a purchaser for the ranch "with the understanding and agreement" that in the event he procured a purchaser the executor would pay the customary commission from the proceeds of the sale as confirmed by the probate court. Therefore, in the absence of such a provision in the contract, it must be held that the contract failed to meet the mandatory requirements of said section 760; and that being so, it is unenforcible against the estate.

In contending that the contract is not fatally defective because of such omission, respondent relies on certain language used by the court in Wilson v. Fleming, supra, to the effect that the code section "is by law a part of any such contract, and the provisions thereof must be read into the same". An examination of the opinion in that case shows, however, that the language quoted was employed only in connection with the last clause of the last sentence of the code section, to-wit, "* * * and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed by the court"; and as will be noted, the code section does not declare that the written contract of employment shall contain such a provision as it does with respect to the provision relating to the payment of the commission out of the proceeds of the sale of the property. The language used in Caine v. Polkinghorn, 54 Cal.App. 387, at pages 391, 392, 201 P. 936, is for the same reason not pertinent here because there it was employed only in connection with the first clause of the last sentence of said section, exempting the representative of the estate from personal liability on such contracts, which, like the second clause of the last sentence, is not required to be made part of the written contract.

It is true that in the case of Wilson v. Fleming, supra, the broker was attempting to enforce a form of contract for the payment of a commission which under the provisions of the code section the representative of the estate was not authorized to enter into; nevertheless, in order to decide that question, it became necessary for the court to construe the provisions of said code section, and in doing so it held that to be enforcible against an estate, the written contract of employment must provide, as expressly declared by said section, for the payment to the agent of a commission out of the proceeds of the sale to the purchaser secured by the agent.

[7] Respondent also cites sections 1656, 1643, and 1636 of the Civil Code, which set forth certain rules for the construction and interpretation of contracts generally, and which admittedly may be invoked where, in the case of contracts between individuals, omissions may be supplied by implication. Justy v. Erro, supra; Sessions v. Pacific Improvement Co., supra. But here respondent is seeking to bind the estate of a deceased person by a contract entered into by the representative thereof in its representative capacity; and as held in Wilson v. Fleming, supra, in such cases neither the representative nor the contracting agent has the right to enter into a contract which shall be binding on the estate unless it conforms to the provisions of the statute. In other words, the terms of the statute constitute the measure of the authority.

The order is reversed.

We concur: PETERS, P. J.; WARD, J.

45 Cal.App.2d 724

PEOPLE v. SLAUGHTER.

Cr. 1771.

District Court of Appeal, Third District, California.

July 3, 1941.

1. Criminal law ⚷507(7)

In prosecution for three specific acts of lewd and lascivious conduct with a minor, the fact that the minor, who was only 11 years old at the time of the trial, admitted on his cross-examination that he knew it was not right to permit the acts complained of, did not require the corroboration of the testimony of the minor on theory that he was an "accomplice". Pen.Code, § 26, subd. 1; §§ 288, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law ⚷507(7)

In prosecution for lewd and lascivious conduct, the victim of the crime need not be corroborated. Pen.Code, §§ 288, 1111.

3. Infants ⚿20

Question whether complaining witness reported unlawful acts and conduct of defendant, charged with lewd and lascivious conduct, to any one, was a matter going to the credibility of complaining witness. Pen. Code, § 288.

4. Criminal law ⚿780(1)

In prosecution for specific acts of lewd and lascivious conduct with a minor child, refusing certain requested instructions dealing with necessity of corroborating testimony of an accomplice was proper. Pen.Code, §§ 288, 1111.

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

William Theodore Slaughter was convicted of lewd and lascivious conduct, and he appeals.

Affirmed.

Francis H. Frisch, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PULLEN, Presiding Justice.

Appellant was charged, under section 288 of the Penal Code, with three specific acts of lewd and lascivious conduct with a minor child. He was found guilty on all three counts, and from the judgment of conviction prosecutes this appeal.

[1] The first count urged for reversal is the refusal of the trial court to grant the motion of defendant for an advisory or directed verdict upon the ground that the complaining witness was an accomplice, and that there was no evidence tending to connect the defendant with the crime charged, as required by section 1111 of the Penal Code.

The argument of appellant seems to be that because the youth admitted on his cross examination that he knew it was not right to permit the acts complained of, that therefore he became an accomplice. The boy was under the age of fourteen, being only eleven at the time of the trial. In declaring who are capable of committing crimes, section 26, subdivision 1, of the Penal Code states that "children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness".

[2] The contention of appellant is based upon an erroneous conception of the law. The victim of this type of crime under the facts here need not be corroborated. In People v. Hulbart, 55 Cal.App. 112, 202 P. 939, 940, the court said: "Appellant contends that, regardless of the boy's age, the evidence shows him to be an accomplice, because of his intelligence, education, and understanding of moral questions, * * *. Without doubt the testimony of an accomplice is required to be corroborated in order to sustain a conviction. Section 1111 of the Penal Code expressly so provides. But, by an amendment of that section in 1915 (Stats.1915, p. 760), we now have a legislative definition of an accomplice as 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' The gist of the offense defined by section 288 is that the acts shall be committed upon or with the body 'of a child under the age of fourteen years.' In the present case the prosecuting witness, a boy of but 12 years, could not be guilty, with this defendant—who was over 14 years of age—of the offense defined in section 288, for, as we have seen, the gist of the offense is that the acts shall be committed upon or with the body of one under the age of 14 years."

[3] As to whether or not the complaining witness reported the unlawful acts and conduct of defendant to any one is a matter going to his credibility. People v. Healey, 52 Cal.App. 563, 199 P. 551. There is no intimation in the record that the testimony of the witnesses for the prosecution is untrue or that they were moved by any base motive. Their testimony seems true and convincing, the opportunities for the commission of the acts were present, and the jury having seen and heard the witnesses for the prosecution and the defense, found the defendant guilty as charged.

[4] Appellant also claims the court erred in refusing to give certain instructions dealing with the necessity of corroborating the testimony of an accomplice, but these instructions were properly refused as is apparent from what has already been said herein upon that matter.

The jury were admonished to carefully scrutinize the testimony of children, and also a cautionary instruction was given that the charges in this type of case are easily made and peculiarly difficult to disprove, and that they must be satisfied beyond a reasonable doubt before finding the defendant guilty.

There is nothing in the record that would justify a reversal. The judgment is affirmed.

We concur: TUTTLE, J.; THOMPSON, J.

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45 Cal.App.2d 757

SLATER v. SUPERIOR COURT OF CONTRA COSTA COUNTY et al.

Civ. 11735.

District Court of Appeal, First District, Division 1, California.

July 9, 1941.

Rehearing Denied Aug. 8, 1941.

See 115 P.2d 865.

1. Mandamus 🔑55

If writ of execution upon judgment was improperly refused, mandamus was proper remedy to compel its issuance.

2. Execution 🔑11

Where jury awarded $10,000 for decrease in market value of property and $2,500 for physical injury to property, but judgment was entered for $12,500, a waiver whereby plaintiff waived all portions of the judgment in excess of and other than the sum of $2,500 awarded for physical injury to the property complied with order granting new trial unless plaintiff waive all portions of judgment in excess of $2,500 and entitled plaintiff to writ of execution on the judgment.

3. New trial 🔑162(5)

In determining whether waiver filed by plaintiff complied with order of court granting new trial unless plaintiff filed waiver of portion of judgment, the waiver was required to be read as a whole.

4. New trial 🔑162(5)

In determining whether waiver filed by plaintiff complied with order of court granting new trial unless plaintiff filed waiver of portion of judgment, the words used in the waiver were required to be given a reasonable interpretation.

5. Execution 🔑11

Where trial court granted new trial unless plaintiff filed waiver of portion of judgment, and plaintiff filed an unambiguous waiver which complied with the order but defendant, allegedly relying on trial court's interpretation that the waiver did not comply with the order, did not appeal from the judgment, failure of defendant to appeal did not deprive plaintiff of right to enforce judgment as reduced by the waiver.

6. New trial 🔑162(5)

Where conditional order granting new trial unless plaintiff filed waiver of portion of judgment made no reference to costs, but simply required a waiver of all portions of judgment in excess of $2,500, the inclusion of reference to costs in waiver of all portions of judgment in excess of, and other than, the sum of $2,500 and the costs, did not affect the legal efficacy of the waiver.

7. Costs 🔑71

Where conditional order granting new trial makes no reference to costs but simply required waiver of all portions of judgment in excess of $2,500, if no mention of costs had been made in waiver, legal effect would have been that plaintiff would be entitled to costs.

8. Judgment 🔑224

Costs are not an integral part of a judgment, and are but an incident to judgment.

9. New trial 🔑162(5)

Where a dispute arises over whether a waiver complies with conditional order of court granting new trial, the clerk of court has no power to pass upon the merits of the dispute, and he should refuse to act and await order of court.

10. Courts 🔑209(2)

Where dispute existed regarding whether waiver complied with conditional order of court granting new trial, and clerk of court refused to issue execution upon judgment, appellate court, determining that the waiver complied with the conditional order, would grant writ of mandate against lower court directing execution to issue on judgment, but would dismiss proceeding against clerk of court.

◆

Proceedings on a petition for writ of mandate by Gertrude Slater against the Superior Court of Contra Costa County and others.

Writ of mandate granted against the court, and proceeding against clerk of court dismissed.

Muldary & Elkington, of San Francisco, for petitioner.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondents.

PETERS, Presiding Justice.

[1] This is a petition for a writ of mandate to compel respondents, the Superior Court of Contra Costa County and its clerk, to issue execution upon a judgment. If the writ was improperly refused mandamus is the proper remedy to compel its issuance. Holtum v. Greif, 144 Cal. 521, 78 P. 11; Sullivan v. Superior Court, 185 Cal. 133, 195 P. 1061.

The facts giving rise to this controversy are as follows: Petitioner commenced an action in Contra Costa County against the Shell Oil Company to recover damages to her real property alleged to have been caused by the unauthorized construction of a pipe line by the Shell Oil Company on her property. On the first trial the trial court granted a motion for nonsuit, and judgment was entered accordingly. This judgment was reversed on appeal. Slater v. Shell Oil Company, 39 Cal.App.2d 535, 103 P.2d 1043. Thereafter, the cause was retried before a jury. The jury brought in a verdict in favor of petitioner which reads in part as follows: "We, the Jury * * * find that by reason of the construction of the second pipe line the market value of plaintiff's property has been decreased in sum of $10,000 Dollars, and we further find that the damage for the physical injury to plaintiff's property is the sum of $2500 Dollars." On December 14, 1940, judgment was entered in favor of petitioner for $12,500, plus costs, assessed at $908.81. In due time the Shell Oil Company moved for a new trial. On February 1, 1941, the trial court made its order granting the new trial unless petitioner filed, by a designated date, a waiver of a portion of the judgment. The order is entitled, "Order Granting New Trial Conditionally", and, so far as pertinent here, reads as follows:

"Now, Therefore, It Is Hereby Ordered that said motion be and it is hereby granted with respect to the issue as to the amount of damages upon all of the grounds specified in said notice and upon the presentation of said motion, including insufficiency of the evidence to justify or sustain the verdict in said action, unless plaintiff on or before the 5th day of February, 1941, file with said court in said action a written waiver of all portions of the judgment heretofore entered in said action on December 14, 1940, in excess of the sum of $2500, and that said motion be and it is hereby denied with respect to all other issues in said action.

"It Is Hereby Further Ordered that if such waiver be so filed within the time aforesaid then said motion be and the same is hereby denied even with respect to said issue as to the amount of damages."

On February 5, 1941, within the time specified in the conditional order, the petitioner filed a waiver, which reads as follows:

"Gertrude Slater, the plaintiff abovenamed, does hereby waive and remit all portions of the judgment hereinbefore entered on December 14, 1940 in excess of, and other than, the sum of $2,500 awarded by the jury as damages for the physical injury to the property of plaintiff, and the costs hereinbefore taxed."

Petitioner thereupon requested the clerk to issue an execution on the judgment so reduced. This, the clerk refused to do. Petitioner thereupon moved respondent court for an order that execution issue. This motion was denied, whereupon this proceeding was instituted.

It is the contention of respondents that the waiver does not comply with the terms of the conditional order granting the new trial; that for that reason the condition was never complied with; and that, upon the expiration of the time set in the order, a new trial was granted. Jennings v. Superior Court, 134 Cal.App. 300, 25 P.2d 246; Gloria v. A Colonia Portuguesa, 128 Cal.App. 640, 18 P.2d 87. The respondents take the position that the remission as filed did not comply with the court's order in that it constituted a remission only as to damages awarded for physical injury to the property in excess of $2,500. It is pointed out that no damages in excess of that amount were awarded for such injury, and, therefore, it is contended that there was no remission at all. In other words, it is urged that petitioner has not waived any portion of the judgment awarded for the decrease in the market value of the property.

[2-4] In our opinion, this construction of the waiver is an unreasonable one. The pertinent language of the conditional order granting the new trial is that such new

trial is granted unless petitioner herein "file with said court in said action a written waiver of all portions of the judgment heretofore entered in said action on December 14, 1940, in excess of the sum of $2500." The pertinent provision of the waiver reads that petitioner "does hereby waive and remit all portions of the judgment hereinbefore entered on December 14, 1940 in excess of, and other than, the sum of $2500 awarded by the jury as damages for the physical injury to the property of plaintiff, and the costs." Respondents' argument that this does not constitute a waiver of all sums awarded in excess of $2,500 (i. e., $10,000) is necessarily predicated upon the theory that the "judgment" referred to in the conditional order and in the waiver was divisible into two independent parts, $2,500 for physical injury to the property and $10,000 for decrease in value. While it is true that the jury verdict was thus divisible, the judgment that was entered on December 14, 1940, was not for two separate sums, but was in the total amount of $12,500. It reads that, "it is Ordered, Adjudged and Decreed that said plaintiff Gertrude Slater do have and recover of and from said defendant Shell Oil Company, a corporation, the sum of Twelve Thousand, Five Hundred ($12,500) dollars, together with all her said plaintiff's costs". When the petitioner waived "all portions" of that judgment "in excess of, and other than, the sum of $2500 awarded by the jury as damages for the physical injury to the property of plaintiff" she clearly waived the portion of that judgment in excess of $2,500. The conditional order when it referred to the judgment was obviously referring to the judgment for $12,500. The waiver also was referring to that same judgment. No other interpretation is reasonably possible. The statement in the waiver that the $2,500 which the petitioner was willing to accept was the $2,500 awarded by the jury for the physical injury to the property, in no way detracted from the operative clause in the document that she was waiving all portions of the judgment in excess of the $2,500. The waiver must be read as a whole, and the words used given a reasonable interpretation. Tested by these standards, the waiver clearly amounts to a remission of the $10,000 awarded by the jury for the decrease in value of petitioner's property.

[5] On the oral argument, counsel for respondents, who are also counsel for the Shell Oil Company, urged that they relied on the trial court's interpretation that the waiver did not comply with the terms of the conditional order granting the new trial; that because of such reliance they assumed a new trial had been granted; that had they known that the new trial had been denied they would have appealed from the $2,500 judgment; that they were thus misled by the petitioner to their injury by the form used by her in attempting to comply with the conditional order. Had the waiver been truly ambiguous, the above argument might be entitled to some consideration in interpreting it. But, as we have seen, the waiver is not ambiguous. A strained unnatural interpretation of the waiver should not be indulged in simply because counsel for the Shell Oil Company elected to rely on an erroneous ruling of the trial court. If counsel had desired to do so, they could have appealed from the judgment, and also could have urged that a new trial had been granted. Counsel elected not to avail themselves of this right. Counsel's failure to avail themselves of this procedure cannot be held to deprive petitioner of the right to enforce the judgment as reduced by the waiver.

[6-8] It will be noted that the conditional order granting the new trial makes no reference to costs, but simply required a waiver of "all portions of the judgment * * * in excess of the sum of $2500." The waiver complies with that provision except that the waiver is of "all portions of the judgment * * * in excess of, and other than, the sum of $2500 * * *, and the costs." Respondents make no point of the fact that the waiver reduced the judgment to $2,500, plus costs. This inclusion of costs in no way affected the waiver. If no mention of costs had been made in the waiver, none having been made in the conditional order, the legal effect would have been that petitioner would be entitled to costs. This follows from the fact that costs are not an integral part of the judgment—they are but an incident of the judgment. Whitaker v. Title Ins., etc., Co., 179 Cal. 111, 175 P. 460; McCallion v. Hibernia, etc., Society, 98 Cal. 442, 33 P. 329; Cain v. French, 29 Cal.App. 725, 156 P. 518. This being so, the inclusion in the waiver of something to which petitioner would have been legally entitled without mention in no way affects the legal efficacy of the waiver.

[9, 10] The only other question left for determination is whether the writ should

issue against both the clerk as well as against the respondent court. Although there appears to be some confusion in the cases (see De Garmo v. Superior Court, 1 Cal.2d 83, 33 P.2d 411), it is our opinion that when a dispute arises over whether a waiver complies with the conditional order of the court, the clerk has no power to pass upon the merits of that dispute. If the clerk should attempt to pass on such question he would be acting judicially and this he has no power to do. Where a dispute exists he should refuse to act and await the order of the court. This was the precise point involved in Holtum v. Greif, supra. There, as in the instant case, a dispute arose as to whether a conditional order granting a new trial had been complied with. The clerk refused to issue execution, whereupon, as in the instant case, a formal motion was made to the court for an order directing the clerk to issue execution. Upon the denial of that motion mandate was sought against both the court and the clerk. It was held that the peremptory writ should issue solely against the court. In so holding, the Supreme Court stated (144 Cal. at page 527, 78 P. at page 13): "In cases of this kind the clerk cannot be expected to pass judicially upon the question whether a condition annexed to an order granting a new trial has been performed or not, and in any case he must be justified in awaiting the order of the court (where alone the question as to performance can be tried) before issuing execution. For this reason we do not think the petitioner has any right to a writ directed to the clerk. But as to the court the case is different. Upon the undisputed facts it is the duty of the court to order execution, and the only question is whether that right is enforceable by writ of mandate—which does not issue where there is a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ.Proc. § 1086. Here it is suggested there is a plain, speedy, and adequate remedy by appeal from the order overruling the motion for execution; but this remedy, although plain, is neither speedy nor adequate. The appeal, in the ordinary course, would not be decided for a long time, and pending the appeal there would be no security for the payment of the judgment; and, besides, nothing would necessarily result from an appeal beyond a reversal of the order, and this would merely confirm the right of the petitioner to execution—a right already complete. So that, unless the judgment of reversal was accompanied by a mandatory direction to order the issuance of execution, the petitioner would find himself at the end of his appeal precisely where he is now—with a right to demand the issuance of the writ, but with no power to compel it."

The reasoning of the court in the Holtum case, supra, is sound. For that reason, the peremptory writ in the present case should issue solely against the trial court, and should be dismissed as to the clerk.

Let a peremptory writ of mandate issue directing the respondent court to grant the motion of petitioner for an order directing execution to issue on the judgment of December 14, 1940, as reduced by the waiver of February 5, 1941. The proceedings against respondent clerk are dismissed.

We concur: KNIGHT, J.; WARD, J.

HINDS et al. v. WHEADON et al.

Civ. 12945.

District Court of Appeal, Second District, Division 2, California.

July 9, 1941.

Hearing Granted Sept. 4, 1941.

1. Appeal and error 🔑927(3)

The evidence must be viewed most favorably to plaintiffs in reviewing judgment predicated upon motion for a nonsuit.

2. Negligence 🔑134(11)

Generally, the burden of proving by preponderance of evidence that negligent act of defendant was proximate cause of damage for which plaintiff seeks recovery rests with the plaintiff.

3. Negligence 🔑134(4)

A recovery for wrongful death of welder caused by explosion of dehydrator tank upon which welder was working, could not be had on theory that defendants violated statutory and common law duties, where plaintiffs admitted that actual cause of explosion was not definitely and scientifically known, and hence to allow recovery would base the judgment on mere conjecture. Code Civ.Proc. § 377; Gen.Laws 1937, Act 4916, § 3.

4. Death 🔑**14(1)**

A recovery could not be had for wrongful death of welder caused by explosion of dehydrator tank on which welder was working on theory that defendants breached an express warranty that tank was safe for welding purposes, since a wrongful death statute is applicable to tort actions only and no recovery may be had for damages resulting from breach of contract. Code Civ. Proc. § 377.

5. Negligence 🔑**22**

The doctrine of "so use your own as not to injure another's property" was inapplicable to action for wrongful death of welder caused by explosion of dehydrator tank upon which welder was working, where decedent, and not defendants, was using the property at time of the explosion. Code Civ.Proc. § 377.

6. Negligence 🔑**121(2)**

The doctrine of "res ipsa loquitur" applies only where instrumentality causing the damage is in possession and under control of defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

7. Negligence 🔑**121(3)**

The doctrine of "res ipsa loquitur" was inapplicable to action for death of welder caused by explosion of dehydrator tank upon which welder was working where tank at time of accident and for some time prior thereto was in the exclusive possession and under control of decedent. Code Civ.Proc. § 377.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Ina Hinds and others against I. M. Wheadon and others, to recover for wrongful death. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Syril S. Tipton and Marvin Wellins, both of Los Angeles, for appellants.

Joseph A. Ball and Kenneth Sperry, both of Long Beach, for respondents.

McCOMB, Justice.

Plaintiffs, the sole heirs at law of George T. Hinds, deceased, appeal from a judgment in favor of defendants after the trial court granted the defendants' motion for a nonsuit in an action to recover damages, pursuant to the provisions of section 377 of the Code of Civil Procedure, for the wrongful death of said decedent.

[1] The evidence being viewed in the light most favorable to plaintiffs, as must be done in reviewing a motion for a nonsuit (Guyer v. Pacific Elec. Ry. Co., 24 Cal. App.2d 499, 500, 75 P.2d 550), the material facts are:

February 23, 1937, George T. Hinds was employed as a welder by E. H. Irwin, doing business as Irwin Welding Works. The latter was engaged by defendant Allied Petroleum Co., to render certain welding services on a dehydrator tank, which was owned by said defendant and located on their premises in the city of Signal Hill. Mr. Hinds was directed by his employer to do the welding on the tank. About 9:30 a. m., February 23, 1937, Mr. Hinds arrived at the premises where the dehydrator was located, and the following conversation took place between the defendant Chester Fisher and Mr. Hinds:

"Q. All right; then, was anything said before he started to weld, regarding the tank, by you or Mr. Haines to Mr. Hinds? A. Mr. Hinds wanted to know if it was already to go to welding on and I told him we had filled it with water and washed it out and he said, 'If you have got it full of water, it is O. K.' and I says, 'You can look right there at that half-inch valve and I will start the pump there and you can see for yourself,' and Mr. Haines and Mr. Hinds was there, both right there and I went over and started the pump and the water started to run—running out and he turned around and said, 'O. K.' and 'shut her down' and I shut it off and he—we went to work—went to welding. Mr. Haines went in the office and we went to work doing the welding."

There was expert testimony to the effect that the proper and safe practice to follow before welding on a dehydrator tank such as the one used in the instant case was to fill it with water. Mr. Hinds proceeded to do the welding work upon the dehydrator tank that was required, and while performing said welding the tank exploded and decedent was killed. There was a discoloration on the inner side of the tank opposite the place where decedent had been spot-welding on the exterior of the tank, which discoloration, according to the testimony, was caused by excessive heat.

Plaintiffs rely for reversal of the judgment on these propositions:

First: Defendants were guilty of negligence in that:

(a) Defendants violated a duty imposed on them by section 3, Act 4916, volume 1, Deering's General Laws [1937] 2071 (now section 3219, Public Resources Code, St. 1939, p. 1067).

(b) There was a common law duty which defendants violated.

(c) Defendants breached an express warranty to decedent that the dehydrator tank was safe for welding purposes.

Second: The doctrine of sic utere tuo ut alienum non laedas *(so use you own as not to injure another's property) is applicable to the instant case.*

Third: The doctrine of res ipsa loquitur *is applicable.*

[2, 3] Points (a) and (b) of plaintiffs' first proposition are untenable, for the reason that it is the general rule that the burden of proving by a preponderance of the evidence that a negligent act or acts of defendant was the proximate cause of the damage for which plaintiff seeks recovery rests with the plaintiff. Creamer v. Cerrato, 1 Cal.App.2d 441, 445, 36 P.2d 1094. In the present case plaintiffs admit that they have not complied with this rule, for they say in their brief, "The actual cause of the explosion in the instant case is not definitely and scientifically known." Therefore, no liability may be predicated on points (a) and (b), since to do so would base the judgment on mere conjecture.

[4] Plaintiffs' point (c) of the first proposition is also untenable, for the law is established in California that in an action for wrongful death, section 377 of the Code of Civil Procedure is applicable to tort actions only, and no recovery may be had under this section for damages resulting from a breach of contract. Willey v. Alaska Packers' Ass'n, D.C., 9 F.2d 937, 938; see also Revel v. Butler, 322 Ill. 337, 153 N.E. 682, 683; Glenn v. Hill, 210 Mo. 291, 109 S.W. 27, 29, 16 L.R.A.,N.S., 699.

[5] Plaintiffs' second proposition is without merit. The mere statement of the doctrine, "So use your own as not to injure another's property," shows its inapplicability to the facts of the instant case. Decedent, and not defendants, was using the property of defendant Allied Petroleum Company at the time of the unfortunate accident.

[6, 7] Plaintiffs' final proposition is likewise untenable. The doctrine of res ipsa loquitur applies only where the instrumentality causing the damage is in the possession and under the control of the defendant. Hernandez v. Southern California Gas Co., 213 Cal. 384, 388, 2 P.2d 360; 19 Cal.Jur. 709 (1925); 8 Cal.Jur. Ten Year Supp. 384, sec. 125 (1936). Hence in the instant case this doctrine is inapplicable, since the uncontradicted evidence discloses that the dehydrator tank at the time of the unfortunate accident and for some period prior thereto was in the exclusive possession and under the control of decedent.

Cases relied on by plaintiffs, such as Merino v. Pacific Coast Borax Co., 124 Cal. App. 336, 12 P.2d 458 and Sistrunk v. Texas Holding Co., 88 Cal.App. 698, 264 P. 259, are factually distinguishable from the instant case. The evidence in them disclosed that facts existed which brought them within the purview of the rules above stated.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurred.

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45 Cal.App.2d 764

McMILLAN v. BOESE.

Civ. 11681.

District Court of Appeal, First District,
Division 2, California.

July 9, 1941.

Hearing Denied Sept. 4, 1941.

1. Wills 🔑205

An unprobated will was not admissible to prove title of a person named therein as devisee.

2. Executors and administrators 🔑176

Even if holographic will devising land to testator's niece had been properly proved and admitted to probate, testator's general power of testamentary disposition was limited by code sections providing for summary administration of small estates, and hence, upon it being found that testator's entire estate did not exceed $2,500, testator's entire estate, including land attempted to be devised to niece, was properly assigned to testator's widow. Probate Code, § 640.

3. Executors and administrators ⚿194(6)

A decree of probate court assigning entire estate of decedent to widow, including land claimed by decedent's niece under holographic will, under provisions of Probate Code for summary administration of small estates, which decree was valid on its face, was not open to "collateral attack" by niece, but was open only to "direct attack" upon ground of extrinsic fraud. Probate Code, § 640.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack" and "Direct Attack".

◆

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action by Roan A. McMillan against Katherine E. Boese to quiet title to land, wherein defendant filed a cross-complaint. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Philip G. Sheehy, of San Jose, and Fred W. Lake, of Los Angeles, for appellant.

Ronald G. Stewart and Herbert S. Bridges, both of San Jose, for respondent.

SPENCE, Justice.

Plaintiff sued to quiet title to a lot in Santa Clara county. Defendant filed an answer and a cross-complaint. The cause was tried by the court and judgment was entered in favor of defendant and cross-complainant. Plaintiff appeals from said judgment.

Otto Boese and defendant Katherine E. Boese were husband and wife and they acquired the lot during their married life by deed in which both of them were named as grantees. Otto Boese died in 1935 and his entire estate was assigned to defendant, it being found that the net value of his estate did not exceed $2,500. (Prob.Code. sec. 640.) After said decree assigning the entire estate to defendant had become final, plaintiff commenced this action.

Upon the trial plaintiff offered in evidence what purported to be an unprobated holographic will of Otto Boese, deceased, by the terms of which purported will all of the property of the deceased was left to plaintiff, the niece of said deceased. Objection was made to the introduction of said will and the objection was sustained. In offering said will, counsel for plaintiff stated, "It is our muniment of title" and after the objection was sustained to the offer, said counsel stated, "On that ruling, our case fails at the inception". Thereafter defendant introduced in evidence the record in the probate proceeding including the decree assigning the entire estate to the defendant and judgment was entered in favor of said defendant.

[1-3] We find no error in the record. The trial court properly sustained the objection to the introduction of the purported will. Such an unprobated will is not admissible to prove the title of a person named therein as a devisee. Roberts v. Roberts, 168 Cal. 307, 142 P. 1080, Ann. Cas.1916A, 886; see also Estate of Clark, 94 Cal.App. 453, 271 P. 542; 22 Cal.Jur. 173 and 174, sec. 46. And even if properly proved and admitted to probate, the general power of testamentary disposition is limited by the code sections providing for summary administration of small estates. Estate of Miller, 158 Cal. 420, 111 P. 255; 11a Cal.Jur. 552, sec. 398. Furthermore plaintiff was in effect attempting to attack collaterally the decree of the probate court. Said decree was valid upon its face and it was not open to collateral attack but was open only to direct attack upon the ground of extrinsic fraud which was neither pleaded nor proved. Eisenmayer v. Thompson, 186 Cal. 538, 199 P. 798.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

45 Cal.App.2d 709

PEOPLE v. ONE 1939 LA SALLE 8 TOURING SEDAN, ENGINE NO. 2301026.

Civ. 11497.

District Court of Appeal, First District, Division 1, California.

July 3, 1941.

1. Forfeitures 🔑3

If an automobile is taken from its owner without his consent and used by the taker for an unlawful purpose, such as the transportation of narcotics in violation of the State Narcotic Act, the automobile cannot be forfeited to the state, but if the owner consents to use of automobile, the fact that he did not know that it was to be used for an unlawful purpose will not prevent a forfeiture. Gen.Laws 1937, Act 5323.

2. Forfeitures 🔑5

Under the State Narcotic Act, a conditional seller of an automobile may avoid a forfeiture of its interest in automobile where automobile has been used to transport narcotics if seller can establish that it entered into conditional sales contract after reasonable investigation of moral responsibility, character and reputation of buyer and without knowledge that automobile was to be used in violation of the act, even though conditional buyer's interest is forfeited. Gen. Laws 1937, Act 5323.

3. Forfeitures 🔑5

If a conditional buyer of an automobile has a defense to a proceeding for forfeiture of automobile on ground that it has been used to transport narcotics in violation of State Narcotic Act, such defense can be asserted by conditional seller regardless of whether seller has made investigation of buyer which would permit seller to avoid a forfeiture. Gen.Laws 1937, Act 5323.

4. Forfeitures 🔑5

In proceedings for forfeiture of an automobile on ground that it had been used to unlawfully transport narcotics, the question of lack of consent by owner of automobile to its use by persons transporting narcotics was a matter of defense which was to be pleaded and proved by persons relying on such defense. Gen.Laws 1937, Act 5323.

5. Forfeitures 🔑5

If an automobile used unlawfully to transport narcotics was the community property of a husband and wife, the latter being registered owner thereof, regardless of identity of driver at time of unlawful use, proof by wife, in proceedings for forfeiture of automobile, that she had given no one permission to take automobile, would not suffice to prevent a forfeiture. Gen.Laws 1937, Act 5323.

6. Husband and wife 🔑265

The husband has the right of control and management of community property.

7. Forfeitures 🔑5

If an automobile used unlawfully to transport narcotics was the community property of a husband and wife, the latter being registered owner thereof, in proceedings for forfeiture of automobile it was necessary to establish that husband did not consent to use of automobile by occupants thereof at time of unlawful use to prevent a forfeiture. Gen.Laws 1937, Act 5323.

8. Husband and wife 🔑262(1)

The statutory rule that whenever any real or personal property, or any interest therein or incumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, is based on theory that under such circumstances it will be presumed that husband has made a gift of his interest to wife, and the presumption will prevail until overcome by credible rebutting evidence. Civ.Code, § 164.

9. Forfeitures 🔑5

In proceedings for forfeiture of an automobile on ground that it had been used unlawfully to transport narcotics, where the state claimed that automobile was community property of registered owner, a married woman, and her husband, the only permissible finding respecting ownership of automobile was that automobile was registered owner's separate property, where registered owner testified that automobile belonged to her and that payments thereon had been made from her separate earnings, and the state offered no evidence to rebut statutory presumption of a gift by husband of his interest to registered owner. Gen.Laws 1937, Act 5323; Civ.Code, § 164.

10. Forfeitures 🔑5

Evidence did not justify forfeiture of an automobile on ground that it had been used unlawfully to transport narcotics where use of automobile was without consent of owner thereof. Gen.Laws 1937, Act 5323.

11. Appeal and error ⚷994(3)

A witness' credibility was for trial court and could not be considered on appeal.

12. Forfeitures ⚷5

In proceedings for forfeiture of an automobile on ground that it had been used unlawfully to transport narcotics, where unlawful use occurred on August 3, 1939, a finding of an unlawful use "on or about the 8th day of August, 1939", could, under circumstances, be interpreted to include August 3d, and error in dates did not entitle the state to reversal of adverse judgment where evidence showed that automobile was used on August 3d without permission of owner. Gen.Laws 1937, Act 5323.

13. Forfeitures ⚷4

Under the State Narcotic Act, unlawful possession or use of an automobile by an occupant thereof works a forfeiture. Gen. Laws 1937, Act 5323.

14. Forfeitures ⚷5

In proceedings for forfeiture of an automobile on ground that it had been used unlawfully to transport narcotics, a finding that at time of use "unidentified person or persons" were operating automobile in contravention of the act and without owner's consent or knowledge was a finding that known occupant of automobile and unidentified person were using automobile without owner's consent, and it could not be inferred that owner consented to use of automobile by occupant and that occupant permitted unidentified person to operate it. Gen.Laws 1937, Act 5323.

◆

Appeal from Superior Court, City and County of San Francisco; Everett C. McKeage, Judge.

Forfeiture proceedings under the State Narcotic Act, Gen.Laws 1937, Act 5323, by the People against One 1939 La Salle 8 Touring Sedan, Engine No. 2301026. Carrol Clifford and the Motor Credit Company filed answers to the notice of seizure. From an adverse judgment, the People appeal.

Affirmed.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

Michael L. Haun, of San Francisco, for claimant, intervenor and respondent Motor Credit Co.

PETERS, Presiding Justice.

The State appeals from a judgment adverse to it, rendered in action brought under the State Narcotic Act (Stats. of 1929, p. 380, as amended; Deering's General Laws, 1937, Act No. 5323, now sec. 11610 et seq., of the Health and Safety Code, St. 1939, p. 767) for the purpose of forfeiting the interests of all who claimed an interest in a certain 1939 La Salle automobile, on the ground that the automobile had been used to unlawfully transport narcotics in violation of the act.

Carrol Clifford, registered owner, and Motor Credit Co., assignee of the conditional seller, filed answers to the notice of seizure. Both of these parties denied that the car was being used to transport narcotics in violation of the act. The Motor Credit Co., in addition, alleged that before the sale and delivery of the car to Carrol Clifford it made a reasonable investigation of the moral responsibility, character and reputation of the purchaser. Carrol Clifford, as a special defense, pleaded that if the car was being used to unlawfully transport narcotics "the same was so done and so used without the knowledge, consent or connivance" of this respondent.

The uncontradicted evidence is to the effect that on August 3, 1939, an operative of the department of narcotic enforcement received delivery from one Rosenberg of a quantity of heroin for which he had previously paid; that Rosenberg was seated in the automobile in question while the car was parked at the curb of a street in San Francisco; that Rosenberg got out of the car and handed the state officer the heroin and then got back into the car which was then driven away; that with Rosenberg at the time, sitting in the driver's seat, was an unidentified man. Rosenberg was not arrested at the time of delivery and the car was not then seized because it was necessary to first ascertain whether the substance that was delivered was in fact a narcotic. Rosenberg was arrested on August 8, 1939, and the automobile was seized on August 29, 1939.

The trial court found that the automobile was used by Rosenberg and a person unknown to unlawfully conceal, convey and transport narcotics; that the person or persons then driving and operating the car were doing so without the express or implied permission, consent or knowledge of the defendant Carrol Clifford; that the unidentified person was using and operating the car in contravention of the State Narcotic Act, supra, without the express or implied permission, knowledge or consent of Carrol Clifford. Based on these findings, judgment was entered in favor of Carrol Clifford and the Motor Credit Co., and the automobile ordered returned to them.

[1] It was the theory of the trial court that an action for a forfeiture of any interest in an automobile used in violation of the State Narcotic Act, supra, may be defeated upon credible proof that the automobile was not being used with the knowledge or consent, express or implied, of the owner. The statute contains no such express limitation on its operation. But it has been held that an implied exception to the operation of the act exists, and that if the automobile is taken from an owner without his permission or consent and used by the taker for an unlawful purpose, it cannot be forfeited to the state. People v. One 1937 Plymouth 6, etc., 37 Cal.App.2d 65, 98 P.2d 750. Of course, if the owner consents to the use of the car, the fact that he did not know that it was to be used for an unlawful purpose will not prevent a forfeiture. People v. One 1933 Plymouth Deluxe Sedan Automobile, 13 Cal.2d 565, 90 P.2d 799; Van Oster v. Kansas, 272 U. S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L. R. 1044.

Appellant does not attack the correctness of the doctrine that if the car is taken without the consent of the owner, it is a defense to the forfeiture action, but contends that the evidence does not support the finding that the automobile was being used without the consent or knowledge of the owner, and, further contends, that the findings do not support the judgment.

[2, 3] The respondent registered owner has filed no brief on this appeal, apparently because she has defaulted on her contract with the Motor Credit Co. The Motor Credit Co. had defended in the trial court on the ground that it had entered into the contract after a reasonable investigation of the moral responsibility, character and reputation of the purchaser and without any knowledge that the car was to be used in violation of the State Narcotic Act, supra. Under that act the conditional seller may avoid a forfeiture of its interest if it can establish such defense, even though the interest of the conditional buyer is forfeited. The trial court did not base its decision on this defense, but simply held that, since the interest of the purchaser could not be forfeited for the reason already stated, the interest of the conditional seller could not be forfeited for the same reason. In the case of People v. One 1937 Plymouth 6, etc., supra, the court held, and such holding is not challenged by appellant, that regardless of whether the conditional seller makes the investigation of the purchaser that would permit it to avoid a forfeiture, if the purchaser has a defense to the forfeiture action, such defense can be asserted by the conditional seller. In view of this holding, the respondent Motor Credit Co. devotes its brief to the contention that the finding that the use of the car was without the knowledge, consent or permission of the registered owner is supported by the evidence.

[4-9] At the trial the theory of the State was that George Clifford, husband of Carrol Clifford, registered owner, was the unidentified person in the car, and that the circumstances show that his wife knew he was driving the car. The State, however, offered no proof as to the identity of the driver of the car. The attorney-general states in his brief, as if the matter appeared clearly from the evidence, that the automobile was the community property of the Cliffords. Although the trial court did not find in so many words that the car was the separate property of Carrol Clifford, that is not only implied in the findings but, under the evidence, it is the only finding that could have been made. The issue is important because the question of lack of consent of the owner or owners of the car is a matter of defense which, under the rule laid down in People v. One 1937 Plymouth 6, etc., supra, must be pleaded and proved by the person or persons relying on this defense. In the absence of any evidence on the issue of consent the interest of the party affected would be forfeited. If the automobile was the community property of the Cliffords, regardless of the identity of the driver, proof by the wife that she had given no one permission to take the car would not

suffice to prevent a forfeiture. Inasmuch as the husband in this state has the right of control and management of the community property it would have to be established that he did not give consent to the occupants of the car to use it. In the instant case the husband was not available and did not testify at the trial. The court found that the car, in February of 1939, was "sold to Carrol Clifford" and that "Carrol Clifford was the registered owner of said vehicle." Mrs. Clifford testified that the automobile in question was her automobile; that the down payment on the car was made by turning in a Buick; that she had purchased the Buick during a period when she was living apart from her husband; that most of the payments on the Buick had been made from her separate earnings during a period when she was living apart from her husband. After the Buick was turned in on the La Salle, in February of 1939, the subsequent payments were made by Mrs. Clifford from money received by her from her husband. The La Salle was registered in the name of Carrol Clifford. Section 164 of the Civil Code provides in part that "whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property." This rule is based on the theory that under such circumstances it will be presumed that the husband has made a gift of his interest to the wife, and this presumption will prevail until overcome by credible rebutting evidence. Dunn v. Mullan, 211 Cal. 583, 296 P. 604, 77 A.L.R. 1015; Vandervort v. Godfrey, 58 Cal.App. 578, 208 P. 1017; see, also, 3 Cal.Jur. Ten Year Supp., p. 559, § 65. No evidence to rebut the presumption of a gift by the husband was introduced by the State. In such circumstances, the only finding that could have been made was that the automobile was the separate property of Mrs. Clifford.

[10] The appellant attacks the sufficiency of the evidence to support the finding that the use of the car on the occasion in question was without the consent of Mrs. Clifford. It is also urged that, at most, the evidence shows that Mrs. Clifford had not given permission to the unidentified driver of the car to use it, and that there is no evidence that she had not consented that Rosenberg, the other occupant, should not use or occupy the car. These contentions are without merit. If the evidence is sufficient at all, and we think it is sufficient, it establishes that Mrs. Clifford had given permission to no one to take the car on the occasion in question. The appellant's attack on Mrs. Clifford's testimony on this issue is predicated upon the contention that it contains mere conclusions of law, and, further, that her credibility was destroyed by the context of her testimony as a whole. We are of the opinion that Mrs. Clifford's testimony was sufficient, and that her credibility was for the trial court.

[11] Mrs. Clifford testified that her husband deserted her about July 1, 1939. The offense took place on August 3, 1939. She further testified that she had not seen or communicated with her husband after he had left her; that her true name was not Clifford, but was Tribolet; that the name Clifford used by her and her husband was her husband's mother's maiden name; that after the separation she had never given her husband permission of any kind to use the car; that there were two keys to the car, one of which continued in the possession of the husband after the separation; that she never asked him to return the key to her; that, as far as she knew, he had never taken the car after the separation; that on August 3, 1939, the day of the offense, the car was parked in the street; that she did not miss it on that day. She was asked: "Did you give anyone permission to take your car, or, if it was taken, did you know that anyone had taken it?" Her answer was: "No." She was also asked: "Did you give anyone any authority, or permission to grant authority or permission to any second or third person?" She replied: "No." This evidence is clearly sufficient to sustain the finding that the use of the car was without her consent. This evidence also refutes the contention of the appellant that Mrs. Clifford failed to show that Rosenberg was in the car without her consent. If she gave no one permission to "take" the car on the day in question, she can scarcely be said to have given Rosenberg permission to occupy it as a passenger. The trial court could have disbelieved Mrs. Clifford on this point. There is evidence in the record which casts some doubt on her credibility. This, however, was a question for the trial court and cannot be considered on this appeal.

[12] The appellant makes several contentions in reference to the findings. The court found that the automobile was used

for an unlawful purpose "on or about the 8th day of August, 1939". The unlawful use took place on August 3, 1939. The findings, in this respect, carried over the wrong date from the notice of seizure filed by the attorney-general. During the trial the State asked permission to amend the notice to conform to the proof. The court permitted the amendment tentatively, subject to the right of counsel for Mrs. Clifford to show that the effect was to change the notice in substance, rather than merely in form. Nothing further was done about the matter. However this may be, the finding is of an unlawful use "on or about the 8th day of August, 1939", which, under the circumstances, can be interpreted to include August 3d. This error in dates would not entitle the appellant to a reversal because the evidence shows a nonpermissive use on August 3d.

[13, 14] It is also urged that there is no finding that Rosenberg was an occupant of the car at the time in question without the knowledge or permission of Mrs. Clifford. Under the State Narcotic Act, supra, unlawful possession or use of the car by an occupant works a forfeiture. As already pointed out, the evidence, as distinguished from the finding, shows that both the unidentified driver and Rosenberg were using the car without Mrs. Clifford's consent. The questioned finding reads as follows:

"That it is true that on or about the 8th day of August, 1939, and while said automobile was being so used (by a person or persons unidentified) in violation of the State Narcotic Act of the State of California, said (unidentified) person or persons was or were driving and operating said automobile without the express or implied permission, consent or knowledge of the defendant Carrol Clifford. That at said time, said (unidentified) person or persons was or were using and operating said automobile in contravention of said State Narcotic Act of the State of California without the express or implied permission, knowledge or consent of said Carrol Clifford." It is quite true that the finding seems to relate only to the unidentified second person in the car. Rosenberg was identified as one of the two occupants of the car. Technically, the finding is to the effect that the unidentified person who was driving the car was doing so without the consent of Mrs. Clifford. However, it will be noticed that the finding uses the phraseology "a person or persons unidentified" and again, "unidentified person or persons". Whether the plural was used to include the passenger in the car as well as the driver does not appear. However this may be, the finding is that the person operating the car was doing so without the express or implied permission of Mrs. Clifford. The evidence already referred to is that the persons using the car on August 3, 1939, including Rosenberg, did not have the express or implied permission of Mrs. Clifford to use the car. That evidence cannot be interpreted to mean that she consented to Rosenberg using the car and he permitted the unidentified person to operate the car. The trial court has passed on the credibility of that evidence by making the finding above-quoted. Certainly there is no evidence in the record at all that Rosenberg had authority to occupy the car. Appellant is relying solely on the alleged failure of respondent to prove lack of permission as to Rosenberg. When Mrs. Clifford testified that no one on the day in question had her permission to use the car, that included Rosenberg as well as the driver. The trial court has determined that that evidence was true as to the driver by the finding above-quoted. Under the circumstances, no other finding could have been made but that Rosenberg and the unidentified person were using the car without the consent of the owner. The finding should, therefore, be so interpreted.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

45 Cal.App.2d 789

PEOPLE v. NORTON.

Cr. 3455.

District Court of Appeal, Second District, Division 2, California.

July 9, 1941.

Hearing Denied Aug. 7, 1941.

1. Criminal law ⇨1186(4)

Even if some of the instructions given in prosecution for assault with a deadly weapon were erroneous, defendant could not urge them as error on appeal, where there was substantial evidence to sustain his conviction, and no prejudice or miscarriage of justice resulted to him from the alleged errors. Const. art. 6, § 4½.

2. Criminal law ⇨959, 1156(1)

Whether to permit oral argument on a motion for new trial rests in the sound discretion of the trial court, and its refusal to do so will not be grounds for reversal in absence of a showing of abuse of discretion.

3. Criminal law ⇨1176

Refusal to permit oral argument on a motion for new trial was not prejudicial to defendant, where counsel argued on appeal allegedly technical errors in instructions which resulted in no prejudice or miscarriage of justice, since it would be assumed that those same alleged errors were the ones that defendant desired to argue before the trial judge. Const. art. 6, § 4½.

4. Criminal law ⇨711

Counsel should at all times be afforded a reasonable opportunity to be heard, but the court must conserve its time, that of counsel, witnesses, and litigants in an effort to lessen the burden on the taxpayers arising from the administration of justice.

5. Criminal law ⇨304(2)

It is common knowledge that the burden on taxpayers arising from the administration of justice is extremely high even in the most efficiently conducted courts.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Ewin O. Norton was convicted of assault with a deadly weapon, and he appeals from the judgment and from an order denying his motion for a new trial.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of assault with a deadly weapon after trial by jury defendant appeals. There is also an appeal from an order denying his motion for a new trial.

The evidence being viewed most favorably to the people (respondent), the essential facts are:

December 13, 1940, about 6:00 o'clock in the evening, Dr. Hugh Curtis, an optometrist, had just closed his office when defendant knocked at the door and was admitted. He discussed with the doctor the question of examining his eyes and when the doctor turned to look for an appointment book, defendant struck him on the head with a rubber hose containing a nut or bolt. He beat the doctor over the head twenty-five or thirty times until the doctor succeeded in locking him in an adjoining office and the police arrived and arrested defendant.

Defendant relies for reversal of the judgment on the following propositions:

First: The trial court committed prejudicial error in instructing the jury.

Second: The trial court erred in denying defendant's motion for a new trial, for the reason that defendant's counsel was not permitted to present oral argument.

[1] As to defendant's first proposition, he concedes the sufficiency of the evidence to sustain the conviction. We have examined the record and find that there is substantial evidence above outlined to sustain each and every finding of fact upon which the judgment of guilty was necessarily predicated, and also that defendant virtually admitted the commission of the crime of which he was charged, by failing when accused thereof to deny his guilt. Therefore, since the law is settled that a judgment will not be set aside in any case upon the ground of misdirection of the jury, unless there has been a miscarriage of justice (art. VI, § 4½, Const. of Cal.; People v. Epstein, 21 Cal.App.2d 488, 490, 69 P.2d 454), we may concede without deciding that some of the instructions of the trial court upon a hypertechnical consideration may be erroneous; still defendant may not urge them as error in this court, in view of the fact

that there is substantial evidence to sustain his conviction on the charge of which he was found guilty, and no prejudice or miscarriage of justice resulted to him from such alleged errors.

Defendant's second proposition is likewise without merit. At the hearing of his motion for a new trial, he having been charged and convicted on three counts, the trial judge granted a motion for a new trial as to the second and third counts but denied defendant's motion as to the first count. Defendant conceded the sufficiency of the evidence to sustain his conviction upon the first count but indicated that he desired to argue the same questions relative to instructions that he has urged before this court. The trial judge without hearing oral argument denied the motion for a new trial as to count one.

[2-5] It is the general rule that it is a matter resting in the sound discretion of the trial court whether to permit oral argument on a motion for a new trial, and its refusal to do so will not in the absence of a showing of abuse of discretion be grounds for reversal (23 C.J.S. [1940] Criminal Law, p. 1326, § 1506). In the present case counsel has argued before this court alleged technical errors in instructions given by the trial court, which as indicated above we are bound to disregard (art. VI, § 4½ Const. of Cal.). We assume that it was these same alleged errors that he desired to argue before the trial judge. Therefore, obviously defendant was not in any way prejudiced by the trial court's action. In fact it is a practice to be commended for trial judges, when satisfied that they are fully advised as to the law and the facts, to conserve the time of the court and counsel by declining to listen to further oral argument. In the statement we have just made it is to be understood that counsel should at all times be afforded a reasonable opportunity to be heard, but that on the other hand it is the duty of the court to conserve its time, that of counsel, witnesses and litigants in an effort to lessen the burden upon the taxpayers arising from the administration of justice, which it is a matter of common knowledge is extremely high, even in the most efficiently conducted courts. Chief Justice Hughes has aptly stated the situation thus:

"The judicial quality of procedure is found in the impartial hearing and the reasoned determination upon ascertained facts, and it may be speedy, summary, and, as our clients would say, business-like, without losing its character."

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., concurred.

PEOPLE v. ZEMAVASKY.

Cr. 2147.

District Court of Appeal, First District, Division 1, California.

July 2, 1941.

Rehearing Denied July 17, 1941.

Hearing Granted July 30, 1941.

1. Criminal law 🔑1159(2)

In rape cases, reviewing court is justified in disturbing verdict of jury only where evidence of prosecution is so improbable in itself as to warrant belief that the verdict was result of prejudice or popular excitement.

2. Criminal law 🔑1159(3, 4)
Rape 🔑54(1)

In rape cases, substantial conflict in evidence will not necessitate reversal, since weight of evidence and credibility of witnesses are for jury, and testimony of prosecutrix need not be corroborated but may sustain conviction considered alone, despite discrepancies therein.

3. Rape 🔑51(1)

Evidence *held* to sustain conviction of rape.

4. Rape 🔑17

The fact that victim of alleged rape failed to make complaint of defendant's relations with her during preceding five years was not ground for setting aside verdict of guilty.

5. Rape 🔑46

In rape prosecution, permitting examination of prosecutrix and cross-examination of her mother on whether defendant, before his marriage to the mother, lived "at" mother's home, was not erroneous as implying wrongdoing by defendant, where trial court indicated that the question merely implied that defendant was living in the house.

6. Criminal law 🔑1169(3)

In rape prosecution, defendant could not complain that question about legality of his former marriage, and his arrest for failure to support children by former marriage, were revealed by cross-examination of his wife and redirect examination of rebuttal witness, where the same matters were also revealed by cross-examination of defendant without objection.

7. Criminal law 🔑1169(2)

Error in admission of evidence is harmless if the fact proved thereby is undisputed or is proved by other evidence which is admitted without objection.

8. Criminal law 🔑1169(3)

In rape prosecution, defendant could not complain of district attorney's misconduct in cross-examination of defendant's wife and redirect examination of rebuttal witness, where the same subject matter was revealed by cross-examination of defendant without objection.

9. Rape 🔑59(3)

In rape prosecution, cautionary instruction that law does not require prosecuting witness to be supported by another witness or by corroborating circumstances, but does require that jury examine her testimony with caution, was sufficient where jury was also fully and correctly instructed on presumption of innocence and reasonable doubt.

10. Criminal law 🔑1172(1)

In rape prosecution, instruction that witness may be impeached in described ways, but not by evidence of particular wrongful acts, except conviction of felony, followed by the statement, "However, there is no such evidence in this case", was not prejudicially erroneous where quoted statement was clearly applicable only to the exception of conviction of felony.

11. Criminal law 🔑1163(1)

Before a judgment may be reversed because of error, it must appear from the record that it was prejudicial and caused substantial injury, and that a different result would have been probable if the error had not occurred.

12. Criminal law 🔑706

In rape prosecution, cross-examination of defendant and his wife concerning criminal prosecution of defendant for failure to support children did not establish bad faith on part of district attorney, where such cross-examination was brought about by testimony representing defendant to be a dutiful and affectionate father.

13. Witnesses 🔑288(2)

In rape prosecution wherein prosecution's rebuttal character witness admitted that she was very much prejudiced against defendant, and defendant's counsel asked her directly whether she remembered telling him that she hoped defendant would go to prison, way was open to redirect examination of such witness.

PETERS, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Nick Zemavasky was convicted of rape, and he appeals.

Affirmed.

Rehearing denied; PETERS, P. J., dissenting.

James F. Brennan and Saul Perlis, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and John R. Golden, Asst. Dist. Atty., of San Francisco, for respondent.

KNIGHT, Justice.

The appellant, Nick Zemavasky, was found guilty by a jury of having committed the crime of rape on his seventeen year old stepdaughter, and he has appealed from the judgment of conviction and the order denying his motion for new trial.

The grounds urged for reversal are that the evidence is insufficient to justify the verdict, that the court erred in ruling on the admissibility of evidence and in giving and refusing to give certain instructions to the jury, and that the prosecuting officer was guilty of misconduct. The brief filed by the attorney general merely accentuates the points made by appellant for reversal, and submits the appeal without comment or recommendation. However, the district attorney filed a brief supporting the conviction, and presented the oral argument for the people at the time the appeal was heard.

[1, 2] As to the question of the evidence, appellant concedes that the testimony of the prosecutrix, if true, is legally sufficient to sustain the conviction, but he contends that it is uncorroborated, conflicting and inherently improbable. The governing rule in this class of cases is that it is only where the evidence of the prosecution is so improbable in itself as to warrant the belief that the verdict was the result of prejudice or popular excitement that a reviewing court is justified in disturbing the verdict of the jury. The mere fact that there is a substantial conflict will not necessitate a reversal, since the weight of the evidence and the credibility of the witnesses are questions for the jury to decide; nor is it essential that the testimony of the prosecutrix be corroborated, for it has long since been the law that such uncorroborated testimony, considered alone, may be sufficient to sustain a conviction, even though discrepancies appear therein. 22 Cal.Jur. pp. 394–401.

[3] Considered in the light of the foregoing rules, it is our conclusion that the evidence here is not such as would warrant a reviewing court in holding as a matter of law that the verdict finding appellant guilty was the result of prejudice or popular excitement. It discloses the following facts: The appellant by occupation is a contracting painter. In 1932 he married the mother of the prosecutrix in San Francisco, and has since lived with his wife and stepdaughter, Dorothy Meyers, at a home on Manchester street. The girl had known appellant since she was seven years old, he having lived at the home of her mother for some time prior to their marriage, and the girl testified that he had been having sexual relations with her since she was twelve years old. The criminal act of which he was convicted, however, was committed, so the prosecutrix testified, on May 29, 1939. At that time Mrs. Zemavasky was visiting relatives in Poland. She left San Francisco on May 6, 1939, and before leaving arranged for her daughter, who was attending high school, to live with a Mrs. Anna Kirichenko in San Francisco. Against her mother's wishes the girl had been keeping company with a young man named Arthur Meyers, and on May 23 Meyers and the girl ran away to Redwood City and were married. Following their marriage they went to Long Beach and there visited Meyers' aunt. She refused to believe they were married, and caused them to be taken into custody by the juvenile court authorities. But that same night the police phoned to Meyers' grandmother, Mrs. Anna Pagel, in San Francisco, at whose home on Capp street Meyers had been living, and upon being informed by her that the couple had been married the police stated they would be released. At Mrs. Pagel's request, however, the police consented to hold them until arrangements could be made to return them to San Francisco. Immediately upon receiving the phone message Mrs. Pagel communicated with appellant, and at her request he called at her home. He was accompanied by another man; and Mrs. Pagel's daughter, Mrs. Toomy, was also present. Appellant did not introduce his friend, but at the trial gave his name as Gabriel Gavrioloff. At this conference Mrs. Pagel and appellant agreed to send the necessary money to bring the couple back to San Francisco. They did so, and the couple arrived in San Francisco by bus about five o'clock on the morning of May 29. They went to Mrs. Pagel's home, where they met Mrs. Pagel, appellant and Mrs. Toomy, and the question was brought up as to whether the couple wanted to continue living together. Appellant insisted, however, on taking the girl home with him so that he could talk with her alone. In this regard Mrs. Pagel testified: "Mr. Zemavasky was very much determined that he would take Dorothy to his home and talk it over privately with her, what they intended to do, and he said, 'I will take you home, Dorothy, and we will talk it over by ourselves, and Arthur can talk to his auntie and his grandmother and find out what they intend to do.'" Upon reaching their home on Manchester street Dorothy went to her bedroom to collect some clothing to take away with her, and she testified that in about five minutes appellant entered the room, and under threats of violence and that he would turn her over to the juvenile authorities, compelled her to have sexual intercourse with him. Later that morning he drove the girl back to Mrs. Pagel's home, and upon leaving her there stated to Mrs. Pagel that the girl wanted to live with Meyers. Mrs. Pagel noticed at that time that the girl had been crying.

Appellant denied having sexual relations with the girl at any time; and denied having gone to her room at all on the morning of May 29. He testified that after they entered the home she went to her room, that he prepared breakfast which they ate, and that soon afterwards he drove her back to Mrs. Pagel's home. Appellant produced Gavrioloff as a corroborating witness. He was a friend of appellant's of some twenty-five years standing, having known him in New York before either of them came to San Francisco. Gavrioloff testified that he was spending the week-end with appellant, and that he was the man who accompanied appellant to Mrs. Pagel's home the night she received the phone message from the police. He testified that he was sitting in the living room of appellant's home, reading a paper, when appellant and the girl arrived on the morning of May 29; that from where he sat in the living room he could see whether anybody went in or out of the girl's bedroom; that he saw the girl go in the bedroom, but that she did not see him; and that appellant did not at any time enter her room that morning. However, the prosecution established quite clearly that Gavrioloff was a witness unworthy of belief. In this regard Mrs. Pagel and Mrs. Toomy both testified positively that Gavrioloff was not the man who came to their house with appellant on the night in question. They stated that the conference was held in their living room, that they saw and talked with the man, and that Gavrioloff was not that man; that he was of an entirely different stature; and on cross-examination Gavrioloff gave an entirely wrong description of the appearance of the room in the Pagel home where the conference was held, and of the articles of furniture therein. Moreover, although he testified he has visited appellant's home many times, he was pointed out to the girl while she was testifying as a witness, and she stated positively that she had never seen him before; and she also testified that no one besides appellant and herself was present in the house on Manchester street that morning; that if anybody had been sitting in the living room, as Gavrioloff claimed he was, she could and would have seen them.

Regarding the matter of conflicting testimony, the prosecutrix testified that on the morning of the commission of the offense she was wearing a dress; whereas appellant claims that in contradiction thereof she testified at the preliminary examination that she was wearing slacks. A fair construction of her testimony given at the preliminary examination does not bear out appellant's contention. Moreover, no less than three witnesses, besides the girl, testified that she was wearing a dress. It is also contended that the testimony given by the girl at the trial as to when she told her husband about appellant having assaulted her on May 29, conflicted with the testimony given by her at the preliminary examination. To a certain extent that is true, but as already stated all such conflicts go to the question of the credibility of the witnesses, of which the jury must be held to be the sole judge.

Appellant points out that not until March, 1940, was appellant formally charged with the commission of the offense; and in this connection it may be conceded that in the absence of satisfactory explanation delays in filing charges of this kind doubtless are looked upon as a weakness in the prosecution's case. But this circumstance also was one for the jury's consideration, and the explanation offered by the girl and Meyers was that the girl was to give birth to a child, and it was feared that if she were to be subjected to the ordeal of participating in a criminal prosecution before the child was born, it would have a seriously ill effect on her and the well-being of the unborn child. As evidenced by its verdict, the jury apparently was satisfied with the explanation. Likewise the fact that prior to the arrest of appellant the girl accepted gifts from him was a matter for the jury's consideration. An attempt was made by appellant to show that the girl had been carrying on intimate relations with Meyers prior to her marriage to him. Both denied having done so; but even though their conduct justified such an inference, that fact would not serve as a legal defense to the criminal act committed by appellant. Also in defense of the charge appellant and his wife testified that prior to filing the charge against appellant the girl and Meyers tried to obtain money from him and his wife. But this was emphatically denied by Meyers and the girl; moreover, the police officer who arrested appellant on the present charge testified that at that time he asked appellant whether "* * * anybody approached him to get money out of him in this case yet, anything mentioned about money" and that he replied "no, there hadn't".

When appellant's wife returned from Poland she was evidently enraged because of her daughter's marriage to Meyers, and considerable testimony was given at the trial as to her violent demonstrations toward him; but it would seem unnecessary to go into details concerning those matters because the only importance that could be attached thereto would be to show that she entertained a bitter feeling toward Meyers.

[4] Nor does the fact that the girl failed to make complaint of appellant's relations with her during the preceding five years constitute ground for setting aside the verdict. A situation somewhat similar arose in the case of People v. Gump, 17 Cal.App.2d 221, 61 P.2d 970, 971, and the court there said: "In his argument attacking the sufficiency of the evidence, the appellant emphasizes the failure of the prosecutrix to make timely complaint of the alleged attack and also the complete lack of any corroborating evidence. Counsel frankly concedes that neither factor is essential to a conviction of the crime charged, but he urges that they are persuasive evidence of the improbability of the story of the prosecutrix. There is much force in the argument that it is highly improbable that these relations could have existed for a period of six years without mention to anyone, and grave suspicion is cast upon the story when it is shown that it was only told after trouble had arisen between father and daughter over her relations with others. But these suspicions are not sufficient to support appellant's plea that the judgment should be set aside. The jury believed the testimony of the prosecutrix, and the trial judge was satisfied to let the verdict stand. We cannot say that the testimony is so inherently improbable that there is not evidence to support the verdict." The same may be said of the present case.

[5] Two of the assignments of error relating to the admissibility of evidence are based on certain preliminary questions asked the prosecutrix on direct examination, and questions asked her mother on cross-examination concerning the same matter. In substance the questions were as to whether appellant prior to his marriage to Dorothy's mother lived "at" her home. We find nothing therein that calls for a reversal. That portion of the record relating to the girl's testimony is as follows:

"Q. Now, can you recall whether previous to the time that your mother and the defendant got married, the defendant was living at the home of your mother?

"Mr. Brennan [counsel for defendant]: Just one minute, we object to that as incompetent, irrelevant and immaterial, entirely outside the issues, and not binding upon the defendant here, in any shape, form or manner.

"The Court: Overruled. * * *

"Mr. Brennan: Just a minute, I want to add to that, if I may, it being understood that it is being added, it is an attempt to impeach the defendant upon particular wrongful acts and put in something entirely irrelevant to the issues involved in this case.

"Mr. Golden [assistant district attorney]: Oh, no, I didn't say 'living' with the lady, I said at the house of the lady. Maybe Mr. Brennan is more suspicious than I am.

"Mr. Brennan: Well, I am not suspicious, but I don't want anybody else to get any suspicions.

"The Court: Well, I didn't take the question to carry any other implication other than he was living in the house, that is the way I understood it. The question is, 'Was he living at the home of your mother?' A. Yes, he was."

The same line of questions was propounded to appellant's wife; and appellant contends that they carried the imputation that prior to their marriage they were living in an illicit relationship. In view of the trial court's remarks, however, it cannot be fairly said that the jury understood the question to imply any wrongdoing.

[6, 7] The remaining assignments of error relating to the admissibility of testimony are directed against certain portions of the cross-examination of appellant and his wife, and the redirect examination of a judge of the municipal court who was called as a rebuttal character witness for the people; and all of the testimony elicited thereby involved substantially the same subject matter. In this regard it appears that appellant's wife was a divorcee at the time she married appellant, and that appellant was the father of three children; that there was some question about the legality of his former marriage, and that on several occasions he was arrested for failing to support said children. Conceding that the matters referred to were foreign to the

issues that were being tried in the present case, appellant is not in a position to claim that the revealing thereof, over his objection, by the cross-examination of appellant's wife and the redirect examination of the rebuttal witness, constituted prejudicial error, because the same matters were also revealed by the cross-examination of appellant without any objection being made thereto. That portion of his cross-examination, as shown by the record, is as follows: "Q. Now, you say you have some children? A. Yes sir.

"Q. How many? A. Three.

"Q. Are they your children? A. My own children, yes.

"Q. Were you married before? A. Yes sir.

"Q. Are you sure of that? A. Well, I have been married, I have children, didn't I?

"Q. Were you married to the mother of the children? A. Probably I would be married, sure.

"Q. What do you mean, probably? A. Well, I have children from her, I have got three children here now.

"Q. I know you have. I am asking you if you were married to their mother at any time?

"Mr. Brennan: Tell him the circumstances. A. Well, we went out to the City Hall and get a license there; her mother been with us and her aunt been with us, and that is all.

"Mr. Golden: Q. And you have been called upon many times to support those children and haven't done so, isn't that so? A. I have been arrested a couple of times for nonsupport of children, yes sir.

"Q. For those three children? A. Yes sir.

"Q. Now, how is it that you failed to support them and yet you were so generous to Dorothy?

"Mr. Brennan: Just a minute, that is assuming that he failed to support them, if the Court please.

"The Court: If he didn't he can explain it.

"Mr. Brennan: That is all right. A. Three or four years ago has been depression, I couldn't get a job very well, you know, so I support two families together, so we ran short with the money. Sometimes I just fail to pay $15 in month and in the meantime the wife just go down there and get a warrant and arrest me. Many times warrant has been served on me after three days I fail to pay. At the time I pay the first of the month and the third of the month I get the warrant."

As will be seen from the foregoing, not only was no objection whatever made to that portion of the cross-examination, but when appellant seemed reluctant to disclose the facts his counsel interrupted by instructing appellant to give the circumstances. And later on, during the cross-examination of one of appellant's character witnesses as to her knowledge of appellant's arrest for failure to support his children, counsel for appellant first objected, and then immediately afterwards in effect withdrew his objection and let in the testimony by saying: "All right, we will go into the whole thing." In that state of the record the law will not permit appellant to complain that he was injuriously affected by the testimony covering the same subject matter given by his wife and the municipal judge, over his objections. As stated in California Jurisprudence (vol. 8, pp. 615–616), error in the admission of evidence is harmless if the fact proved thereby is undisputed or if it is proved by other evidence which is admitted without objection.

[8] The charges of misconduct are not based on any assignments made at the trial, but are founded upon the assumption that the questions asked by the district attorney, eliciting the testimony above referred to, were improper; however, since it appears that appellant is not in a position to claim that such testimony operated to his prejudice, it follows that the asking of the questions cannot be held to constitute misconduct.

[9] The appellant submitted a cautionary instruction, which the trial court refused but instead gave the following: "You are instructed that, while it is true that the law does not require in this character of cases that the prosecuting witness be necessarily supported by another witness, or by corroborating circumstances, still I charge you that the law does require, in this class of cases, that you examine the testimony of the complaining witness with caution." In the recent case of People v. Lucas, 16 Cal. 2d 178, 105 P.2d 102, 104, 130 A.L.R. 1485, it is stated that in all cases of this character a defendant should be afforded the benefit of a cautionary instruction to the

general effect that such a charge is easily made and difficult to disprove, for which reason the testimony of the prosecutrix should be examined with caution. However, in that case such an instruction was refused and no other cautionary instruction was given. Nevertheless the judgment was affirmed upon the ground that because of the giving of other instructions upon the presumption of innocence, reasonable doubt, and to the effect that the jury should not act on mere probabilities and should disregard fanciful theories and unreasonable inferences, no prejudicial error was shown. Here a cautionary instruction was given, but not in the exact form outlined in People v. Lucas, supra; however, in addition to the cautionary instruction, the jury was fully and correctly instructed upon the doctrines of presumption of innocence and reasonable doubt. It is our opinion, therefore, that no error has been established.

[10, 11] The court also instructed the jury as follows: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility. A witness may be impeached by the parties against whom he is called, by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony. However, there is no such evidence in this case. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony." Appellant contends that the presence of the sentence "However, there is no such evidence in this case" renders the entire instruction erroneous. Upon reading the instruction as a whole, however, it is manifest that the objectionable sentence could be understood in no other way than as applying to the exception which immediately preceded it, to-wit: "except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony", and this is made more apparent by the admitted fact that there was much contradictory evidence in the case and also evidence relating to the general reputation of the defendant. As said in People v. Lucas, supra, "It is not every error that requires a reversal on appeal. People v. Nolan, 126 Cal.App. 623, 634, 14 P.2d 880. The authorities are legion to the effect that before a judgment may be reversed because of error it must appear from the record that it was prejudicial and caused substantial injury and that a different result would have been probable if the error had not occurred. Murnane v. Le Mesnager, 207 Cal. 485, 495, 279 P. 800; People v. Britton, 6 Cal.2d 10, 13, 56 P.2d 491." It does not so appear in the present case.

[12, 13] The arguments advanced by appellant in his briefs in an effort to prove that the social relationship between Meyers and his wife and the Zemavaskys continued friendly after the prosecutrix had informed her husband of the alleged assault of May 29, and also in support of his claim that money was a motivating reason for filing the criminal charges, are based, as the record will show, for the most part if not entirely on the testimony given by appellant and his wife; and a reading of the testimony of both will reveal many reasons which would seem to fully justify the jury in refusing to believe their stories. Furthermore, in refutation of the charge of bad faith made by appellant against the district attorney, it would appear that the cross-examination of the Zemavaskys with reference to the criminal prosecution which resulted from his alleged failure to support his children was brought about by the fact that in their testimony they had represented him to be a dutiful and affectionate father. It would seem also that counsel for appellant opened the way for the redirect examination of the prosecution's rebuttal character witness when after said witness had frankly admitted that she was "very much prejudiced against Mr. Zemavasky", counsel for appellant asked her the direct question, "Do you remember telling me you hoped this man would go to San Quentin?"

After examining the entire cause, including the evidence, it is our belief that the verdict has not resulted in a miscarriage of justice. Therefore the judgment of conviction and the order denying the motion for new trial are and each of them is affirmed.

I concur: WARD, J.

PETERS, Presiding Justice (dissenting).

I agree with the implied admission of the deputy attorney general representing the respondent that prejudicial error was committed during the trial, and that the judgment should be reversed. It seems to me that the refusal of the attorney general's office to attempt to support the judgment is entitled to considerable weight.

It must be conceded, and I do not believe that my associates contend to the contrary, that the question presented to the jury as to defendant's guilt or innocence was an extremely close one. I agree that the evidence is sufficient to support the conviction. I am also aware of the rule that the credibility of the witnesses is for the jury, and not for the appellate court to consider. But the closeness of the case is a matter properly to be considered in determining the seriousness of any error committed during the trial. The attorney general, after reviewing the evidence, states in his brief: "From the foregoing resume it appears that the evidence against appellant was not overly credible." (Res. Brief, p. 4.) I agree with this conclusion.

It would serve no useful purpose to review the entire record in this dissent. Without attempting to enumerate all of the factors that cast doubt on the prosecution's case, the following serve to illustrate the weaknesses in that case.

1. The prosecuting witness, Dorothy Meyers, contends that she was raped by defendant, her stepfather, on the morning of May 29, 1939, under the circumstances set forth in the majority opinion. This was six days after her marriage to Meyers. Dorothy made no complaint to the authorities until March of 1940. During that period of approximately ten months Dorothy maintained some semblance of a friendly relationship with the Zemavaskys. In September of 1939, on her eighteenth birthday, she accepted birthday presents from them, and at Christmas of that year not only accepted Christmas presents from them, but admittedly both Dorothy and her husband gave the defendant Christmas presents. During this ten-month period Dorothy occasionally visited her mother, and, on occasion, saw and talked with the defendant. Admittedly, during this period, she never mentioned the charge to her mother or to any one else except to her husband. She testified at the trial that she told her husband of the offense about July 4, 1939. In spite of this, Meyers made no complaint to anyone, and not only exchanged Christmas presents with the defendant in that year, but admittedly had a friendly visit with him just before Christmas.

Dorothy also testified that the defendant had forced her to submit to intercourse with him ever since she was twelve years old—a period of five years. During this five-year period she was living with her mother and the defendant, but admittedly made no complaint to her mother, or to anyone else concerning the conduct of defendant.

2. Although there is some conflict, what I consider the most credible evidence shows that towards the end of 1939 or early in 1940, the relationship between Dorothy and her mother was becoming strained; that rightly or wrongly Dorothy felt, as did her husband, that she was entitled to a fund promised her for her education. This dispute over the money was an important issue in the case. It is of some significance that, although defendant and his wife positively testified as to conversations about the money had with Dorothy and her husband in the presence of the parents of Mr. Meyers, the prosecution made no attempt to produce the parents or to explain the failure to do so. It should also be mentioned that just before filing the present charges Dorothy and her husband visited an attorney concerning the matter. Although defense counsel charged that this was done for the purpose of suing defendant civilly, Dorothy and her husband offered no satisfactory explanation of this visit.

3. There are several direct conflicts and contradictions between the story told by Dorothy at the preliminary examination and on the trial. Some of these were explained and some were not. For example, on the trial she was at first very positive that she had told her husband about the rape on May 29, 1939, the day it is supposed to have occurred. Her testimony at the preliminary examination was to the effect that she had not told him until early in July. Her attempt to reconcile this conflict is not satisfactory. There is also a conflict, which is very hard to reconcile between her testimony at the preliminary and at the trial as to whether she was wearing slacks or a dress when she arrived from Los Angeles on the morning of May 29th—an important issue in the

case. The same conflict, only partially explained, exists as to whether she talked about money to her mother prior to bringing these charges.

It is elementary, of course, that these conflicts and contradictions, as well as the question of the credibility of defendant and his witnesses, were for the jury. I agree that this court has no power to weigh the evidence or to pass upon the credibility of the witnesses. It is equally elementary, however, that the defendant was entitled to a fair trial. This court is not only permitted to, but must consider the state of the evidence in determining whether any errors committed were prejudicial. Where the evidence is overwhelming against a defendant errors in the introduction of evidence will not necessarily require a reversal under article VI, section 4½ of the Constitution. In such cases it can be said, as a matter of law, that such errors were not prejudicial. But in a close case, and certainly in one as close as the instant one, any error of a substantial nature may require a reversal. If the reviewing court has any reasonable doubt as to whether the error is prejudicial, that doubt must be resolved in favor of defendant. Under such circumstances, article VI, section 4½ has no application.

There is another factor that must be considered in this particular case. This is a rape case. The courts have frequently commented on the difficulties facing an accused in his attempt to refute the charge in such cases. Any evidence improperly admitted which tends to discredit the defendant or his witnesses in such a case throws an intolerable burden on the defendant. The error in such a case is far more significant than it might be in a different kind of case.

It was undoubtedly these factors which led the attorney general to impliedly concede that the errors hereafter to be discussed were prejudicial, and to refuse to offer any argument in support of the judgment.

During the course of the trial the prosecuting attorney consistently attempted to blacken the character of the defendant and of Mrs. Zemavasky, his wife, and one of his principal witnesses. Time after time the prosecuting attorney was permitted, sometimes over objection and sometimes without, to introduce evidence showing that defendant was probably not lawfully married to his first wife; that the three children of that marriage were probably illegitimate; that he had been frequently charged with nonsupport of those children, and that his present wife was living at the same house with him prior to their marriage. This evidence could have no other purpose but to blacken the reputation and character of defendant and his wife. It was a clear-cut attempt to impeach the defendant and his wife by evidence of other wrongful acts in direct violation of the law. Sec. 2051, Code Civ.Proc.

It is perhaps true, as implied in the majority opinion, that the evidence that Dorothy and her mother lived at defendant's house prior to the time that defendant and the mother were married, was admissible to show when defendant first became acquainted with Dorothy. But even as to this evidence, there is considerable doubt as to whether it was offered in good faith. Dorothy had testified as to acts of intercourse since she was twelve, which was September 3, 1933. Defendant had married Mrs. Zemavasky in June, 1932. The period that Mrs. Zemavasky is supposed to have lived at defendant's house was before June of 1932. The district attorney knew these facts. Yet he did not ask the prosecutrix whether she had lived with her mother and defendant since their marriage in June of 1932, which would have more than covered the entire period that the illegal relationship is supposed to have existed, but he asked: "Now can you recall whether previous to the time that your father and mother got married the defendant was living at the home of your mother?" What purpose could there be in the very form of the question but to blacken the character of defendant and Mrs. Zemavasky? The same error was committed in a whole series of questions, some of which were objected to, as to the circumstances under which and the time at which defendant and Mrs. Zemavasky lived in the same house prior to their marriage. The real purpose of the district attorney is disclosed by his statement made before the jury during an argument over the admissibility of such evidence that "* * * here is a certain background which would make it more or less likely that the girl's story is true".

There can be no doubt that the evidence of the illegality of defendant's prior marriage, that he had three illegitimate daughters, and that he had frequently been arrested for nonsupport of these children was not admissible. These were matters foreign to the issues in the present case. The majority opinion concedes that this is so, but holds that since defendant's counsel did not object to the district attorney's cross-examination of defendant on these issues, that he cannot now object to that admittedly erroneous evidence. This conclusion is based on the well-settled rule that error in the admission of evidence is harmless if the fact involved is proved by other evidence which is admitted without objection. That is a sound and salutary rule. The usual situation where it is applied is where the defendant or his witnesses testify as to a fact, and then object to the prosecuting attorney producing his side of the transaction in issue. But that rule should not be applied to the present case for the following reasons: These facts were all first brought out, over defendant's objections, on the cross-examination of Mrs. Zemavasky. At that stage of the trial error was committed. Then the defendant took the stand. On his direct examination none of the matters under discussion was gone into. On cross-examination the district attorney began to ask questions concerning these matters. In view of what had already taken place it would be useless to object. The trial court had already ruled. Defendant made no objection, and the conversation took place which is set forth in the majority opinion. But that is not all. Then what happened? The prosecuting attorney cross-examined the three daughters and the witness Kirichenko on the same subject matter. Then the prosecution produced a Municipal Judge of San Francisco as a rebuttal character witness. After testifying that defendant's reputation for "truth, honesty and integrity, morality and upright living" was "bad", she was cross-examined by defendant's counsel. He properly brought out the fact that she was prejudiced. She admitted that she knew nothing about the facts of the case then on trial; that she was "very much prejudiced against Mr. Zemavasky", and admitted telling counsel for defendant that she "hoped this man would go to San Quentin". Then on redirect examination, over defendant's objections, she was permitted to answer the question, "On what, Judge, do you base that hope?" She replied, "Well, I met Mr. Zemavasky in the court charged with omitting to provide for three minor illegitimate children. I knew his former wife, that he had gone through a service that was not a marriage and then left her with these three children. I made every effort to collect money from him for those three children and to no avail; I made arrangements with him to come to my office at the City Hall; he never kept it, and those three children had to be taken care of by the City and County of San Francisco". She was the last witness. The question and answer were not only improper because they tended to bring out evidence of other wrongful acts, but also because it is an unquestioned rule of evidence that when any witness admits bias and prejudice on cross-examination, on redirect the reasons for such prejudice cannot be gone into, at least where such reasons involve other alleged offenses outside the issue. The rule, supported by many cases, is stated as follows in 70 Cor. Jur., p. 1007, § 1217: "* * * nor does the witness' unqualified admission of ill will open the door to proof of the reasons, therefor, especially where such reasons involve other alleged offenses outside the issue * * *." The reason for the rule is obvious. When the defendant is able to prove that a prosecution witness is prejudiced, if that witness could then explain the reason for the prejudice by stating what he knows about other wrongful acts, it would bring into the case all kinds of extraneous and unrelated offenses not relevant to the issue, and would permit the prosecuting attorney to do indirectly what he cannot do directly. Exactly the same problem involved in the instant case was presented in Sneed v. State, 40 Ariz. 441, 14 P.2d 248. At page 249 of 14 P.2d the court stated: "The reason why the witness was hostile towards appellant was not a proper subject for either direct or redirect examination by the prosecution. The elicitation by the appellant of the witness' ill feeling towards him did not open the door to proof by the prosecution that such ill feeling was the result of criminal acts of appellant against the witness. Otherwise it would be most dangerous to cross-examine a witness as to his bias and prejudice towards the accused, for, if such reason may be given, all kinds of extraneous and unrelated offenses might be detailed to the jury, so that the trial would be not of the particular offense charged but of many offenses not charged. The court should have sustained the appellant's objection on the ground of the incompetency of the testimony to prove any issue of the case."

The majority opinion holds that the erroneous admission of all this evidence was not error because appellant's counsel failed to object to the cross-examination of defendant and of Nora Zemavasky on these issues. If defendant had produced evidence on these issues there would be a waiver. But is it the law that when a prosecuting attorney on cross-examination asks a witness a question concerning other wrongful acts, which question he knows or ought to know is improper, and the defendant, having previously objected, does not object again, that then the prosecuting attorney can with impunity ask any future witness the same question, and that it is not error for the trial court to overrule the objections? If that is so, one slip by defendant's counsel will turn a criminal prosecution for rape into a trial of any other offense with which the defendant may have been charged in the past. Such a rule loses sight of the realities of the problem. It must be remembered that a criminal prosecution is not a game of skill. The defendant is entitled to a fair and impartial trial. The prosecuting attorney is duty bound to see that the defendant receives such a trial. A reading of the record in this case convinces me that evidence was improperly admitted. I have, to say the least, a reasonable doubt as to whether the defendant would have been convicted without that evidence. For that reason I agree with the implied admission of the attorney general that the judgment and order should be reversed, and a new trial ordered.

45 Cal.App.2d 766

PIGNET et al. v. CITY OF SANTA MONICA et al.

Civ. 12681.

District Court of Appeal, Second District, Division 1, California.

July 9, 1941.

Rehearing Denied Aug. 6, 1941.

Hearing Denied Sept. 4, 1941.

1. Trial ⚷296(4)

In action against city and manager of its airport by owners of airplane involved in collision with automobile on runway of airport, failure of instruction relating to defendants' duty to protect plaintiff from negligence of driver of automobile to contain suggestion of possible contributory negligence did not constitute prejudicial error, where doctrine of contributory negligence was sufficiently explained in other instructions.

2. Municipal corporations ⚷742(6), 857

In action against city and manager of its airport by owners of airplane which collided with automobile on runway of airport, instruction relating to defendants' duty in regard to automobiles on runways was not erroneous on ground that it was misleading because it ignored necessity for automobiles to be upon runways during working hours and fact that accident occurred after working hours, where jury would not have been misled if they heard testimony relating to those matters.

3. Trial ⚷194(16)

In action against city and manager of its airport by owner of airplane which collided with automobile on runway of airport, instruction that defendants were bound to anticipate that persons might drive automobiles across runways and that they were required to use care necessary to prevent such driving was prejudicial as invading the province of the jury, where only evidence in regard to presence of automobiles was that they were necessarily employed on airport during working hours.

4. Appeal and error ⚷1064(2)

In action against city and manager of its airport by owners of airplane which collided with automobile on runway of airport, instruction that manager was agent for city and that his acts and omissions were acts and omissions of the city was prejudicial when taken in connection with previous instruction that defendants were bound to anticipate that persons might drive automobiles across runways and that defendants were required to use care to prevent such driving.

5. Automobiles ⚷246(42)

In action against city and manager of its airport by owners of airplane which collided with automobile on runway of airport driven by person employed on W.P.A. project at airport, defendants' requested instruction that driver of automobile was not a servant or employee of either city or manager should have been given where complaint had alleged that driver was in employ of city and manager and there was uncertainty in evidence on that point.

6. Automobiles ⚷246(42)

In action against city and manager of its airport by owners of airplane which collided with automobile on runway of airport, defendants' requested instruction that negligence, if any, of driver of automobile was not imputable to city and manager should have been given, where complaint had alleged that driver was in employ of city and manager, and there was evidence that driver was using a city owned concrete mixer in W.P.A. construction project at airport over which city exercised some supervision.

7. Automobiles ⚷246(42)

In action against city and manager of its airport by owners of airplane which collided with automobile which was being driven on runway of airport by operator of city owned concrete mixer used in W.P.A. construction project at airport over which city had some supervision, defendants' requested instruction that if automobile driver's negligence was sole cause of collision verdict should be for defendants should have been given, in view of uncertainty created by the evidence as to whether driver was an agent or employee of city.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Ray Pignet individually and Ray Pignet and Edward Spencer, co-partners doing business as the Pacific Flying Service, against the City of Santa Monica, E. R. Carter, and another for damages resulting from a collision between an airplane and an automobile at the defendant city's airport. From a judgment in favor of Ray Pignet individually and a judgment in favor of the two plaintiffs, the named defendants appeal.

Judgments reversed and cause remanded.

Cornelius W. McInerny, Jr., of Santa Monica, and Gibson, Dunn & Crutcher, and Philip C. Sterry, all of Los Angeles, for appellants.

Forrest S. Macfarland, David Blonder, Max Sisenwein, and Joseph L. Fainer, all of Los Angeles, for respondents.

DESMOND, Justice pro tem.

A jury rendered a verdict in the sum of $25,000 in favor of Ray Pignet, suing as an individual, in a damage action. The same jury returned a separate verdict in the sum of $1,600 in favor of Pignet and his partner, Edward Spencer, doing business as Pacific Flying Service. These verdicts were rendered against appellants, City of Santa Monica and E. R. Carter. It appears from respondents' brief that on a former trial Weldon Van Gundy, another defendant, had defaulted, and that after the introduction of evidence the jury returned a verdict against him for damages in the sum of $27,350. In that trial the court had entered a judgment of dismissal as to respondents here, after a nonsuit granted in their favor. That judgment, however, was reversed on the ground that the jury should have been permitted to decide whether negligence existed on the part of defendants Carter and City of Santa Monica (Pignet v. City of Santa Monica, 29 Cal.App.2d 286, 84 P.2d 166) and the trial which gave rise to this appeal ensued. The appeal is from both judgments in this action, insufficiency of the evidence being specified, and appellants contending that error arose by reason of the court's rulings on questions of evidence and in giving and refusing to give certain instructions. Appellants also claim that "The amount of the verdict rendered in favor of the plaintiff, Ray Pignet, is so excessive that it must be held to have been the result of passion or prejudice upon the part of the jury."

The accident in which respondent Pignet was injured and the airplane of his firm damaged occurred on Clover Field Airport, owned and operated by the City of Santa Monica. Pignet and his partner, Spencer, rented from the City office and airplane hangar space located upon Clover Field Airport under a sublease which permitted them to use the runways maintained thereon for the "landing and taking off from said Municipal Airport for the demonstration of aircraft, for all non-commercial uses, commercial uses and for charter parties, etc." Acting under this proviso, respondent Pignet, on January 19, 1937, undertook to instruct an airplane student, and in the course of their flight descended to Clover Field, where, unfortunately, a collision occurred on one of the runways between the airplane of respondents and an automobile driven by Van Gundy, in which the student was killed and Pignet gravely injured.

According to appellants, "The accident occurred at 4:45 P. M. *after the W.P.A. had finished work for that day*". Respondents state in their brief, "On January 19, 1937, at about the hour of 4:20 P. M., respondent Ray Pignet was operating an airplane in the air, engaged in giving flying instructions to a student. At said time Pignet approached the airport field, and circled the same to see if it was clear preparatory to making a landing. Pignet landed the airplane at a speed of approximately 50 miles per hour." Whatever the exact time of the collision may have been the statement of appellants that it occurred after working hours is not challenged by respondents.

Some months prior to the accident the City of Santa Monica had entered into an agreement with the Works Progress Administration of the United States Government, known colloquially as W. P. A., under the terms of which certain men, including Van Gundy, were employed for the purpose of constructing and repairing the airplane runways located on Clover Field. According to respondents, "The concrete runways which were used for the landing and taking off of airplanes were each 200 feet wide, one runway extending from the southwest corner of the field to the northeast portion, and the other runway from the northwest portion of the field to the southeast corner. These runways cross each other at an approximate thirty-three degree angle. On January 19, 1937, when the accident in question occurred, all portions of these runways were completed and covered with concrete and available for the landing and taking off of planes, excepting a certain section of the runway which extended to the northeast corner of the field. This portion of said runway was incomplete and still under construction at the time of the accident."

The collision occurred at a point within the intersection of the two runways, where they had been completed by the W. P. A. and had been turned over by appellants to pilots for landing and taking off of airplanes. Van Gundy was driving his car on the north-south runway when he collided with Pignet's airplane, which was landing on the east-west runway. The labor which was hired by the W. P. A. for construction work was under the direction of the W. P. A. engineer in charge of the project. Quoting again from the respondants' brief, "It appears from the evidence, however, that considerable cooperation and joint effort existed between appellants and the W. P. A. in generally determining what should or should not be done to comply with the plans and specifications which were prepared by the employees of appellant, City of Santa Monica." It appears from the transcript that Van Gundy had completed his day's work at about 3:30 p. m., then had partaken of some intoxicating liquor with a fellow workman and at the time of the accident was on his way to a building at the southern end of the field, using the runway as a shortcut. Under regulations set up by the W. P. A. all vehicles engaged in the work that was being done upon the airport were required to carry a red flag to indicate that they were on the field under proper authorization. Van Gundy testified that to meet this requirement, "I went down there to the tank truck and picked up my coat and a red flag which I picked up for the purpose of putting on my automobile because I knew no automobile without the red flag was allowed on the airport." He entered the field at the corner where work upon the job was still unfinished; that is, at the northeast corner. A fence or barrier which had been placed at this point of entrance was down at the time Van Gundy went upon the field. As to this, Mr. Johnson, the W. P. A. foreman, testified: "At the time of the accident the northerly portion of the north-south runway had not been completed. At the northeast corner up by Centinella Avenue there was a fence that consisted of poles with a wire cable running from them. A section or so of that fence had been taken down by the W. P. A. because that field had to be made out in that corner and it was necessary to take it down to complete the work." Van Gundy testified further, "I drove in a southwesterly direction on the north half of the runway. When I took my car and began driving it in a southwesterly direction I did not see any watchmen at the point marked V-1 on Plaintiff's Exhibit 1. No one attempted to stop my car as I was proceeding to the point of the accident and I do not remember any one hollering at me."

Mr. Johnson stated: "During working hours the W. P. A. maintained flagmen around the work where it was being carried on. I had eight to twelve men on the field at all times with flags. Their duties was to watch out for anything that might come in on the field that didn't belong there. Their duties ended about 4:30 in the afternoon. At hours other than working hours we had a watchman at each entrance, that is at Centinella and 27th Street. I had instructed those watchmen not to permit anybody on the field." The witness Katzenberger testified that he was employed at Clover Field as a night watchman; that he started work on the day of the accident at about 3:45 p. m., at that time relieving the flagman. "When I saw this man (i. e.: Van Gundy) I did not holler at him because I know that he work there. I thought the mixer had broke down. I had never seen Mr. Van Gundy; I saw him as his car moved down to the airway; if he had not had a red flag on I would have stopped him and wanted to know what business he had there. I was about 200 feet away from him when I saw him."

The respondents contend that, "The evidence shows that a dangerous, hazardous condition existed on the airport because (1) there were no proper watchmen, signs, fences, barriers, or other preventative devices to keep automobiles off the airplane runways; (2) automobiles were continuously on the field and on the runways prior to the accident, thereby creating the hazardous condition; (3) appellants had knowledge of such hazardous conditions; and (4) appellants failed and omitted to do anything to remedy the dangerous situation, etc."

Appellants in their reply brief criticize particularly the statement which says that "automobiles were continuously on the field and in the runways prior to the accident, thereby creating the hazardous condition", pointing out that "Respondents have not seen fit to set forth in their brief any evidence whatsoever tending in the slightest degree to establish the fact that vehicles other than those used in the construction work were seen on the field or that any vehicles were on the field at any time other than during working hours.

"The 'aforementioned testimony' referred to in the above quotation is that of the plaintiff, Pignet, and the witnesses, Goddard, Darby and Spencer, all of whom testified that prior to the accident they had observed vehicles on the field which were used in connection with the work being carried on. No witness testified to having seen any other vehicles on the field after working hours.

"Pignet stated: 'I knew construction work was being carried on by the W. P. A. before the accident and had seen trucks of various kinds hauling materials on to the airport and hauling dirt away from the airport."

"Goddard's version was: 'I should say that that work had been going on six or seven months at the time the accident happened. During that time on occasions I had seen automobiles with red flags moving up and down the runways where they were working and had made complaints of that fact to Colonel Carter.'

"The testimony of Darby and the plaintiff, Spencer, is to the same effect.

"Of course, this testimony is not even suggestive of the facts stated in the quotation from respondents' brief. On the contrary it clearly shows that the only vehicles seen by the witnesses and reported by them to Colonel Carter were those engaged in construction work during working hours."

Appellants argue further "that there is no evidence tending in the slightest degree to establish the fact that Carter should have anticipated Van Gundy's act, nor evidence of any negligence upon his part which proximately caused the accident. If there is any such evidence respondents have failed to present it in their brief.

"Of course it was incumbent upon respondents to establish by a preponderance of the evidence facts which would charge a reasonably prudent person with knowledge that there was a reasonable probability that unauthorized vehicles would be driven on to the airport after the construction work for the day had been finished. There is not a scintilla of evidence tending to establish such facts.

"It would be an absurdity to say that the fact that defendants were aware that vehicles, necessary to the prosecution of work, were used on the airport during the hours of work charged them with knowledge of the fact that it was reasonable to suppose that unauthorized vehicles would enter the airport after working hours."

We have presented the foregoing comments and arguments of counsel on the particular matters involved because they have a direct bearing upon exceptions taken to certain instructions given and refused by the trial court.

To assist the jury in determining the questions inherent in this tort action the plaintiffs submitted thirty-one instructions, all of which were given by the trial judge; the defendants submitted fifty, of which the first sixteen were given and the remaining thirty-four refused. The court of its own motion gave the jury fifteen instructions. We have examined all these instructions and find that, in regard to some, prejudicial error has occurred, necessitating a new trial.

[1] The court read to the jury plaintiff's instruction No. 22, as follows:

"You are instructed that it is the duty of an airport owner, while operating an airport, to protect persons from dangers arising from the negligence of a third party which could reasonably have been anticipated. Thus, if you find from the evidence in this case that the defendants, E. R. Carter and City of Santa Monica, had knowledge or notice of the condition which existed on the Clover Field Airport by virtue of the fact that automobiles were being driven on the concrete runways used for the landing and taking off of airplanes, *and if you find that such defendants should reasonably have anticipated that someone would drive upon the concrete runways reserved for airplanes,* and if you find that furthermore the defendants did not exercise reasonable care in protecting Ray Pignet from the negligence of Weldon Van Gundy, then you must return a verdict in favor of the plaintiffs and against the defendants, E. R. Carter and City of Santa Monica."

It will be noted that in this instruction there is no suggestion of possible contributory negligence on the part of plaintiff Pignet. Appellants feel that because of this omission the instruction was so faulty as to require a reversal. However, we find that the doctrine of contributory negligence was sufficiently explained in plaintiff's instruction No. 11 and also in defendants' instruction No. VIII, and are not prepared to say that the omission in this particular instruction, plaintiff's No. 22, is so serious as to constitute prejudicial error.

[2] Appellants complain that the instruction was misleading, for, to use their language, "it completely ignores the fact that it was necessary for automobiles to be upon the runways during working hours * * * and it also ignores the fact that the accident occurred after the day's work had ceased, etc.". If the members of the jury were attentive, however, they would have heard the testimony offered on these points and therefore should not have been misled because they were omitted from the instruction. Furthermore, appellants might have submitted a pertinent instruction on the subjects mentioned. So, we do not hold that error arose in connection with plaintiff's instruction No. 22, but we have reproduced it here for the purpose of contrasting certain language therein appearing and which we have emphasized, with certain other language which we have placed in italic print in plaintiff's instruction No. 24.

[3] That instruction reads as follows: "*You are instructed that* the defendants, City of Santa Monica and E. R. Carter, had no right to assume that motor vehicles would not be driven upon the runways reserved for the landing and taking off of airplanes on Clover Field Airport, but *under all the circumstances and at all times said defendants were bound to anticipate that persons might drive automobiles onto said airport and across said runways,* and said defendants were at all times required to use such ordinary care as would enable them to prevent persons from driving upon said airport or across said runways in motor vehicles. If you find from the evidence in this case that the defendants, City of Santa Monica and E. R. Carter, did not use ordinary care to keep motor vehicles from being driven upon Clover Field Airport, or its runways, then you are instructed that said defendants were guilty of negligence, and if such negligence on their part proximately caused the accident, damages and injuries sustained by the plaintiffs, and the plaintiffs were not themselves guilty of any contributory negligence, then your verdict must be against the defendants, City of Santa Monica and E. R. Carter, and in favor of the plaintiffs."

Placing these instructions side by side we find that the first, No. 22, committed to the jury determination of the question whether "defendants should reasonably have anticipated that someone would drive upon the concrete runways reserved for airplanes", while the other, No. 24, by its terms, decided that question for the jurors for it instructed them "that * * * under all circumstances and at all times said defendants were bound to anticipate that persons might drive automobiles onto said airport and across said runways" and further instructed the jury that defendants were at *all times* required to use such effective ordinary care as would keep the airport and runways clear of motor vehicles. The valid objections to this latter part of the charge are at once apparent in view of the testimony that motor vehicles were necessarily employed on the airport and across or along the uncompleted runways during working hours. Both portions of No. 24 to which we have called attention are objectionable as invading the province of the jury.

Appellants' comment on the situation is as follows: "By plaintiffs' instruction 24 the jury was told that as a matter of law the defendants were bound to anticipate Van Gundy's acts. As to whether defendants should have anticipated such negligence upon his part under all the circumstances disclosed by the evidence was one of the vital issues before the jury for their determination (Pignet v. City of Santa Monica, supra, 29 Cal.App.2d 286–290, 84 P.2d 166); however, this issue was taken from them by this instruction. As pointed out there is not the slightest suggestion in the record even remotely tending to show that any other automobiles had ever been driven upon the airport *except during working hours in the prosecution of the work,* nor in there a scintilla of evidence tending to establish *any* fact or circumstance from which it could be said that a reasonably prudent person in defendants' position would have anticipated that Van Gundy would * * * drive his car on to the field after the day's work had been completed. From the instruction the jury must have assumed that the court had determined that there was such evidence and that defendants were guilty of negligence as a matter of law * * * *in failing to take steps to prevent the accident.* The instruction is not open to any other interpretation."

Here appellants cite the case of Nickell v. Rosenfield, 82 Cal.App. 369, at 377, 255 P. 760, at 763, where the court said: "Every trial judge knows from experience that many general instructions are quite puzzling to the average juror, striving to get every word of counsel from the court; but when the court takes up the particular situation involved and bases a charge thereon by applying the facts to the law, instantly the jury becomes directly interested"; and McKeon v. Lissner, 193 Cal. 297, at 306, 223 P. 965, at 969, the court there using the following language: "Thus the instruction assumed the existence of the very fact which was in issue in the case, and upon which the plaintiff's right to recover depended; namely, the negligence of the defendants."

[4] Exception is taken to plaintiff's instruction 26 reading as follows: "It is established that E. R. Carter, who was operating manager of the Clover Field Airport, involved in the accident in question, was acting as agent for the defendant City of Santa Monica and within the scope of his authority, at the time of the events out of which the accident occurred. Therefore, the acts and omissions of that agent were, in contemplation of law, the acts and omissions, respectively, of his principal, the defendant City of Santa Monica." Respondents point out that this instruction is a copy of the instruction numbered 53A of B.A.J.I. (Book of Approved Jury Instructions), and that it merely states a rule of agency. In this connection, however, it must be noted that the court previously instructed the jury, in plaintiffs' instruction number 24, which we have just quoted, that "under all the circumstances and at all times said defendants were bound to anticipate that persons might drive automobiles onto said airport and across said runways, and said defendants were at all times required to use such ordinary care as would enable them to prevent persons from driving upon said airport or across said runways in motor vehicles".

In practical juxtaposition with that language instruction No. 26 is in effect a statement by the court that appellant Carter as agent for the City of Santa Monica was guilty of an omission that in itself constituted negligence. Since that was a question for the jury to decide we feel that prejudicial error arose in the giving of both instructions, No. 24 and No. 26.

[5-7] Among the thirty-four instructions numbered XVII to L, inclusive, submitted by the defendants and refused by the trial court, were a number which we feel should have been given as bearing upon the defendants' theory of the case. One of these, XXVI, we quote here.

"You are instructed that Weldon Van Gundy was not a servant or employee of either the defendant City of Santa Monica or the defendant E. R. Carter."

Another is XXXVI: "The negligence, if any, of the defendant Weldon Van Gundy at the time of the happening of the accident is not imputable to the defendant City of Santa Monica and the defendant E. R. Carter, and said defendants cannot be held responsible for any negligence, however gross, upon the part of said Van Gundy."

Still another is instruction XXXVIII: "If you believe from the evidence in this case that the defendant Weldon Van Gundy was guilty of negligence which was the sole and proximate cause of the collision, then you will return your verdicts in favor of the defendants City of Santa Monica and E. R. Carter."

Respondents contend that it was unnecessary for the court to give any of these last mentioned instructions, stating that: "No issue was created by the evidence concerning whether or not Van Gundy was an agent or employee of appellants. It was not contended by respondents that Van Gundy's negligence was *imputed* to appellants; the evidence showed that appellants were guilty of their own independent acts of negligence." The complaint, however, alleged "that the defendant Weldon Van Gundy was at all times herein mentioned in the employ of the defendant City of Santa Monica and defendant E. R. Carter for the purpose of working and aiding in the repair, improvement, maintenance and construction of said Clover Field Airport"; and from the transcript we quote the following questions by counsel for the respondents and answers given thereto by Mr. Johnson, the W.P.A. foreman:

"Q. What work or services did Mr. Carter perform on that project? A. Mr. Carter, as the city engineer, was the sponsor's representative in regard to construction, to the best of my knowledge.

"Q. And what did he do in that connection? A. He had charge of the city's saving clause, and gave any advice to us, as representative at the field, and as to the method, and as to the progress of the work.

"Q. Did he direct what work was to be done? A. Yes.

"Q. Did he direct how it was to be done? A. Yes, sir.

"Q. In what manner did you carry out his instructions? A. We did that only to the extent—well, we selected, or picked the personnel and of course I carried out his instructions; in other words the W.P.A. furnished the labor and had supervision over the labor, in regard to the discipline of the labor.

"Q. Mr. Carter direct the laborers in the performance of their work? A. Mr. Carter had a representative on the field; he was not there.

"Q. Well, did his representative direct where the work was to be done by the laborers? A. Yes, through the W.P.A. foreman."

It was also brought out in the same inquiry that "Mr. Carter or his representative directed the type of equipment that was to be used in connection with the work. The City of Santa Monica furnished a three-wheel, 12-ton roller and tandem roller; a grader; two tractors and they had two shovels at two different times and five-sack concrete mixer and a one-sack mixer, scarifiers, fresnoes, tumble bug and a pair of mules at one time and some trucks. Mr. Van Gundy was a mixer operator. We used the concrete mixer for mixing emulsified asphalt. He was the operator on that concrete mixer which was supplied by the City of Santa Monica. The City of Santa Monica also furnished sand, cement, lumber, various oils and other equipment." The transcript discloses that the "Mr. Carter" mentioned in this examination is not the appellant Carter, but both were city employees, one, city engineer; the other, operating manager of the airport.

In view of the information elicited by respondents' counsel it is quite probable in our opinion that the jury may have been somewhat in the dark as to whether Van Gundy, working under the system described and using a city owned concrete mixer, was an agent or employee of the city. We believe, therefore, that instructions Nos. XXVI, XXXVI, XXXVIII should have been given.

Other instructions given or refused on the measure of damages form the basis of complaint on the part of appellants, but we deem it unnecessary to consider exceptions taken in this regard since the cause must be remanded for a new trial.

Judgments reversed and cause remanded.

We concur: DORAN, Acting P. J.; WHITE, J.

BECK v. SUPERIOR COURT OF MENDOCINO COUNTY et al.

Sac. 5470.

Supreme Court of California.

July 16, 1941.

Rehearing Granted Aug. 14, 1941.

1. Wills ⚷337

Where judge before whom will contest had been tried was out of the county and another judge was presiding in his place at date of hearing of motion for new trial, and hearing was continued by consent to later date in order that presiding judge might read the transcript prepared in the matter, the presiding judge had jurisdiction to hear and determine the motion at later date, notwithstanding that judge who heard original proceedings returned to county during intervening time. Code Civ.Proc. § 661.

2. New trial ⚷114

The spirit of provision of Code of Civil Procedure relating to motions for new trial indicates that judge who presided at trial should determine motion for new trial if possible, and trial judges should make every effort to carry out spirit of the provision, although it is contemplated that under some circumstances another judge should have jurisdiction to determine the motion. Code Civ.Proc. § 661.

3. Certiorari ⚷66
New trial ⚷113

In certiorari proceeding to annul order granting new trial on ground that judge granting new trial was without jurisdiction because he was not the judge who presided at the trial, the presumption was in favor of existence of jurisdiction, and statute relating to hearing of motions for new trial was not to be construed to deny existence of jurisdiction unless provisions necessarily required such construction. Code Civ.Proc. §§ 661, 1963, subd. 16.

* * *

In Bank.

Proceeding in certiorari by Ethel Beck against the Superior Court of Mendocino county and others to obtain the annulment of an order granting a new trial, following a verdict for the petitioner in a will contest tried in the Superior Court.

Order granting new trial affirmed.

W. H. Brunner and Wm. Van Dyke, both of Ukiah, for petitioner.

Lilburn Gibson and Mannon & Brazier, all of Ukiah, for respondents.

SPENCE, Justice pro tem.

In this proceeding in certiorari, petitioner seeks the annulment of an order granting a new trial.

Petitioner was contestant in a will contest which was tried in the superior court in Mendocino County before Hon. W. D. L. Held, sitting with a jury. The jury returned a verdict in favor of petitioner and a decree was entered on October 30, 1940, revoking the probate of the will. A notice of intention to move for a new trial was filed and the matter was set for hearing on December 6, 1940. On that date the matter was regularly continued to December 9, 1940. On the last-mentioned date Hon. Donald Geary was presiding in said court in the place and stead of Hon. W. D. L. Held, who was out of the county at that time. The minutes of the court show that "it was stipulated that Judge Held is out of the county. Hearing of said matters is hereby continued by consent to December 18, 1940, in order that Judge Geary may read the transcript prepared in said matter." On December 18, 1940, the matter came on again before Hon. Donald Geary and the minutes show that "Respective counsel stipulated that trial Judge Hon. W. D. L. Held is at this time absent from the County of Mendocino. Said motion made by counsel and argued until 12:05 P. M., at which time recess was taken until 1:00 P. M. Resumed at 1:10 P. M. and further argued by respective counsel and submitted for decision." On December 28, 1940, Hon. Donald Geary signed an order granting a new trial upon the ground of insufficiency of the evidence and other grounds, which order was filed on December 30, 1940.

Thereafter, and on February 5, 1941, petitioner filed a notice of motion to vacate the order granting a new trial upon the ground "that said order granting a new trial is void as being in excess of the jurisdiction of the Hon. Donald Geary, the judge who made and entered the same". Said notice was accompanied by an affidavit purporting to show that Hon. W. D. L. Held was not absent from the county of Mendocino on December 18, 1940, but was merely absent from the city of Ukiah, the county seat, during a portion of said day. Said motion to vacate was heard by Hon. Donald Geary on February 10, 1941. Testimony was taken and an order was made denying said motion. This proceeding was then commenced by petitioner.

The respondents contend that petitioner had a right of appeal from the order granting a new trial and that petitioner may not therefore invoke the remedy of certiorari. But we deem it unnecessary to discuss this contention of the respondents for we do not believe that petitioner is entitled in any event to the annulment of the order under the circumstances presented by the record before us.

[1] Petitioner cites section 661 of the Code of Civil Procedure which provides in part as follows: "The motion for a new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court." Petitioner further cites Francis v. Superior Court, 3 Cal.2d 19, 43 P.2d 300, holding that the provisions of said section are mandatory. But when said section is examined, it appears that a judge other than the judge who presided at the trial may hear and determine the motion if at the time "noticed for hearing" the judge who presided at the trial is absent from the county where the trial was had. It is conceded that said motion was regularly "noticed for hearing" on December 9, 1940; that Hon. Donald Geary was presiding at that time; that Hon. W. D. L. Held was then out of the county; and that the further hearing of said motion was then "continued by consent to December 18, 1940, in order that Judge Geary may read the transcript prepared in said matter". It therefore appears that Hon. Donald Geary had the power and jurisdiction to hear and determine said motion at the time that it was noticed for hearing on December 9, 1940; that the parties then stipulated to the fact that showed that Hon. Donald Geary had such power and jurisdiction; and that said parties consented to a continuance to December 18, 1940, for further hearing before Hon. Donald Geary solely for the purpose of permitting the latter to read the transcript before passing upon said motion. Under these circumstances, we do not believe that the power and jurisdiction of Hon. Donald Geary to hear and determine said motion were affected by any subsequent return of Hon. W. D. L. Held to the county during the time within which said motion could have been heard and determined.

[2, 3] In conclusion, we deem it appropriate to state that it appears that the spirit of said section 661 indicates that the judge who presides at a trial should hear and determine the motion for new trial whenever possible, and we believe that trial judges should make every effort to carry out the spirit of said section. The provisions of said section, however, contemplate that there may be circumstances under which some other judge should have the power and jurisdiction to hear and determine such motion. We are here dealing with an attack upon the jurisdiction of a judge other than the judge who presided at the trial, after the motion had been heard and determined by him. The presumption is in favor of the existence of such jurisdiction, subd. 16, sec. 1963, Code Civ.Proc., and the statute should not be construed to deny the existence of such jurisdiction unless the provisions thereof necessarily require such construction. Our reading of said section 661 and of the record before us leads us to the conclusion that Hon. Donald Geary had the jurisdiction to hear and determine said motion under the circumstances.

The order granting a new trial is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; SHENK, J.; TRAYNOR, J.; EDMONDS, J.; CARTER, J.

45 Cal.App.2d 796

TAPO CITRUS ASS'N v. CASEY.

Civ. 2769.

District Court of Appeal, Fourth District, California.

July 9, 1941.

Rehearing Denied Aug. 6, 1941.

Hearing Denied Sept. 4, 1941.

1. Associations 🔑5

Where either general law or charter of an association describes mode in which by-laws may be adopted, the by-laws or amendments to the by-laws which association seeks to make must be adopted in such mode in order to be valid.

2. Agriculture 🔑6

The purpose of section of Agricultural Code providing that a majority vote of members of a nonprofit co-operative marketing association or shares of stock outstanding entitled to vote, or written assent of a majority of members or of stockholders representing a majority of all shares of stock outstanding and entitled to vote, is necessary to adopt by-laws or to repeal or amend any by-laws, or to adopt additional by-laws, is to provide a mode of amendment of by-laws for associations both with and without shares of stock. St.1933, p. 257, § 1200.

3. Agriculture 🔑6

Under section of Agricultural Code relating to mode of amending by-laws of nonprofit co-operative marketing association, where nonprofit co-operative marketing association had no shares of stock outstanding, mode of amending its by-laws was by vote or written assent of a majority in number of its members. St.1933, p. 257, § 1200.

4. Agriculture 🔑6

Since section of Agricultural Code providing a mode of amendment of by-laws of nonprofit co-operative marketing association was specifically written to apply to nonprofit co-operative association, it, and not the general law, would be followed. St.1933, p. 257, § 1200; Civ.Code § 301.

5. Agriculture 🔑6

Where according to section of Agricultural Code providing mode of amending by-laws of nonprofit co-operative association, mode of amendment of by-laws of an association, which had no shares of stock outstanding, was by vote or written assent of a majority in number of members, and written assent to by-law changing time of permissive withdrawal of members from "the month of October" to the "first week in September" of each year was given by members holding majority of voting rights as provided under articles of incorporation of association, but by less than a majority in number of members, attempted amendment was invalid. St. 1933, p. 257, § 1200.

Appeal from Superior Court, Ventura County; Raymond McIntosh, Judge.

Action by Tapo Citrus Association, a co-operative marketing association, against R. E. Casey, to enjoin defendant from delivering fruit grown by him to another association, and to require defendant specifically to perform his contract with plaintiff. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

Stewart, Shaw & Murphey, Wm. L. Murphey, and Arvin B. Shaw, Jr., all of Los Angeles, for appellant.

Don R. Holt, of Ventura, for respondent.

MUNDO, Justice pro tem.

Plaintiff is a nonprofit co-operative marketing association organized in 1917 under the provisions of title XXI, part 4, division first of the Civil Code of the state of California, §§ 653m–653s, and is engaged in picking, packing, shipping and marketing oranges, lemons and other citrus fruits produced upon lands owned or controlled by its members situate in the vicinity of Rancho Tapo, in the county of Ventura. On March 1, 1937, defendant became a member of said Association and executed a contract in writing to deliver to the Association all citrus fruits grown upon land owned by defendant so long as he remained a member of plaintiff Association. The contract further provided that defendant would be bound by the articles, regulations and by-laws of plaintiff Association. At the time defendant became a member of the Association and at all times thereafter, the articles of incorporation of plaintiff Association provided in article "sixth" that the voting power and property rights and interests of each member of the Association should be unequal; that the voting power of each member should be determined as follows: "Each member shall have one vote at all annual and special meetings of the members for each $10.00, or major fraction thereof, paid by him to the revolving fund, * * * less all payments made to him from said revolving fund." Article II, section 9 of the by-laws of said Association at the time defendant became a member thereof and at all times thereafter, provided that at each meeting of the members each member shall be entitled to vote in person or by proxy held by some member or members present at such meeting and made in accordance with the laws of the state of California, and shall have one vote for each $10 or major fraction thereof paid by him to the revolving fund; that all questions except the election of directors and any questions, the manner of deciding which is specially regulated by law, shall be determined by a majority of the members; provided, that any member may demand a representative vote and in that case such representative vote shall immediately be taken and each member shall be entitled to one vote for each $10 or major portion thereof paid by him to the revolving fund. At all times after July 21, 1931, article I, section 10 of the by-laws of plaintiff Association provided that if any member thereof should cease, fail, neglect or refuse for any reason to deliver, pack, ship or market any portion of his citrus fruits produced from orchards owned or controlled by him, through plaintiff Association, or should sell any of his said citrus fruits, the Association shall be entitled to collect from such member three-fourths of one per cent per pound for all oranges so sold. At all times from July 21, 1931, until January 4, 1938, article I, section 8 of the by-laws of plaintiff Association provided that its members could withdraw by filing a written notice with the secretary of plaintiff Association stating his withdrawal during the month of October of any year. On January 4, 1938, at the regular annual meeting of the members of plaintiff Association, in lieu of an oral resolution and voice vote to amend article I, section 8, members holding a majority of the voting rights, 2419 votes out of a total of 3350 votes according to the next preceding priority schedule of funds paid in by the members to the revolving fund, executed a written assent, by the terms of which said article I, section 8 of the by-laws of said Association was amended to provide that any member might withdraw from the Association only during the first week of September of any year. The members who executed said written assent were less than a majority in number of the members of said Association. On February 19, 1938, a written notice of said assent of the members to amend said by-laws of said plaintiff Association was mailed to each and all of the members of said Association, including the defendant, as the address of each member appeared upon the books of plaintiff Association. In said notice specific attention was directed to defendant and each and all of the other members of the plaintiff Association that on January 4, 1938, said by-law had been amended as to the date of permissible withdrawal of any member from "the month of October" as theretofore provided, to "the first week of September" of each year.

On October 29, 1938, after the adoption of said amendment of said by-law and notice thereof given to the defendant, defendant notified plaintiff Association in writing of his withdrawal from the plaintiff Association. On the same day plaintiff Association notified defendant in writing acknowledging defendant's notice of withdrawal, directing defendant's attention to the change in the by-laws as to the time within which withdrawals would be permitted, directing defendant's attention to notice of change in the Association's by-laws dated February 19, 1938, and notifying defendant that his notice of withdrawal had been presented too late, was invalid and ineffective, and was not accepted by the plaintiff Association.

Thereafter defendant entered into an agreement with the Ventura County Orange and Lemon Association, a cooperative marketing association, by the terms of which defendant agreed to harvest and deliver all oranges grown by defendant to said last-mentioned association. On April 20, 1939, plaintiff Association notified defendant that it expected defendant's crop to be harvested and delivered to it on or about April 24, 1939. At all times thereafter defendant neglected, failed and refused to harvest or deliver to plaintiff Association or permit plaintiff Association to harvest and receive delivery of and market oranges grown by defendant on his land, estimated to consist of 2300 field boxes of oranges.

The plaintiff Association commenced this action to enjoin defendant from delivering fruits grown by him to the Ventura County Orange and Lemon Association, to require defendant to specifically perform all of the terms of the grower's contract entered into by defendant and plaintiff Association, for a temporary restraining order, costs and such other relief as the court may deem just. On July 17, 1939, a hearing was had and judgment was entered for the defendant upon the ground that the amendment to the by-laws of plaintiff Association had not been duly or regularly adopted. The plaintiff Association appeals from this judgment.

The liability of defendant for breach of contract to deliver his citrus crop to plaintiff Association, either by mandatory or prohibitory injunction or both, for penalties prescribed in the by-laws of plaintiff Association in the event defendant sells his citrus fruit elsewhere than to plaintiff Association, and any liability of plaintiff Association for costs of court, depends upon the validity of defendant's withdrawal as a member of plaintiff Association on October 29, 1938, which in turn is dependent upon the validity of the adoption on January 4, 1938, of the amendment of article I, section 8, of said by-laws changing the time of permissive withdrawal of members from "the month of October" to "the first week in September" of each year.

[1] When either the general law or the charter of the Association prescribes the mode in which by-laws may be adopted, the by-laws which the Association seeks to make must of course be adopted in such mode in order to be valid, and the same proposition holds true with amendments. At the time of the attempted amendment of the by-laws in question, section 1200 of the Agricultural Code, St.1933, p. 257, provided: "Each association shall within thirty days after its incorporation, adopt for it government and management, a code of by-laws, not inconsistent with this chapter. A majority vote of the members or shares of stock issued and outstanding and entitled to vote, or the written assent of a majority of the members or of stockholders representing a majority of all the shares of stock issued and outstanding and entitled to vote, is necessary to adopt such by-laws and is effectual to repeal or amend any by-laws, or to adopt additional by-laws."

[2, 3] Plaintiff Association contends that the language of said section 1200 of the Agricultural Code "is ambiguous or at least amphibolous". It asks: "Does this language mean that a non-profit co-operative marketing association, without capital stock or shares of stock but whose articles and by-laws provide for unequal voting in its various members, can only amend its by-laws by vote or written assent of a majority in number of its members, or does it mean that a majority vote or written assent of its members entitled to vote—a majority of the voting power of its members—may amend its by-laws?" We would answer this by saying that the object of section 1200 of the Agricultural Code is to provide a mode of amendment for both classes of associations, those with and those without shares of stock. In the case of plaintiff Association, which has no shares of stock, we think the mode of amending the by-laws as authorized by section 1200 of the Agricultural Code is by vote or written assent of a majority in number of its members.

[4] All references to representative voting in the articles and in the by-laws of plaintiff Association are found in sections that deal with meetings, and nowhere in the articles or the by-laws do we find any reference to written assent. This latter phrase is found in Civil Code, section 301, and in section 1200 of the Agricultural Code. If section 301 of the Civil Code were to prevail here, the by-laws could be amended by the vote of shareholders authorized to exercise the majority of the voting power of the corporation or by the written assent of such shareholders, but since section 1200 of the Agricultural Code was specifically written to apply to associations of plaintiff's class it, and not the general law, will be followed. It will be remembered, too, that the plaintiff Association has no shares of stock.

[5] According to section 1200 of the Agricultural Code, as we have said, the mode of amendment would be by vote or written assent of a majority in number, of members. In this case, since written assent was given by less than a majority in number of members, the attempted amendment must be held to be invalid.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

46 Cal.App.2d 42

PEOPLE v. MARR.

Cr. 614.

District Court of Appeal, Fourth District, California.

July 14, 1941.

Hearing Denied Aug. 11, 1941.

1. Criminal law ⚷998

A judgment need not be set aside on motion, unless it is void upon its face.

2. Criminal law ⚷998

An attempt to set aside a judgment of conviction of the offense of escaping from an officer on the ground that such judgment was void because the offense allegedly was committed in county other than that of the superior court in which the judgment was entered constituted a "collateral attack" upon the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

3. Criminal law ⚷273

A plea of guilty includes an admission of every element entering into the offense charged.

4. Criminal law ⚷273

A plea of guilty to information filed in superior court of Orange county, charging accused with the offense of escaping from an officer, admitted that accused escaped from an officer in Orange county, since such escape in Orange county was an element of the offense charged by the information.

5. Escape ⚷10

Where accused pleaded guilty to information filed in superior court of Orange county, charging that accused on or about a specified date escaped from an officer, thereby admitting all elements of offense charged, evidence that accused on or about date charged in information escaped from a deputy sheriff in Los Angeles county, even if admissible upon accused's motion to vacate judgment of conviction, would in no way establish that accused had not also escaped from the same or another deputy sheriff on or about the same date in Orange county, as alleged in the information and admitted by plea of guilty.

6. Criminal law ⚷998

Where accused pleaded guilty to information filed in superior court of Orange county, charging that accused on or about a specified date escaped from a deputy sheriff, evidence that accused on the date specified in information escaped from a deputy sheriff in Los Angeles county did not warrant setting aside judgment of conviction entered upon the plea of guilty, since such evidence was insufficient to establish that superior court of Orange county lacked jurisdiction to enter such judgment and that, therefore, the judgment, regular and valid on its face, was void.

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Warren Marr pleaded guilty to the charge of escaping from an officer, and from an order denying his motion to vacate the judgment of conviction, he appeals.

Order affirmed.

See, also, 113 P.2d 22.

Benjamin D. Frantz, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Judge.

The defendant was charged with escaping from an officer. He pleaded guilty and judgment was pronounced on September 16, 1938. On March 28, 1941, he moved in the trial court to vacate the judgment, and this appeal is from the order denying that motion.

The information charged that the appellant escaped from a deputy sheriff in the county of Orange on or about the 21st day of October, 1936. The appellant now contends that, in fact, he escaped from a deputy sheriff of Orange county at Pasadena, in the county of Los Angeles, and that the judgment is void since it was entered by the superior court of Orange county, which had no jurisdiction over the offense. It is also contended that the court erred at the hearing on the motion to vacate the judgment in refusing to permit the appellant to introduce evidence to the effect that the crime actually occurred in Los Angeles county. In this connection the appellant sought to introduce into evidence a written report dated October 21, 1936, made by a certain deputy sheriff of Orange county to the sheriff of that county, in which report it was stated that the deputy sheriff on that date took the appellant to Pasadena and that while there the appellant escaped.

[1-6] It has frequently been held that a motion to set aside a judgment need not

be granted unless it appears that the judgment is void upon its face. No such situation here appears, the judgment here in question being regular and valid upon its face. The only contention here made is that one fact, the location of the crime, could now be shown to be different from that implied by the judgment and the face of the record. Not only is this a collateral attack upon the judgment but the evidence offered, if received, would not be conclusive of the fact relied upon. The plea of guilty included an admission of every element entering into the offense charged. People v. Brown, 140 Cal.App. 616, 36 P.2d 194. One element of the offense charged was that the appellant escaped from an officer in Orange county. This was admitted by the plea of guilty. The most that could be said for the proffered evidence is that it would establish that the appellant escaped from a deputy sheriff in Pasadena on October 21, 1936. Such evidence, if received and if admissible at all, would in no way establish that the appellant had not also escaped from the same or another deputy sheriff on or about the same date in Orange county, as alleged in the information and admitted by the appellant. While the evidence now offered might have been valuable to the appellant if presented at a trial on the original complaint, it is entirely insufficient to establish that the superior court of Orange county had no jurisdiction over the offense to which the appellant pleaded guilty, and is insufficient, on this collateral attack, to establish that the judgment is void.

The order appealed from is affirmed.

We concur: MARKS, J.; KELLY, Justice pro tem.

KEY NUMBER SYSTEM

46 Cal.App.2d 14

EVERTS v. MATTESON et al.

Civ. 12985.

District Court of Appeal, Second District, Division 2, California.

July 10, 1941.

Rehearing Denied July 22, 1941.

Hearing Denied Sept. 4, 1941.

1. Appeal and error 🔑158(1), 781(7)

Generally, voluntary payment and satisfaction of judgment terminates litigation for all purposes, renders questions on appeal from judgment moot, and warrants dismissal of appeal.

2. Appeal and error 🔑158(2)

An enforced satisfaction of judgment does not prevent prosecution of appeal therefrom.

3. Appeal and error 🔑781(7)

Where judgment creditor, holding judgment debtor's money, exceeding amount of judgment, under attachment in bank, refused to levy execution, and judgment debtors, in order to gain possession of excess funds due them, caused bank to pay money to sheriff and made demand on him to pay judgment and deliver balance to debtors, sheriff's subsequent payment and satisfaction of judgment was not voluntary on debtors' part, so that motion to dismiss appeal from judgment on ground that voluntary payment of amount thereof rendered questions involved moot must be denied.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by H. W. Everts against G. A. Matteson, Raymond H. Vanderbush, and others. Judgment for plaintiff, and defendant Vanderbush and certain other defendants appeal. On motion to dismiss the appeal.

Motion denied.

A. P. G. Steffes, of Las Vegas, Nev., for appellants.

Edmund Nelson, John E. Walter, Freston & Files, and James A. McLaughlin, all of Los Angeles, for respondent.

McCOMB, Justice.

This is a motion to dismiss the above entitled appeal on the ground that appellants have voluntarily paid the amount of the judgment rendered against them in the trial court, thereby rendering the questions on appeal moot.

These are the essential facts:

Respondent recovered a judgment against appellants in the principal sum of $2,635.28, together with interest at 7% from June 24, 1938, and costs in the sum of $33.30. At the time of the judgment respondent held under attachment in the Security First National Bank of Los Angeles money of appellants in the sum of $4,000. After the judgment was entered appellants' attorney asked respondent's attorney to cause a writ of execution to be levied upon the money in the bank, which respondent's attorney refused to do, stating that he did not know the amount of the costs that would be recoverable upon appeal, or should a new trial be granted, the amount of the ultimate cost.

Thereafter appellants' attorney caused the Security First National Bank to pay the money which they held under attachment to the Sheriff of Los Angeles County, and appellants made demand upon the Sheriff of Los Angeles County that he pay the judgment in full and deliver the balance to appellants. This the sheriff did by drawing a warrant to the order of respondent in the sum of $3,119.96 and paying the balance to appellants. The sheriff likewise satisfied the judgment of record.

This is the sole question necessary for us to determine:

Did appellants voluntarily satisfy the judgment which had been rendered against them?

[1] This question must be answered in the negative. It is the general rule that voluntary payment and satisfaction of a judgment terminates the litigation for all purposes, renders the questions on appeal moot and warrants the dismissal of the appeal. Estate of Shaver, 131 Cal. 219, 221, 63 P. 340.

[2, 3] This rule is qualified by the rule that an enforced satisfaction of a judgment does not prevent the prosecution of an appeal. Hartke v. Abbott, 106 Cal.App. 388, 391, 289 P. 206. The present case falls within the qualification to the general rule. Respondent held $4,000 of appellants' money under attachment. It is clear that he was not entitled to the entire sum. Since respondent refused to levy an execution upon the money under attachment, in order to gain possession of the excess funds due them, appellants' only recourse was to make a demand upon the sheriff to pay the judgment. Thus, the payment of the judgment and satisfaction thereof was not voluntary upon the part of the appellants, since they were compelled to take the steps resulting in these acts, in order to obtain a sum of money rightfully due them.

For the foregoing reasons the motion to dismiss the appeal is denied.

MOORE, P. J., concurred.

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46 Cal.App.2d 44

POPESCU v. POPESCU.

Civ. 11694.

District Court of Appeal, First District, Division 1, California.

July 15, 1941.

1. Divorce 🔑46

Acts which might otherwise constitute grounds for divorce may be nonactionable where provoked by party seeking divorce.

2. Divorce 🔑46

"Cruelty", as a foundation for divorce, must be unmerited and unprovoked.

See Words and Phrases, Permanent Edition, for all other definitions of "Cruelty".

3. Divorce 🔑54

If cause relied on by defendant in divorce action to establish defense of recrimination was provoked by defendant, it is unavailable by way of defense in same manner as it would be as where it is made basis of a prayer for divorce. Civ.Code, §§ 122, 123.

4. Divorce 🔑46

If conduct of party who claims to have been provoked is out of all proportion to the provocation, provocation does not bar a cause for divorce or a defense of recrimination. Civ.Code, §§ 122, 123.

5. Divorce 🔑184(6)

The question as to whether physical violence used by one spouse will bar that spouse from securing a divorce, or whether provocation by other spouse will excuse the physical violence, is primarily a "question of fact", and each case must be determined on its own facts. Civ.Code, §§ 122, 123.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

6. Divorce 🔑184(6)

In wife's action for divorce on ground of cruelty, trial judge, having had opportunity to see and hear witness, was best able to ascertain whether physical violence used by wife was induced by husband, or whether, under circumstances, it was out of proportion to provocation, so as to support husband's defense of recrimination. Civ.Code, §§ 122, 123.

7. Divorce 🔑130

Evidence established that wife's throwing bowl at husband, though not justified, was induced as result of husband's provocation, so that such act would not establish husband's defense of "recrimination" in wife's action for divorce on ground of cruelty. Civ.Code, §§ 122, 123.

See Words and Phrases, Permanent Edition, for all other definitions of "Recrimination".

8. Appeal and error ⚿1011(1)

Where evidence was conflicting and trial court resolved all conflicts in favor of plaintiff, District Court of Appeal was bound by trial court's findings.

9. Divorce ⚿130

In wife's action for divorce on ground of cruelty, evidence established that wife's acts in summoning police to their home, in filing insanity complaint against husband, and in seeking an order restraining husband from occupying family dwelling, though not justified, was induced as result of husband's provocation, so that such acts would not establish husband's defense of "recrimination". Civ.Code, §§ 122, 123.

10. Divorce ⚿135

Evidence that parties ceased living together as husband and wife before filing of wife's action for divorce, but that they continued to live in separate rooms of family residence, established a sufficient "separation" to authorize the decree of divorce.

See Words and Phrases, Permanent Edition, for all other definitions of "Separation".

11. Divorce ⚿150(2)

Findings in divorce action by reference to allegations of pleadings are sufficient to warrant decree.

12. Divorce ⚿150(2)

Findings in divorce action that each and every, all and singular allegations of defendant's answer to the plaintiff's complaint, and defendant's answer to supplemental complaint of plaintiff, and particularly with reference to paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 17 of defendant's supplemental answer, and each and every one of the above-mentioned allegations of the answer and supplemental answer of defendant were untrue and not sustained by evidence, was a sufficient finding on defendant's defense of recrimination to warrant decree. Civ.Code, §§ 122, 123.

13. Divorce ⚿150(2)

Failure of trial court to make findings in divorce action as to three of paragraphs of defendant's supplemental answer wherein he set up defense of recrimination, did not entitle defendant to reversal of a decree granting plaintiff a divorce, where findings favorable to plaintiff, based on allegations of her complaint, and findings adverse to defendant, based on allegations of the answer, amply supported judgment of divorce, even if paragraphs on which no findings were made were true. Civ.Code, §§ 122, 123.

14. Divorce ⚿130

Evidence warranted trial court's conclusion that wife had proved cruelty authorizing a divorce, and that husband had not established his defense of recrimination. Civ. Code, §§ 122, 123.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Julia Popescu against Manuel Popescu for a divorce. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Carl W. Mueller, of San Francisco, for appellant.

Joseph F. O'Malley, of San Francisco, for respondent.

PETERS, Presiding Judge.

Defendant appeals from a judgment awarding his wife a divorce on the ground of cruelty. His main contention on this appeal is that, if it be assumed that the evidence supports the findings that he was guilty of acts of cruelty, the evidence, as a matter of law, also establishes that plaintiff was guilty of acts of cruelty towards him, so that, under the doctrine of recrimination, pleaded as a defense by him, plaintiff should have been denied a divorce.

By its decree the court awarded plaintiff custody of the two daughters of the parties, aged fourteen and ten years, directed defendant to pay plaintiff $80 a month for the support of the daughters, and made an approximately equal division of community property, including annuity policies with a cash value of more than $34,000.

Plaintiff is a Hungarian and defendant is a Rumanian. They lived together as husband and wife in Rumania, where, according to defendant, a ceremonial marriage is not required. A son was born of the union, who was twenty-three years old at the time of this action. Defendant came to San

Francisco in 1917. In 1922 plaintiff and the boy came to this country with funds provided by defendant, and she and defendant were married in accordance with the laws of this state.

Prior to bringing this present action, plaintiff, within a period of a few years, brought two actions for divorce and two for separate maintenance. A separate maintenance action filed May 3, 1937, was ordered off the calendar on May 21, 1937, as prematurely brought, on the testimony of defendant and one of the daughters that the parties had not separated on March 8, 1937, as alleged, but on May 11, 1937, which was after the action had been commenced. Plaintiff filed a dismissal of the maintenance action on May 26, 1937. The present complaint for divorce was filed on May 21, 1937, after the judge had refused on that day to proceed with the trial of the separate maintenance action. Plaintiff testified that the dismissals of the other actions followed reconciliations.

Defendant's trade was that of a "boner", preparing meat for sausage making. About a year after the marriage in this state, real property in San Francisco was purchased and a building erected, on the ground floor of which defendant conducted his business. The upper story of four rooms was the family residence. The parties were still living in this building when the present action was tried, although in separate rooms, and not as husband and wife. The building cost between $9,000 and $10,000, and was found by the court to be community property. An undivided half interest was awarded to each by the divorce decree.

Plaintiff had worked side by side with her husband in his boning business. It profited to such an extent that they had paid cash in the amount of $34,000 to purchase paid up annuity policies. They had also procured an insurance policy of $2,000 on their joint lives, and a $10,000 policy on the life of the husband, on which premiums were being paid. The marital difficulties seem to have affected defendant to such an extent that he was unable to carry on the business.

In her complaint plaintiff alleged that defendant had annoyed, nagged, scolded and quarreled with her, and had abused and humiliated her; that he possessed an ungovernable temper and would become violently angry with her and abuse her; that in the presence of the children and friends defendant would use towards plaintiff vile, vulgar and abusive language. In a supplemental complaint she alleged that since filing the action defendant had harassed her with pleas for a reconciliation; that she could not go out without being followed by him; that during her absence he had broken into one of the rooms in which she lived separate and apart from him and had removed a rare and valuable violin belonging to a friend.

Defendant denied the charges of cruelty and by way of recrimination set forth a number of acts, which, he alleged, constituted extreme cruelty on the part of plaintiff for which a divorce should be denied to her. He did not himself seek a divorce. The court made findings favorable to plaintiff on the allegations of her complaint, and found against defendant on his defense of recrimination.

Plaintiff gave testimony substantiating the allegations of her complaint, and was corroborated by three witnesses, two of them women friends of long standing, and by the fourteen-year-old daughter of the parties. They testified to defendant's fits of temper, in which he swore at plaintiff and otherwise maligned her. These rages were usually brought on by some incident in the business which upset defendant. He would come upstairs in a disturbed state of mind and give vent to his emotions by stirring up a quarrel with his wife. Plaintiff and her witnesses testified that she would try to quiet him, but if unsuccessful he would rave on for fifteen minutes to half an hour in a torrent of profanity. The witnesses testified that plaintiff, on such occasions, sometimes broke into tears and left the room. At other times, when provoked, she would reply to defendant's invectives: "You are the same." The testimony was that these tantrums were of frequent occurrence, and that it was defendant and not the plaintiff who provoked domestic strife. Plaintiff testified that defendant had thrown boxes, barrels and meat at her, and also had "thrown around" chairs and dishes. There can be no doubt but that the findings to the effect that defendant was guilty of acts of cruelty are amply supported by the evidence, and defendant does not seriously contend to the contrary. His main contention, as already pointed out, is that, as a matter of law, plaintiff herself had committed acts of cruelty which would have entitled him to sue for divorce, with the result that, although the charges against him be found in her favor, nevertheless the doctrine of recrimination, sec. 122, Civ. Code, prevents her from obtaining a divorce.

Defendant relies particularly on an incident that occurred early on a Sunday morning in February of 1937. On the day in question, he had returned home from the Sausage Makers' Ball between 2 and 4:30 o'clock in the morning with a Mrs. Heldal. Defendant and Mrs. Heldal testified that as he entered, and before he had spoken, plaintiff threw a bowl or vase at his head, which broke and cut him.

Plaintiff testified that she threw the bowl at defendant after he had sworn at her. The evidence also shows that plaintiff and defendant had planned to attend the ball together, and, according to Mrs. Heldal, whose testimony on this point was not disputed, plaintiff had invited the Heldals to accompany them. Mrs. Heldal was an old friend of the Popescus, had attended them at their wedding, and was godmother of their two daughters. Mr. Heldal was unable to go to the ball, and it was arranged that Mrs. Heldal should go with the Popescus. On Saturday afternoon defendant ordered plaintiff to clean the chicken house, and, as she was complying, he came out, and without provocation on her part, started to revile her and her parents, long since dead. When she went into the house he continued his profane abuse to such an extent that she took her daughters and left the house, remaining away for several hours.

In the meantime, Mrs. Heldal telephoned from the hairdresser's and talked to defendant. He told Mrs. Heldal that he would call for her there. He brought her to his home, to await plaintiff's return. When she did not return, defendant and Mrs. Heldal left together for the ball. Plaintiff returned to her home about 10 o'clock that night. She found that a soup bowl which defendant had left on the stove, over a lighted burner, had broken and that the contents had discolored the stove and floor. She and the two girls went to bed. Sometime early Sunday morning the telephone rang several times. When finally answered by plaintiff it proved to be Mrs. Heldal. Plaintiff testified it was then 4 a. m., and that Mrs. Heldal started to abuse her over the telephone, and that she hung up. She further testified that at about 4:30 a. m. defendant arrived home in the company of Mrs. Heldal. Both had been drinking. Mrs. Heldal came up to plaintiff's bedroom and continued the abuse she had started on the telephone. This awakened and frightened the two children who started to cry. Thereafter, the husband came upstairs. Plaintiff testified that, "my husband come upstairs, then he started to call me S.B. and rotten whore, and everything. I said, 'I am that?' Then I grab the soup bowl and smash him in his face, and I kicked him out from the house." That then Mrs. Heldal grabbed her, pulled her hair, and called her names. Mr. Popescu then left with Mrs. Heldal, and did not return until about 7 o'clock that morning.

[1-3] Accepting the version of plaintiff, as the trial court did, it appears that it was defendant who was the aggressor in the events which culminated in the throwing of the bowl. The law is clear that acts which might otherwise constitute grounds for divorce may be non-actionable where provoked by the party seeking the divorce. Harp v. Harp, 204 Cal. 193, 267 P. 101; Jones v. Jones, 48 Cal.App. 771, 192 P. 463; Johnson v. Johnson, 14 Cal. 459. "Cruelty, as a foundation for a divorce, must be unmerited and unprovoked." Madden on Domestic Relations, p. 274; see, also, 17 Am.Jur. 192; 19 C.J. 77-79; note, Ann.Cas.,1918B, 496. Since the defense of recrimination consists of establishing cause for divorce in favor of the defendant, sec. 123, Civ.Code, it follows, of course, that if the cause relied on by the defendant was provoked by him, it is unavailable by way of defense in the same manner as it would be as where it is made the basis of a prayer for divorce.

[4-6] The conduct of the party who claims to have been provoked may be out of all proportion to the provocation, in which event provocation does not bar a cause for divorce or a defense of recrimination. Eidenmuller v. Eidenmuller, 37 Cal. 364; 17 Am.Jur. 192; 19 C.J. 79. It has been said that no provocation, however great, will justify physical violence. Albert v. Albert, 5 Mont. 577, 6 P. 23, 51 Am.Rep. 86. But other decisions do not adhere to such a rule. See 17 Am.Jur. 192. In Jones v. Jones, supra, the wife was denied a divorce where her physical violence provoked defendant to slap her. The question as to whether the physical violence used by one spouse will bar that spouse from securing a divorce, or whether the provocation by the other spouse will excuse the physical violence, is primarily a question of fact. Each case must be determined on its own facts.

The trial judge, having the opportunity to see and hear the witnesses, is best able to ascertain whether the physical violence used was induced by the other spouse, or whether, under the circumstances, it was out of proportion to the provocation.

[7] The record herein will support the conclusion that the parties lived in a state of violent turmoil and disharmony induced by defendant's irascibility and emotional instability. The record also supports the conclusion that defendant, by his actions that Saturday afternoon and Sunday morning, had so irritated the plaintiff, and his acts were so calculated to provoke her, that her actions were the result of his provocation. In the circumstances, accepting plaintiff's version of what took place, as this court must in view of the judgment in her favor, her conduct in throwing the bowl at defendant, while not "justified", nevertheless was induced by defendant, and, considering their emotional condition, as revealed by the record, was not an unnatural response to the provocation.

Defendant also relies on other acts of plaintiff as establishing his defense of recrimination. Most of these other acts took place after the bowl throwing incident.

As a result of the quarrel after the Sausage Makers' Ball, plaintiff filed an insanity complaint against defendant. She testified that she telephoned Mr. Mueller, defendant's attorney, who represents him on this appeal, and Mueller advised the filing of the insanity complaint. He arranged to meet plaintiff and to go with her to file the complaint. The clerk suggested that she wait a week. Mr. Mueller accompanied her a second time, and, according to her testimony, gave the clerk the information used in procuring issuance of a warrant of arrest for insanity. Defendant was kept under observation for six days and then released by the court, following receipt of a letter from the doctor in charge stating that defendant showed no evidence of abnormal mental behavior, that he had a history of domestic strife, and that rearrangement of the family situation was suggested.

Plaintiff thereafter brought the separate maintenance action which preceded the present suit, and in that action sought a restraining order with reference to community property. In the order presented to the judge was included a provision ordering him to remain away from the residence. The judge refused to sign the order until these words were stricken out.

On two occasions after filing the present complaint, plaintiff summoned the police. On May 30, 1937, defendant testified he wished to give the older daughter $5 for a present, as she was graduating from grammar school. He testified that plaintiff instructed the child to throw the money and letter with it out the window to him. Plaintiff testified that defendant came upstairs and started a disturbance, and that she called the police when he refused to leave the room. On August 5, 1937, in the absence of plaintiff, defendant entered one of the rooms which plaintiff kept locked for herself and the children, and removed a violin which had been pledged for a loan of $100 defendant had made to a friend. On plaintiff's return she found the closet in disorder and again called the police. On both occasions the officers left after talking with defendant.

As part of his defense of recrimination defendant also contends that plaintiff gave false testimony at the trial of the separate maintenance action as to the date they ceased living together as husband and wife. She alleged in her amended complaint therein that the date was March 8, 1937. As noted above, the court refused to proceed with the trial of that action on the testimony of defendant and the older daughter that the date was May 11, 1937, which was after the maintenance suit was filed. In the present action plaintiff testified that the date was in fact March 8, 1937, but that her complaint herein gave the date as May 11, 1937, in order to conform with the ruling of the court in the prior action.

[8, 9] The answer also averred, and defendant sought to prove, that plaintiff poisoned the mind of the older daughter against him, that she screamed and yelled at him and called him vile names. The trial court resolved all conflicts in the evidence in favor of plaintiff, and this court is bound by the findings of the trial court where the evidence is in conflict. While plaintiff's acts in summoning the police, in filing the insanity complaint against defendant, and in seeking an order restraining him from occupying the family dwelling may not have been fully justified, it cannot be held, as a matter of law, that thereby she forfeited her cause for divorce. These acts took place after the violent quarrel involving the bowl incident. Upon the evidence the trial court was warranted in concluding that it was defendant who provoked the unhappy domestic situation which culminated in that

incident, and that plaintiff, in her overwrought and disturbed state of mind following that occurrence should not be held to a standard of conduct to be expected of persons in a calmer mental and nervous state.

[10] Defendant further contends that a divorce should be denied his wife for the reason that when the action was brought the parties were still living in the same house. It is not disputed that the parties ceased living together as husband and wife before this action was filed. In fact, in his answer defendant alleges by way of recrimination that since May 21, 1937, when the suit was filed, plaintiff had refused to speak to him, that she locked herself in certain rooms of the house and refused to cook his meals or perform any duties of a wife. The evidence shows that she acted in this manner prior to May 21st, and the court found the date of separation to be May 11, 1937, as alleged in the complaint. The separation was clearly sufficient.

Defendant further objects to the form of the finding on his defense of recrimination. The finding is as follows:

"This court further finds that each and every, all and singular the allegations of defendant's answer to plaintiff's complaint, and the defendant's answer to the supplemental complaint of plaintiff on file herein, and particularly with reference to paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 17 of said supplemental answer of the defendant herein, and each and every one of the said above mentioned allegations of the said answer and supplemental answer of the said defendant herein, are untrue and not sustained by the evidence."

[11, 12] Findings by reference to allegations of the pleadings have been held sufficient. Stevens v. Stevens, 215 Cal. 702, 12 P.2d 432; Minnich v. Minnich, 127 Cal.App. 1, 15 P.2d 804; Stanton v. Stanton, 113 Cal.App. 462, 298 P. 524; 24 Cal.Jur. 986. Findings by reference to pleadings may be in such form that they are subject to particular objections, as, for example, where the finding is that all material allegations of a pleading are true, without indication of the allegations deemed material by the trial court. Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 P. 516; Perkins v. West Coast Lumber Co., 120 Cal. 27, 52 P. 118; 24 Cal.Jur. 989. But the finding in the instant case is not of this kind.

[13] Defendant is not entitled to a reversal of the judgment for plaintiff by reason of any failure to find as to paragraphs 5, 15 and 16. Paragraph 5 alleged that plaintiff sought an order to evict defendant from the family home, which the court refused. The evidence as to this matter is set forth above. Paragraph 15 refers to the incident of the violin, reciting that plaintiff called defendant a thief and summoned the police. Paragraph 16 avers that plaintiff had no appreciation for defendant's kind acts, averring that he had paid her fare to this country, erected the dwelling, procured the annuity policies and made a will in her favor. Had the court found that these paragraphs of the answer were true, the strongest possible assumption in favor of defendant, it would not require a reversal. The findings favorable to plaintiff, based on the allegations of her complaint, and the findings adverse to defendant based on the allegations of the answer, amply support the judgment of divorce even if those paragraphs were true.

[14] The effect of the general finding by reference to defendant's pleadings was also to find as untrue certain matters which were admitted. For example, it appears, without dispute, that plaintiff had defendant arrested for insanity on March 15, 1937, which fact is alleged in paragraph 3 of the supplemental answer. It is held above that plaintiff did not thereby forfeit her cause for divorce. Treating the general finding as a nullity in so far as its incidental effect is to find facts contrary to undisputed evidence, other facts found, for which there is support in the evidence, warrant the trial court's conclusion that plaintiff has proved grounds for divorce and defendant has not established the defense of recrimination.

The judgment is affirmed.

We concur: KNIGHT, J.; WARD, J.

46 Cal.App.2d 39

PEOPLE v. MARR.

Cr. 613.

District Court of Appeal, Fourth District, California.

July 14, 1941.

Hearing Denied Aug. 11, 1941.

1. Licenses 🔑18½

A certificate of interest, or participation in a corporation or association is a "security" which, under the Corporate Securities Act, may not be sold without a permit from the Corporation Commissioner of the state. St.1937, p. 1428, § 2(a), subd. 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Security".

2. Criminal law 🔑998
Licenses 🔑42(3)

Indictment charging accused with selling a security and certificate of interest in a certain corporation without having obtained a permit from the Corporation Commissioner of the state, stated a cause of action under the Corporate Securities Act and was not subject to collateral attack, on motion to vacate judgment of conviction.

3. Criminal law 🔑998

Where indictment was not so defective as to make judgment of conviction absolutely void on its face, the judgment was not subject to collateral attack, on motion to vacate the judgment.

4. Criminal law 🔑1134(10)

Where indictment was not void on its face, any errors or uncertainties could and should have been directly attacked before judgment or presented on appeal from the judgment, and were not reviewable on appeal from an order denying motion to vacate the judgment.

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Warren Marr was convicted of violating the Corporate Securities Act, and he appeals.

Affirmed.

Benjamin D. Frantz, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant pleaded guilty to two counts of an indictment charging him with violations of the Corporate Securities Act. Some two and one-half years later, he moved to vacate the judgment on the ground that the court had no jurisdiction to enter the same because neither count of the indictment stated a public offense. This appeal is from the order denying that motion.

Each count of the indictment alleged that the appellant at a certain time and place wilfully, unlawfully and knowingly sold to a certain person "a security and certificate of interest in the North American National Corporation" without the appellant "or anyone else" having obtained a permit from the Corporation Commissioner of this state. The appellant contends that no public offense was there stated. It is argued that the indictment does not allege the selling of a certificate of interest in a "profit sharing agreement" or a certificate of interest in an "oil, gas or mining title or lease" and that these are the only certificates of interest which are defined as securities in the Corporate Securities Act.

Subsection 7 of section 2(a) of the Corporate Securities Act, St.1917, p. 673, as amended by St.1937, p. 1428 at the time in question, reads in part as follows:

"The word 'security' shall include any stock, bond, note, * * * certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining title or lease, * * * any transferable share, investment contract, * * *".

[1] By its language this section defines a certificate of interest or participation as a security and then goes on to separately define as securities a "certificate of interest in a profit-sharing agreement" and a "certificate of interest in an oil, gas or mining title or lease". It cannot be held that the first of these definitions is meaningless or that it was intended to exclude all certificates of interest except those in profit-sharing agreements and those in oil, gas or mining titles or leases. The inclusion in the statutes of the words "certificate of interest or participation", in addition to the certificates of interest which are otherwise specifically mentioned, indicates an intention to include some other certificates of interest as securities. In view of the purpose of the entire act it is only reason-

able to suppose that it was intended by this portion thereof to define as a security a certificate of interest or participation in a corporation or association, which is one of the more common forms of the general kind of securities which the act was designed to cover.

[2] The appellant relies on People v. Davenport, 21 Cal.App.2d 292, 69 P.2d 862, in which the court held that an allegation that the defendant had sold an "investment contract" was not sufficient to state a cause of action since some investment contracts may lawfully be sold without obtaining a permit from the Commissioner of Corporations. There is a wide difference between an investment contract in general and a certificate of interest, and the case just cited is not controlling here. The indictment here in question, in the language of People v. Walther, 27 Cal.App.2d 583, 81 P.2d 452, 454, "states a public offense in the precise language of the statute in plain language sufficient to inform a person of common understanding of the exact offense with which the appellant is charged". In this case, the appellant was charged with selling a security and certificate of interest in the North American National Corporation. We think this was sufficient to state a cause of action under the Corporate Securities Act and it was certainly sufficiently specific to apprise the appellant of the precise thing with the selling of which he was charged. Nor can it be argued that he might have been merely selling his own property which had originally been issued and sold by another, since it was alleged that neither the appellant nor anyone else had obtained a permit from the Corporation Commissioner. While it may be conceded that the indictment is not a model the minor irregularities therein, if deemed material in any way, could and should have been directly attacked before or after judgment.

[3, 4] In our opinion, the indictment is not so defective as to make the judgment absolutely void upon its face and in such a situation the judgment may not be collaterally attacked. People v. Clark, 24 Cal.App.2d 302, 74 P.2d 1070. Not being void on its face, any errors or uncertainties could have been reached by appropriate action before judgment or presented on appeal from the judgment and are therefore, not reviewable on an appeal from an order denying a motion to vacate the judgment. People v. Ramirez, 139 Cal.App. 380, 33 P.2d 848.

The order appealed from is affirmed.

We concur: MARKS, J.; KELLY, J., pro tem.

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46 Cal.App.2d 1

PEOPLE v. FLUMERFELT et al.

Cr. 2179.

District Court of Appeal, First District,
Division 1, California.

July 10, 1941.

1. Criminal law ⚿1121(1)

The ground of appeal that defendants did not conspire to do anything unlawful, and that it was error to present conspiracy instructions to jury, must be based on claimed insufficiency of evidence to show a conspiracy, where no objection was made to form of instructions, and if evidence was sufficient to show defendants guilty of unlawful acts alleged, and was also sufficient to show that they were acting in concert and agreement in such acts, such contention would need no further consideration.

2. Criminal law ⚿814(2)

In prosecution for grand theft and violation of Corporate Securities Act, instructions relating to conspiracy were proper under evidence. St.1917, p. 673, as amended.

3. False pretenses ⚿49(1)
Licenses ⚿42(4)

Evidence supported conviction of defendants of one or more of acts charged under indictment for grand theft and violation of Corporate Securities Act in connection with sale of stock in gold recovery corporation. St.1917, p. 673, as amended.

4. Criminal law ⚿369(1), 376

Generally, prosecution is not only forbidden to prove another crime, but it may not introduce evidence designed merely to degrade and prejudice defendant before jury.

5. Criminal law ⚿1165(1)

Reviewing courts may not reverse a judgment of conviction unless there appears to have been a miscarriage of justice.

6. False pretenses ⚷41
Licenses ⚷42(4)

Where pretended success of dredging company, which was another project of one of defendants, was used as a sales argument to prospective investors in corporation involved in prosecution for grand theft and violation of Corporate Securities Act, it was proper to show true financial condition of dredging company and knowledge by defendants as to necessity of procuring from corporation commissioner a permit to sell stock. St.1917, p. 673, as amended.

7. Criminal law ⚷1169(1)

Assuming that there was only far-fetched connection between venture involved in prosecution for grand theft and violation of Corporate Securities Act and dredging company which was another project of one of defendants, no injury resulted to defendants from admission of evidence as to investment made by one of complainants in dredging company under circumstances. St.1917, p. 673, as amended.

8. Criminal law ⚷369(1)

In prosecution for grand theft and violation of the Corporate Securities Act in connection with sale of stock in gold recovery corporation, it was improper to question one of defendants relative to investigation of her activities in Mexican gold transaction, as distinguished from conviction of a felony. St.1917, p. 673, as amended.

9. Criminal law ⚷1169(11)

In prosecution for grand theft and violation of Corporate Securities Act in connection with sale of stock in gold recovery corporation, interrogation of one of defendants regarding investigation of her activities in Mexican gold transaction was not prejudicial under circumstances. St.1917, p. 673, as amended.

10. Criminal law ⚷1169(11)

In prosecution for grand theft and violation of Corporate Securities Act, admission of evidence of other business transactions and promotion ventures of two of defendants did not result in substantial injury in face of evidence which was amply sufficient to prove guilt of each of defendants. St.1917, p. 673, as amended.

◆

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Percy G. Flumerfelt and others were convicted of one or more of the acts charged under an indictment for grand theft and violation of the Corporate Securities Act St. 1917, p. 673, as amended, and they take a joint appeal.

Affirmed.

Leo A. Sullivan, of Oakland, and William A. Sullivan, of San Francisco, for appellants.

Earl Warren, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., and George C. Perkins, Deputy Dist. Atty., both of Oakland, for respondent.

WARD, Justice.

Appellants were indicted for grand theft and violation of the Corporate Securities Act, and a jury trial resulted in their conviction of one or more of the acts charged. They have taken a joint appeal from the judgment. There were nine counts in the indictment, four charging them with grand theft, and five with violation of the Corporate Securities Act. Appellants Flumerfelt and Ardelle were convicted on all nine counts; appellant King on all but the fifth (one of the counts of grand theft), and Fletcher on four counts of violation of the Corporate Securities Act, St. 1917, p. 673, as amended. Sentences were imposed against each, to run concurrently; and in addition, as to Flumerfelt and Ardelle, to run concurrently with a term of imprisonment imposed upon each for a similar offense in another county. People v. Flumerfelt, 35 Cal.App.2d 495, 96 P.2d 190.

It is contended that the evidence is insufficient to sustain the verdicts or support the judgments upon each count; that certain instructions on conspiracy were prejudicial error and that the appellants were not accorded a fair and impartial trial by reason of the admission of evidence concerning other transactions which they claim were not connected with the offenses charged.

[1] The ground of appeal, that the appellants did not conspire to do anything unlawful and that it was error to present conspiracy instructions to the jury, must be based upon the claimed insufficiency of the evidence to show a conspiracy, as no objection is made to the form of the instructions thereon. If the evidence is sufficient to show appellants guilty of the unlawful acts alleged in the indictment upon which each was found guilty, and if the evidence is also sufficient to show that

they were acting in concert and agreement in such acts performed, then this contention will need no further consideration.

[2, 3] The facts are as follows: Flumerfelt and Ardelle, operating as a partnership under the name of Ardelle-Flumerfelt Syndicate, were interested in a machine claimed to be a gold recovery machine, used to salvage any remaining gold in mine dumps or tailings. The evidence indicates that certain recovery was accomplished, but, contrary to the representations of these two, there was apparently nothing unusual, distinctive or secret about the machine, nor did they have a patent thereon. These appellants, together with an attorney, one John M. Cartwright, conceived a plan of using the machine to exploit the public through the organization of a corporation. In consideration of the transfer of the machine to such corporation, appellants King and Cartwright agreed to secure sufficient funds to acquire a mining dump near Angels Camp to be operated by the corporation. All of the parties were to receive "promotion stock" share and share alike, Ardelle and Flumerfelt to retain control of the corporation through a voting trust. Subsequently Fletcher became a party to the scheme through appellant King, in whose share of the promotion stock he was to participate. In accordance with their agreement, in May, 1937, Cartwright and King entered into a contract with one Steffa to purchase the Angels Camp mining dump for $10,000, but this contract was later rescinded because of Steffa's inability to convey title to the property. During the same month, Cartwright went to Oregon with the intention of purchasing a mining property for the corporation for the sum of $30,000 with an added $5,000 as secret compensation to be paid the attorney for the trustees of the mine in payment of his services in the matter. A down payment was made and some preliminary work performed, but no further payments were forthcoming and the trustees repossessed the property. Cartwright finally withdrew from the organization, and was not joined as a defendant herein, although appellants contend that his culpability was greater than theirs.

In the meantime, articles of incorporation were filed for an organization to be known as the American Metals Recovery Corporation. The five directors thereof included the nephew of appellant Ardelle, the wives of King, Fletcher and Cartwright, each under her maiden name, and one of the complaining witnesses in this case, who, at a meeting called for the organization of the corporation, was elected president thereof. It appears from the record that during this period appellants Ardelle and Flumerfelt were having some difficulty in connection with "some Mexican gold brick transaction" and were under investigation by the Federal authorities and the state corporation commissioner, for which reason it was thought inadvisable to use their names in connection with the new corporation.

The sale to the public of the stock in the corporation was camouflaged by pretended personal loans from investors. In return for an amount advanced, the investor received King's personal promissory note, also a promise of two shares of stock, in the corporation to be formed, for every dollar invested. At the same time, the investor signed a document, retained by the corporation, in which he declared himself about to become associated with others for the purpose of forming the American Metals Recovery Corporation, and agreeing to advance the designated sum of money to help finance its organization, and to take its corporate note for the amount when the incorporation should have been completed. Fantastic statements were made to the prospective investors—some, it is true, relating to future events—and promises of financial returns as high as two hundred per cent a month. It was also represented that appellants had a right to sell stock; that certain of them owned mine dump properties and that large amounts of gold had been extracted from other locations by the proposed method. All of these statements were untrue. Although certain "deals" for the acquisition of such properties were in process of negotiation, they were never completed and no permit to sell stock was ever obtained from the corporation commissioner or even applied for. When all other representations failed to induce the parties to invest, a demonstration of the machine was presented. One of the appellants made a statement to the chief of police of Palm Springs as follows: "* * * no patent could be obtained. The principle of the machine was so simple they could fool anyone who did not know the basic principles of physics. To the average person, he said, the machine was a mechanical mystery, when as a matter of fact, only a vacuum cleaner motor was needed for the bottom part to force the air through a cloth to set up a vibration." The representations relating to the future were interwoven with false statements of the present and the past. The appellants agreed by means of concerted action to defraud the investors. The conspiracy instructions were proper and the evidence upholds the verdicts of conviction.

[4, 5] There is more apparent substance in appellants' claim that the admission of evidence of other business transactions and promotion ventures of Flumerfelt and Ardelle was prejudicial to the rights of all appellants to a fair and impartial trial; but even the force of this argument dissolves and disappears after a thorough study of the record. The briefs indicate considerable admission of such evidence. In People v. Vertrees, 169 Cal. 404, 412, 146 P. 890, 893, the court said: "The general rule is that the prosecution is not only forbidden to prove another crime, but may not introduce evidence designed merely to degrade and prejudice the defendant before the jury." However, reviewing courts may not reverse a judgment of conviction unless there appears to have been a miscarriage of justice.

[6, 7] It is claimed that appellant Ardelle was interrogated relative to a $15,000 investment made by one of the complainants herein in another of her projects, namely, Gold Acres Dredging Company. The pretended success of the last named company was used as a sales argument to prospective investors in the corporation here involved. It was therefore proper to show the true financial condition of that company, and knowledge by the appellants as to the necessity of procuring from the corporation commissioner a permit to sell stock. Assuming that there was only a far-fetched connection between the present venture and the Gold Acres company, still no particular injury seems to have resulted to appellants from the admission of this evidence.

[8, 9] The assignment of error most worthy of consideration is that appellant Ardelle was interrogated regarding an investigation by the United States postal authorities of her activities in the Mexican gold transaction. It was improper to question her relative to an "investigation" as distinguished from a conviction of a felony. Objection to this line of questioning was sustained and the jury instructed generally not to consider for any purpose an offer of evidence not admitted. Appellants contend that "Although the learned trial court sustained objections to this latter line of questioning, nonetheless irreparable harm had been done to this defendant which no admonition from the bench could repair." In this respect, however, appellants Ardelle and Flumerfelt themselves introduced evidence that they had been convicted of a crime. In People v. Flumerfelt, supra, it appears that the charge of grand theft there alleged had to do with the purchase and sale of gold in Mexico, and that as the outgrowth of convictions in that case two of the appellants herein were actually serving time when the present case was tried. While the interrogation was improper, under all of the circumstances it does not appear that any of appellants were prejudiced thereby.

[10] The evidence in the present case, unlike that of People v. Braun, 14 Cal.2d 1, 92 P.2d 402, where it did not unerringly point to appellants' guilt, is amply sufficient to prove the guilt of each of the appellants herein, and in the face of such evidence it does not appear that any of them were substantially injured.

The orders and judgments are and each of them is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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45 Cal.App.2d 718

TRUESDAIL v. LEWIS et al.

Civ. 6594.

District Court of Appeal, Third District, California.

July 3, 1941.

Hearing Denied Aug. 28, 1941.

1. Quieting title 🔑34(1)

A complaint which alleged that defendant, who was one of incorporators of yeast company, and who held virtually all stock in company, agreed to give plaintiff, who was a research scientist and chemist, one-eighth of common stock of company if he would conduct all scientific and chemical experiments for his company and procure a $15,000 loan for company, that, upon representation that plaintiff's reports would have greater weight with public if his name did not at first appear as a stockholder, stock was issued to defendant under agreement to transfer stock to plaintiff at later time, that plaintiff performed his part of agreement, and that thereafter defendant procured a purported relinquishment of plaintiff's interest in stock by means of fraud, sufficiently stated a good cause of action to quiet title to stock, on ground that facts alleged constituted either a voluntary or an involuntary trust. Code Civ. Proc. § 738; Civ.Code, §§ 2221, 2223, 2224.

2. Quieting title ⚷19

Where complaint seeking to quiet title to stock in company alleged that defendant obtained a purported relinquishment of plaintiff's interest in stock for $2,000 by means of fraud, plaintiff was not required to tender the $2,000 which he received in such transaction as a prerequisite to maintenance of the suit, but the court in its final determination might properly pass title to stock in plaintiff subject to his paying defendant the money which he received on the alleged void transaction. Code Civ.Proc. § 738.

3. Limitation of actions ⚷103(2)

The statute of limitations does not begin to run in case of a voluntary trust until defendant repudiates the trust or at least until owner of property has knowledge of trustee's intention to repudiate the trust.

4. Limitation of actions ⚷103(2, 4)

In case of an involuntary trust, the statute of limitations begins to run, regardless of the repudiation thereof, from time when the wrongful or fraudulent acts are performed by trustee, except that statute is tolled as to owner of property until he actually acquires knowledge of the wrongful acts, or, by exercise of reasonable care, until he is charged with such notice.

5. Limitation of actions ⚷179(2)
Quieting title ⚷29

Where complaint, seeking to quiet title to stock in company incorporated April 18, 1931, alleged that stock was issued by corporation to defendant under agreement between plaintiff and defendant that defendant was to transfer stock to plaintiff at later time, that defendant never affirmatively repudiated his trust, that in May, 1936, defendant procured a purported relinquishment of plaintiff's interest in stock by means of fraud, and that such fraud was not discovered by plaintiff until December 19, 1939, and the suit was commenced within a few months after date on which alleged fraud was discovered, complaint did not show on its face that it was barred by statute of limitations or "laches", regardless of whether facts alleged constituted a voluntary or involuntary trust. Code Civ.Proc. § 738; Civ.Code, §§ 2221, 2223, 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

* * *

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Roger W. Truesdail against Lawrence W. Lewis and another to quiet title in shares of stock of a company, and to establish a trust therein in favor of plaintiff. From a judgment for defendant, after demurrer was sustained to plaintiff's complaint, plaintiff appeals.

Reversed, with directions to overrule demurrer.

Snow & Forster and Morton L. Barker, all of Los Angeles, for appellant.

Stick & Moerdyke and S. Arion Lewis, Jr., all of Los Angeles, for respondents.

THOMPSON, Justice.

The plaintiff has appealed from a judgment which was entered against him pursuant to an order sustaining a demurrer to the third amended complaint without leave to amend the pleading.

This is a suit to quiet title to 625 shares of the common stock of California Yeast Products Corporation, Ltd., and to declare that the defendant, Lawrence W. Lewis, holds the stock in trust for plaintiff. The third amended complaint alleges that plaintiff is a research scientist and chemist who has had thirteen years of experience in that work; that the California Yeast Products Corporation, Ltd., was incorporated April 18, 1931, with 5,000 shares of common stock of the par value of $1 each; that its principal place of business was Los Angeles and that the defendant, Lawrence W. Lewis, was one of the incorporators of the company, a member of the board of directors, president and general manager thereof; that he was virtually the alter ego of the corporation which was engaged in conducting, improving and producing a yeast enterprise, together with the by-products thereof; that on June 18, 1931, the corporation was duly authorized to issue and sell 5,000 shares of the common stock of the company at $1 per share, and that 4,998 of said shares were issued to the said Lewis, who ever since said time has been and now is the record owner and holder thereof; that the defendant Lewis agreed with plaintiff that if he would conduct all scientific and chemical experiments for the improvement and production of by-products and better methods of handling the yeast and procure a $15,000 loan for the corporation he would be given one-eighth of the common stock of the corporation and become a shareholder thereof "as soon as the shares were issued"; that the said Lewis told plaintiff his reports on such products would have far greater weight with the public if his name did not at first appear as a stockholder of the company, and that his shares of the stock would be issued to Lewis, who would hold them for plaintiff and transfer them to him at a later time, which was agreed upon; that in reliance upon that agreement plaintiff continuously performed services of that nature until the latter part of 1934 and succeeded in procuring the $15,000 loan mentioned; that on November 5, 1931, Mr. Lewis signed a written agreement to transfer to the plaintiff 50 shares of the stock as soon as it was issued by permission of the corporation commissioner; that the plaintiff often demanded of Lewis the issuance and delivery of his capital stock, but that said defendant fraudulently told him the stock had never been issued; that in May, 1936, the said Lewis falsely and fraudulently informed the plaintiff that the company and all of its assets had been sold for $85,000, but that there were a large number of debts of the company which must be first paid, after which the plaintiff's net share in the assets of the corporation would amount to only $2,500, upon which Lewis was compelled to pay $500 in taxes; that relying upon those statements the plaintiff accepted the check of Mr. Lewis for $2,000 and gave him a receipt in full for his entire interest in the corporation; that all of the said statements of Lewis were false and fraudulent as he well knew; that only a portion of the assets of the company had been sold and that "the stock owned by plaintiff and standing of record in the name of defendant Lewis was not sold by said defendant, but is still held by him". Thereupon the prayer asks for a decree determining that plaintiff is the owner of 625 shares of the common stock of the company in the hands of Lawrence W. Lewis; that he be declared to hold the same in trust for plaintiff and that he be required to transfer the stock to plaintiff as the owner thereof.

Many other facts and circumstances of the transaction are alleged, which we think are not necessary to relate in determining this appeal. The complaint is involved and lengthy. Probably many immaterial facts have been alleged. Primarily it is a suit to quiet title to 625 shares of stock, which are alleged to be held by Mr. Lewis in trust for the plaintiff. Incidentally, the complaint charges that Lewis procured the plaintiff's settlement of his entire claim of interest in the company, represented by his 625 shares of stock, by means of fraud. If that be true, the purported settlement of plaintiff's claim to an interest in the stock and company is absolutely void.

[1] We are of the opinion the third amended complaint states a good cause of action under section 738 of the Code of Civil Procedure to quiet title to 625 shares of the common stock of the California Yeast Products Corporation, Ltd., alleged to be held in trust by the defendant, Lawrence W. Lewis. McAlvay v. Consumers' Salt Co., 112 Cal.App. 383, 297 P. 135. The facts of the McAlvay case were quite similar on principle to those of the present case. In that case V. E. Stockwell was a stockholder and president of the Consumers Salt Company. Two hundred and twenty-five thousand shares of the stock were issued to him and stood in his name. The plaintiff claimed title to the stock by virtue of an execution sale thereof. Stockwell claimed he was the owner of the stock. The stock had been purchased in the name of Mrs. Greenleaf, the mother-in-law of Stockwell. Plaintiff brought suit to quiet title to the stock. The court held that while the stock was originally purchased in the name of Mrs. Greenleaf she merely held it in trust for her son-in-law who was the real owner, and that the plaintiff acquired title thereto by virtue of the execution sale. Judgment was rendered quieting title to the stock in plaintiff. On appeal that judgment was affirmed.

[2] The complaint in the present suit contains all the necessary allegations to constitute a good cause of action to quiet title to personal property. The allegations to the effect that Lewis merely held the stock in trust for the plaintiff, and that he procured a purported relinquishment of plaintiff's interest therein by means of fraud, are merely incidental to the suit to quiet title to the stock. The chief issue is whether Lewis or the plaintiff owns the

625 shares of stock which stand in Lewis' name. This is not a suit to rescind the purported settlement of plaintiff's interest in the stock. It is alleged that settlement was procured by fraud and that it is therefore void. The plaintiff neither sold nor transferred his stock to Lewis. It is not necessary that the plaintiff should tender to Lewis the $2,000 which he received in that transaction as a prerequisite to the maintenance of this suit to quiet title. Lewis is not prejudiced by failure to return the $2,000. In the final determination of the suit the court may properly quiet title to the stock in plaintiff, subject to his paying Lewis the money which he received on a void transaction.

All of the necessary elements constituting a voluntary trust of the stock in Lewis are alleged as required by section 2221 of the Civil Code. The complaint also sufficiently alleges facts showing that Lewis fraudulently acquired and holds the stock as an involuntary trustee under sections 2223 and 2224 of the Civil Code. 12 Cal. Jur. 806, sec. 64.

[3-5] The complaint does not show on its face that the action is barred by the statute of limitations. It is alleged that Lewis never did affirmatively repudiate his trust, and, upon the contrary, that when plaintiff demanded his stock he was repeatedly told that he would receive it as soon as it was issued by the corporation. It is also alleged that plaintiff did not discover the fraud with respect to the alleged sale of the corporation assets, upon the basis of which alleged false statements the purported settlement was procured, until December 19, 1938. This suit was commenced within a few months thereafter. The rule is well established that the statute of limitations does not begin to run in the case of a voluntary trust until the defendant repudiates the trust or at least until the owner of the property has knowledge of the trustee's intention to repudiate the trust. Leviston v. Tonningsen, 212 Cal. 656, 664, 299 P. 724; 25 Cal.Jur. 271, sec. 133. In the case of an involuntary trust the statute of limitations begins to run, regardless of repudiation thereof, from the time when the wrongful or fraudulent acts are performed by the trustee, except that the statute is tolled as to the owner of the property until he actually acquires knowledge of the wrongful acts, or, by the exercise of reasonable care, until he is charged with such notice. Neilsen v. Neilsen, 216 Cal. 150, 13 P.2d 715; 25 Cal.Jur. 274, sec. 135. Regardless of whether the facts alleged in the present case constitute a voluntary or an involuntary trust, it does not appear that the statute of limitations bars the action.

For the foregoing reasons it does not appear from the allegations of the complaint that the action is barred by laches.

The judgment is reversed and the trial court is directed to overrule the demurrer and permit the defendants to answer the third amended complaint.

We concur: PULLEN, P. J.; TUTTLE, J.

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46 Cal.App.2d 21

MacKAY v. DARUSMONT et al.

Civ. 2762.

District Court of Appeal, Fourth District, California.

July 10, 1941.

1. Husband and wife 🔑264

Evidence failed to establish that husband agreed to transmute his separate property into community property, so as to entitle wife to maintain action to set aside deed to the property executed by husband on ground that the property was community property and that the wife had not joined in the deed.

2. Husband and wife 🔑266

Under codal provision, a wife may convey her interest in realty to her husband whether the interest is community or otherwise. Civ.Code, § 172a.

3. Husband and wife 🔑267(1)

The codal provision requiring wife to join husband in executing any instrument by which community realty is conveyed was designed to protect a wife's community interest where the property stands in the name of her husband, and does not apply to property taken in the name of husband as his separate property with wife's knowledge, consent and active participation. Civ.Code, § 172a.

4. Husband and wife ⚷267(9)

In order to entitle a wife to set aside conveyance of community property executed by husband alone and to recover the property, wife must establish that it was community property, and the general circumstances must be such as do not affirmatively show that the wife is estopped from attacking the transfer. Civ.Code, § 172a.

5. Husband and wife ⚷265½

Where wife enabled and caused record title of property to be placed in name of husband as his separate property, and had knowledge of sale of the property by husband to third parties, and of the consideration that the third parties were paying to the husband, and although the wife talked to the third parties on several occasions she did not claim a community interest in the property, and the wife surrendered possession to the third parties, the wife upon being deserted by her husband was "estopped" from attacking the record title and claiming the conveyance to be void because the property was community property and the wife did not join in execution of the deed.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

6. Husband and wife ⚷270(7)

Where facts were pleaded constituting an estoppel against wife who sought to set aside deed executed by husband alone on ground that it conveyed community realty, and wife had not joined therein, the grantees were entitled to rely on the estoppel even though estoppel was not pleaded in express terms.

7. Husband and wife ⚷270(8, 9)

Findings that husband acquired property at close of an escrow, that wife executed and delivered to husband quitclaim deed covering the property, that husband conveyed property to third parties for valuable consideration, that in the meantime the property had stood in the name of the husband as his separate property at all times, and that the third parties acquired the property without notice of alleged community interest of the wife and in reliance on her quitclaim deed were sustained by evidence and were sufficient to support judgment refusing to set aside the husband's deed on ground that it conveyed community realty, and that the wife had not joined therein. Civ.Code, § 172a.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Gwendolen MacKay against Milton S. Darusmont and others to set aside a deed. From an adverse judgment, plaintiff appeals.

Affirmed.

Lowenthal & Elias, of Los Angeles, for appellant.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondents.

BARNARD, Presiding Judge.

This is an action to set aside a deed on the ground that it conveyed community real property and that the wife had not joined therein. From a judgment in favor of the defendants, the plaintiff has appealed.

There is no dispute as to the material facts. The appellant was employed by Dr. T. A. MacKay in his dental office for some eighteen months prior to February 20, 1937. On that date they went through a marriage ceremony in Yuma, Arizona. MacKay's former wife had obtained an interlocutory decree of divorce in the superior court of Los Angeles county on February 19, 1936. A final decree in that action was not entered until February 23, 1937. On April 20, 1939, after an answer had been filed in this action raising the question as to whether this appellant was legally married to MacKay, another final decree was entered in the divorce action nunc pro tunc as of February 20, 1937.

On April 24, 1937, an escrow was opened with a bank by MacKay as buyer and one Nelson as seller, through which MacKay purchased the property here in question. MacKay's instructions provided that the money he placed in escrow was to be used provided a policy of title insurance was procured showing title vested in him, a married man, as his separate property. The appellant placed in this escrow a quitclaim deed to this property which she had signed under date of April 24, 1937, and acknowledged May 1, 1937, which quitclaimed the property to "Tim Adolph MacKay, a married man, as his separate property". She also handed the escrow bank a letter dated April 24, 1937, in which she stated: "I herewith hand you a quitclaim deed executed by Gwendolyn MacKay to Tim Adolph MacKay, a married man, as his separate property describing (here follows description of property) which you are authorized to use upon the order of Tim Adolph MacKay without collection for my account, as I have received full consideration therefor outside of escrow". In closing this escrow this quitclaim deed and a deed from the Nelsons conveying the property to "Tim Adolph MacKay as his separate property" were recorded on May 13, 1937. It appears, without conflict, that the full consideration for this lot, $5,787.50, was paid in cash out of funds belonging to MacKay as his separate property.

On June 22, 1937, MacKay borrowed $7,000 from the respondent bank, securing the loan by a deed of trust on this property, in the execution of which the appellant did not join. The proceeds of this loan were used to build a combined dental office and residence upon the lot. MacKay and the appellant moved into the building on October 20, 1937, and lived there until May 11, 1938, when they surrendered possession to the respondents Darusmont.

The respondents Darusmont, who had not previously known the MacKays, purchased the property through a real estate agent with whom MacKay had placed it for sale, paying $20,000 for it, a part of this being obtained through a new loan made by the respondent bank after cancellation of the prior trust deed given to this bank by MacKay. The negotiations for the sale to Darusmont which began in February, 1938, were delayed some weeks while a change in zoning regulations was obtained. The escrow in this connection was closed on April 23, 1938, and about six months later MacKay deserted the appellant. Thereafter, and within a year from the conveyance of the property to the respondents Darusmont, this action was brought.

The appellant testified that she talked to MacKay about the purchase of this lot and the manner in which it was to be paid for before he bought it and that she knew that it was to be paid for with his separate funds. With respect to the sale of the property to the respondents Darusmont she testified that she had talked to MacKay about selling the property; that MacKay said he wanted to give up his practice and get away; that MacKay then talked to the real estate man in her presence, saying, "My price is going to be Twenty Thousand"; that respondents Darusmont then came to the property and she was introduced to them as the wife of MacKay; that she showed them over the building; that she talked to them a number of times before the deal was closed; that she did not ask any questions or say anything to them about the payment of the consideration; and that after the deal was closed "I had to get myself organized and get out of the house so they could take possession on the 15th of May, 1938."

While this property was originally purchased with separate funds belonging to MacKay, appellant's contention that it was transmuted into community property is based upon evidence of certain oral statements claimed to have been made by MacKay. The appellant testified in this connection that MacKay had promised to build a home "on the Palisades" and that she need not work after their marriage; that shortly after their marriage MacKay took her to see the lot in question and told her that if she continued to work in his office and give up the idea of building a home on the Palisades "he would build very lovely new offices, including a residence"; that she asked MacKay how they could build this building if they could not build a home; that he replied that he would use his money to buy the lot and that "I will throw it into the jack pot providing you will work with me and we will work together. You will continue with the office. We will work together, clean up the debts which we will have to borrow from the bank; and if you will do that with me, then we will have this debt cleaned up very quickly"; and that she agreed to do this and thereafter worked in the office when she was able. There was also evidence that on several occasions while they were living on the property MacKay had spoken of it to others as being the property of himself and the appellant.

With respect to the merits of the appeal the appellant argues that it conclusively appears that this was community property; that her quitclaim deed passed only such interest in the property as she possessed at the time of its execution but not the interest she later acquired when the escrow was closed and the property was acquired by MacKay; that he then acquired it as community property, although the record title was in his name; and that the respondents Darusmont could not be bona fide purchasers because they knew she was MacKay's wife and, under section 172a of the Civil Code, there is no presumption of the validity of a deed given under such circumstances.

[1] We think it does not conclusively, or at all, appear that this property became the community property of MacKay and the appellant. Without question it was purchased by separate funds. MacKay's statement that he would put his money into the jack pot providing the appellant would work with him and that they would work together and soon pay off the money borrowed to erect the building, with his subsequent statements to others to the effect that he and his wife owned the property, constitutes rather weak evidence of an agreement to transmute separate property into community property. He did not do any such thing but in his escrow instructions provided that his money was to be used to secure a conveyance of the lot to him as his separate property. The appellant had full knowledge of this and acquiesced by putting her quitclaim deed into the escrow with instructions that it was to be used at MacKay's order without collection for her, and with the statement that she had received full consideration outside of the escrow. With her knowledge and consent and active participation, the record title of the lot was placed in the name of MacKay as his separate property. She placed her quitclaim deed in escrow and permitted it to be used in connection with the acquisition of this lot by MacKay for the very purpose of enabling him to acquire it as separate property. None of the papers in the escrow were to be used until the escrow was closed in accordance with the instructions, which were to the effect that the property was to be conveyed to MacKay as his separate property. The effective date of the papers was when they were recorded and the quitclaim deed was placed in escrow with the intention that it should apply to and be used in connection with the acquisition of this very property as the separate property of MacKay. MacKay had no interest in the property until the escrow was closed and, whatever the appellant's interest in the property was, it was then conveyed by her to MacKay with the specific provision that it was to be his separate property. The appellant had no after-acquired interest in this property, community or otherwise, which survived the delivery and use of this quitclaim deed.

[2-6] Section 172a of the Civil Code provides that none of its provisions shall be construed to apply to a conveyance between husband and wife. It must have been intended thereby to permit a wife to convey her interest in property to her husband whether that interest was community or otherwise. Section 172a was apparently designed to protect a wife's community interest where property stands in the name of her husband. We may assume that it would apply to property which is actually community property but which has been placed of record in the husband's name as his separate property without the wife's knowledge or consent. It would be unreasonable to hold, however, that it was intended to apply to property taken in the name of the husband as his separate property not only with his wife's knowledge and consent but by her active participation and, in fact, through a conveyance from her to her husband which she has signed, acknowledged and delivered for the very purpose of creating a record title in him as his separate property. Regardless of any presumption provided for in section 172a a wife, in order to set aside a conveyance to another and recover such property, must establish that it was community property and the general circumstances must be such as do not affirmatively show that she is estopped from attacking the transfer. Mark v. Title Guarantee, etc., Co., 122 Cal. App. 301, 9 P.2d 839. Section 172a was never intended to serve as a weapon by which a wife may defraud an innocent buyer after having herself misled him. While the appellant is appealing to a court of equity she does not come in with clean hands. While she alleged in her complaint that the conveyance was made without her knowledge or consent, the undisputed evidence indicates the contrary. She enabled and caused the record title of this property to be placed in the name of MacKay as his separate property, she knew all about the sale to the respondents Darusmont, knew the consideration they were paying to her husband, talked with them on several occasions but did not tell them of her claim to a community interest, and when the deal was finally closed she surrendered possession to them without a word, and it was not until after her husband deserted her that this claim was raised. Under the circumstances here appearing it must be held that this lot never became the community property of MacKay and this appellant, and that she is now estopped from attacking the record title relied upon by the respondents and which she was instrumental in creating. While estoppel was not pleaded in express terms

the facts constituting an estoppel were pleaded. Under the circumstances here appearing this is sufficient. Burrow v. Carley, 210 Cal. 95, 290 P. 577; Johnson v. Schimpf, 197 Cal. 43, 239 P. 401.

[7] The appellant further contends that the court failed to make findings on material issues, that the judgment is not supported by the findings as made, and that the findings are not supported by the evidence. It is argued that the court did not find whether or not this was community property, that since the court did not find that the respondents Darusmont purchased the land without knowledge that the appellant was the wife of MacKay the judgment cannot be supported, and that under section 172a of the Civil Code a number of the findings that were made are immaterial. The court found that MacKay and the appellant were husband and wife; that MacKay acquired the property from the Nelsons at the close of the escrow on May 13, 1937; that the appellant executed and delivered to MacKay a quitclaim deed covering the property; that MacKay conveyed the property to the respondents Darusmont for a good and valuable consideration; that in the meantime the property had stood in the name of MacKay as his separate property at all times; and that the respondents Darusmont acquired said property from MacKay without notice of the community interest, if any, of the appellant and in reliance upon her quitclaim deed. The court also found that the appellant received no consideration for the execution of her quitclaim deed, and that as between herself and MacKay this deed did not divest her of any interest she had in the property. Doubtless this finding was made in an effort to protect the appellant in any controversy she might have with MacKay, but it in no way detracts from the other findings which are material here as between the appellant and these respondents. It is argued that the finding that in purchasing this property the respondents Darusmont relied upon the appellant's quitclaim deed is not supported by the evidence. While Mr. Darusmont testified that he had not seen this deed and knew nothing of it, he also testified that he purchased the property through an escrow and relied upon the record title as reported by the title company. This finding is sufficiently sustained for the purpose of this action. The material findings are supported by the evidence and the findings, as made, are sufficient to support the judgment. Under the circumstances, it would serve no useful purpose to consider in detail all the technical points raised by the appellant or to go into the question as to whether the appellant was ever legally married to MacKay.

The judgment is affirmed.

We concur: MARKS, J.; KELLY, J. pro tem.

46 Cal.App.2d 59

PEOPLE v. PRICE.

Cr. 465.

District Court of Appeal, Fourth District, California.

July 15, 1941.

Hearing Denied Aug. 11, 1941.

1. Indictment and Information 🔑57

The various provisions of the statute for simplifying pleadings in criminal cases and providing among other things that statement of offense may be in any words sufficient to give accused notice of offense of which he is accused, are "permissive" and "directory" and not "mandatory". Pen.Code, § 952.

See Words and Phrases, Permanent Edition, for all other definitions of "Directory", "Mandatory" and "Permissive".

2. Larceny 🔑33

An information alleging that stolen property was taken from the person of a designated individual was a sufficient allegation that the stolen property was in possession of that individual at time of its taking. Pen. Code, § 484.

3. Larceny 🔑32(1)

It is an essential element of "larceny" that thing which is taken and carried away shall be the property of another, but exact status of legal title to the property need not be meticulously charged. Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny".

4. Larceny 🔑7, 8

"Ownership" and "possession" as an element of larceny may be regarded as synonymous terms, since one who has right of possession as against thief is, so far as the latter is concerned, the owner. Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Ownership" and "Possession".

5. Larceny ⚿65

Evidence sustained conviction of grand theft. Pen.Code, § 484.

6. Criminal law ⚿1186(4)

In prosecution for grand theft, where it was alleged that certain property was taken from the person of a designated individual, and evidence that the stolen property belonged to that individual was received without objection, and evidence demonstrated guilt beyond the possibility of doubt, failure to charge in information that the stolen property was the personal property of another, which is part of the definition of the crime of theft, was not reversible error. Pen. Code, §§ 484, 952; Const. art. 6, § 4½.

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Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Earby Price was convicted of grand theft, and he appeals.

Affirmed.

Hervey and Holt, of San Diego, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from a judgment pronounced on defendant after his conviction of the crime of grand theft.

Defendant argues as his sole ground for reversal of the judgment that the information filed against him does not state facts sufficient to constitute a public offense. He did not question the sufficiency of the information in the trial court.

The charging part of the information is as follows:

"Earby Price is accused by the District Attorney of the County of San Diego, State of California, by this information of the crime of grand theft from the person committed as follows: The said Earby Price on or about the 14th day of February, 1941, at the said County of San Diego, State of California, and before the filing of this information did then and there wilfully, unlawfully and feloniously take from the person of one Burdette Cleary, a yellow gold man's Gruen wrist watch, $60.00 in lawful money of the United States, a check for $600.00 lawful money of the United States, and a check for $30.00 lawful money of the United States."

It should be observed that it is not alleged that the stolen property was "the personal property of another" which is part of the definition of the crime of theft. Sec. 484, Penal Code. Thus, we have here an example of very careless pleading which would have required a reversal of the judgment prior to the amendments of section 952 of the Penal Code in 1927 and 1929. See People v. Hanselman, 76 Cal. 460, 18 P. 425, 9 Am.St.Rep. 238; People v. Ammerman, 118 Cal. 23, 50 P. 15; People v. Cleary, 1 Cal.App. 50, 81 P. 753; People v. Mills B. Sing, 42 Cal.App. 385, 183 P. 865.

The Attorney General relies on such cases as People v. Covington, 1 Cal.2d 316, 34 P.2d 1019, and People v. Dozier, 35 Cal.App.2d 49, 94 P.2d 598, to support the sufficiency of the information. Those cases hold that the allegation that the stolen property was the property of another, which was omitted from those pleadings, did not render them fatally defective. Those were cases of robbery, which crime consists of taking personal property in the possession of another from his person or immediate presence by means of force or fear. Sec. 211, Penal Code. Thus one element of that offense is the breach of the right of possession, not of the ownership of personal property. It follows that decisions in robbery cases are not very helpful here.

[1] Section 952 of the Penal Code was passed to simplify pleadings in criminal cases and to remove many technicalities formerly required in them. It is there provided that the statement of the offense may be "* * * in any words sufficient to give the accused notice of the offense of which he is accused. * * *" The various provisions of the section are permissive and directory and not mandatory. They do not direct what must be alleged in a pleading but indicate rather broadly the form a pleading may follow.

A reading of the transcript demonstrates that defendant suffered no prejudice from the form of the pleading. He knew the exact offense of which he was accused. Evidence that the stolen property belonged to Cleary was received without objection.

There is no contrary evidence and defendant claimed no interest in it. It would be a travesty on justice to reverse the judgment because of the carelessness on the part of the pleader in omitting the allegation that the stolen property was "the personal property of another".

[2-4] Further, the information alleges that the stolen property was taken "from the person of one Burdette Cleary". This is a sufficient allegation that the stolen property was in the possession of Cleary at the time of its taking. In discussing this same subject in People v. Brunwin, 2 Cal. App.2d 287, at page 297, 37 P.2d 1072, at page 1077, it was said:

"It is an essential element of the crime of larceny that the thing which is taken and carried away shall be the property of another. 18 Am. & Eng. Encyc. of Law (2d Ed.) p. 498. But the exact status of the legal title to the property need not be meticulously alleged in the pleading which charges the commission of the offense. 'Considered as an element of larceny, "ownership" and "possession" may be regarded as synonymous terms; for one who has the right of possession as against the thief is, so far as the latter is concerned, the owner.' People v. Edwards, 72 Cal.App. 102, 116, 236 P. 944, 950. It is, after all, a matter of no concern to a thief that legal title to the stolen property is not in the complainant. People v. Edwards, supra. It is essential that the pleading which charges the commission of the crime of larceny shall contain an averment that the property which is the subject of the offense is not the property of the defendant. People v. Nunley, 142 Cal. 105, 75 P. 676; People v. Mills B. Sing, 42 Cal.App. 385, 395, 183 P. 865. 'Possession alone, as against the wrongdoer, is a sufficient interest to justify an allegation and proof of ownership in a prosecution for larceny.' People v. Kirsch, 204 Cal. 599, 602, 269 P. 447, 449."

Further, this is a case, if one can be found, where we should apply the provisions of section 4½ of Article VI of the Constitution that "No judgment shall be set aside, or new trial granted, in any case * * * for any error as to any matter of pleading * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[5] The evidence demonstrates the guilt of defendant beyond the possibility of doubt. His own evidence when called as a witness in his own behalf is more than sufficient to demonstrate his guilt.

Defendant with three youths and two young girls had been out on a drinking party. They picked up Cleary who also had been drinking, at the corner of Ray Street and University Avenue in San Diego, at about 1 o'clock on the morning of February 14, 1941. Cleary bought the young people a quart of whiskey. The automobile was driven to a spot on Florida Street near a canyon. Defendant charged Cleary with undue familiarity with one of the girls and admitted striking him twice. Cleary was forced from the automobile and cruelly beaten. His injuries included a broken jaw bone. After the beating he was thrown or rolled through brush to the bottom of the canyon. His personal property remained with some of the young men though defendant denied taking any of it from Cleary's possession. He admitted that in his presence the currency and the checks were taken from Cleary's billfold which was thrown away. He admitted that the $30 check was cashed by one of the other men at a service station near Oceanside and that he was given $5 of the money obtained in this manner.

[6] This evidence forces the conclusion that the error in the pleading has resulted in no miscarriage of justice.

The judgment is affirmed.

We concur: BARNARD, P. J.; KELLY, J. pro tem.

46 Cal.App.2d 7

BERTRAND v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 12455.

District Court of Appeal, Second District, Division 1, California.

July 10, 1941.

Rehearing Denied Aug. 1, 1940.

Hearing Denied Sept. 4, 1941.

1. Appeal and error 🔑1071(6)
Trial 🔑388(1)

Findings are required on all material issues raised by the pleadings and evidence unless they are waived, and a judgment rendered by court without making such findings must be reversed.

2. Appeal and error 🔑1071(6)

Where conflicting medical testimony concerning plaintiff's ability to work was presented by plaintiff and defendant and testimony of a physician appointed by the court was taken on that issue, the trial court's failure to make a separate finding on the issue of time lost by plaintiff from her regular employment as result of accident was error, and plaintiff was entitled to reversal of judgment which she contended awarded her insufficient damages, and to a new trial on issue of damages, notwithstanding reviewing court's power in an appropriate case to make findings of fact contrary to, or in addition to those made by the trial court. Code Civ. Proc. §§ 632, 633, 956a; Const. art. 6, § 4¾.

3. Appeal and error 🔑1071(6)
Trial 🔑388(1)

Trial court must make full findings on all material issues raised by the pleadings and evidence, and failure to make finding on a material issue results in prejudicial error entitling complaining party to reversal if it appears from record that there was evidence introduced as to such issue, and the evidence was sufficient to sustain a finding in favor of such party. Code Civ.Proc. §§ 632, 633.

4. Appeal and error 🔑1122(2)

Reviewing courts are vested with authority to determine, without additional expense and loss of time, whatever justice may require in any case submitted to them when conditions warrant such action, but the rule requiring finding of material issues has not been abrogated, and whether it is feasible for reviewing court to exercise the power to make findings of fact contrary to, or in addition to those made by the trial court, must always depend upon the situation presented by each appeal. Code Civ.Proc. §§ 632, 633, 956a; Const. art. 6, § 4¾.

DORAN, Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Frederick E. Bertrand against the Pacific Electric Railway Company and others for injuries sustained by the plaintiff as she was alighting from a street car. From a judgment for the plaintiff for $963.05, the plaintiff appeals.

Reversed and remanded for new trial on question of amount of damages sustained by the plaintiff.

Rehearing denied; Doran, Acting P. J., dissenting.

Mayock & Lester, of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, E. E. Morris, and O. O. Collins, all of Los Angeles, for respondents.

DESMOND, Justice pro tem.

Plaintiff appeals from a judgment awarding her the sum of $963.05 and asks that the cause be remanded for a new trial upon the sole question of damages, claiming that "the court erred in finding that the sum of $963.05 was a reasonable sum to be allowed plaintiff for general and special damages, in that there is insufficient evidence to support said finding", also that error arose when the court found an aggregate sum for damages and refused "to make separate findings on the various items of special damage which were specially pleaded and denied by the defendants and which were in part stipulated to at the trial and in part proved by uncontradicted evidence".

The action was one for injuries received by appellant as she was alighting from a street car operated by respondent, and the finding which gives rise to this appeal reads as follows: "That by reason of the negligence and injuries received as aforesaid, plaintiff has expended certain funds for hospitalization, doctors, medical and nurse service, and that by reason thereof, and loss of time, and pain suffered by plaintiff, the plaintiff has been damaged in the aggregate sum of $963.05, which the court finds to be a reasonable sum."

At the trial the following items of special damage were stipulated to be correct: Hospital bill, $125.95; ambulance, $2.50;

nursing, $164.60. Dr. Macklin testified that his bill amounted to $78. The total of these items is $371.05. Just how much of the balance, $592, the trial court estimated was due "for loss of time" mentioned in the finding, or for "pain suffered by the plaintiff", is a matter of speculation; although there is a statement in appellant's opening brief undenied by respondent that the trial judge indicated before the judgment was prepared that the items making up the total included those stipulated to as correct, aggregating $289.05, Dr. Macklin's bill $70, loss of earnings $100, and general damage $500, making the total $963.05; that later, when presented with findings showing plaintiff's inability would extend to a date two years after the accident, and that her earning capacity was $20 per week, the judge refused to adopt them but made the finding to which exception is taken and which lumps the general and special damage.

[1] Because the trial court failed to segregate financially the items "loss of time" and "pain" in his estimate of damage and to make a separate finding as to how much time was lost by appellant from her regular employment, she claims a proper cause for reversal, relying upon several cases including James v. Haley, 1931, 212 Cal. 142, at page 147, 297 P. 920, at page 922, where the court said: "Ever since the adoption of the Codes, it has been the rule that findings are required on all material issues raised by the pleadings and evidence, unless they are waived, and, if the court renders judgment without making findings on all material issues, the case must be reversed." 24 Cal.Jur. p. 935, sec. 183, and p. 940, sec. 186.

The accident in which plaintiff was injured occurred April 6, 1938. In her complaint filed in the following month she alleged, paragraph VII thereof: "That by reason of the negligence and injuries as aforesaid, this plaintiff has not been able to work; that for some time prior to said accident this plaintiff was working and earning twenty dollars ($20.00) per week; that since said accident she has been completely unable to work and will be unable to do any work whatever for the next four (4) months, to her damage in the sum of four hundred eighty dollars ($480.00)." The action was tried on April 10th and April 14th, 1939, approximately one year after the accident, and at the session of April 10th paragraph VII of the complaint was amended so that the closing portion reads "that since said accident she has been completely unable to work and will be unable to do any work whatever to her damage in the sum of $5,000.00". This change in the complaint was made immediately after Dr. Schultz, who had examined the plaintiff in February, 1939, testified as to her physical condition at that time. He stated that in his opinion "her heart condition resulted from the accident because at the present time she has a chronic myocarditis", which we understand to be an inflammation of the muscular portion of the wall of the heart. He also found that plaintiff had secondary anemia and "a definite nephritis", which is a kidney involvement. There was no evidence of any history of it prior thereto. Dr. Schultz observed that the plaintiff flinched at the time pressure was applied to the back and on the hip and stated: "This is largely objective when they flinch." In his judgment "her injuries are permanent in character. I doubt very much if she will ever be able to work again. I do not think she will".

Defendant produced as a witness Dr. Arnold M. Scholz, a physician and surgeon employed in the medical department of defendant. He stated that he examined the plaintiff on July 22, 1938, about three months after the accident and that he then found no evidence of external injury; that plaintiff, an elderly woman, was in fair general health, whose motions were within normal limits for her age. Dr. Scholz found evidence of heart trouble. "Both the increase of the blood pressure and the intermittent pulse with skipped beats was indicative of some degeneration of her heart muscle. That can be called myocarditis. I do not see how she could have received any injury to her heart in the accident which she described to me. In my opinion her heart trouble existed for some time before my examination, and in my opinion prior to her accident in April. In my opinion it was something that had been coming on for years. * * * In my opinion the accident did not have any effect upon the white blood cells. The anemia was absolutely not caused by the accident." Later defendant asked the trial judge to appoint an impartial doctor to examine the plaintiff. He named Dr. John B. Doyle for the purpose and on April 13th, the day before trial was resumed, this third examination was made. Dr. Doyle reported in some detail the "history" of plaintiff's accident and her physical condition as she gave it to him and as a result of his examination determined that "the patient suffers from myocardial degeneration", observing, in the examination, evidence of arteriosclerosis and hypertension. *"The emotional stresses associated with and following the accident have unquestionably led to wide fluctuations in pulse rate and blood pressure.* I do not believe that the accident has caused the patient any appreciable permanent damage. *Her present symptoms* are due to vascular disease and *are aggravated by her emotional state."* In answer to the question "In other words, she is about as good now as she was before the accident?", Dr. Doyle replied: "I think she is, aside from the fact that an elderly person does not stand a jolt like that as well as a thirty year old, and also *the accident unquestionably has precipitated emotional situations which have caused her blood pressure to fluctuate as I have indicated, widely from time to time."* He further stated: *"I think that the fluctuations in her blood pressure, of course, are probably due to a variety of emotional stresses associated with and subsequent to the accident,* but I do not think that they are likely to cause any appreciable change as far as duration of life or damage to organs is concerned." (Emphasis supplied.) And in answer to the question "Does she suffer any pain or distress now over or near the regions where your history showed she had been injured?", the physician said, "Yes", and the colloquy then continues:

"Q. Well, in your opinion, will that pass away? A. Yes, sir.

"Q. It will? A. Yes.

"Q. Realizing the fact that the accident occurred over a year ago, what would be your judgment as to how long it would be before she was able to carry on what was her pre-accident normal activity? A. Well, I would assume that she would continue to improve for an interval of eighteen to twenty-four months from the time of the accident.

"Q. That would be another year from now? A. That is right.

"Q. And after that you feel that she would be free from all the effects of this particular accident? A. I think so.

"Q. Outside of the mental effects, if any, that may result from fear or shock resulting from trauma? A. Well, as a rule they wear off.

"Q. At the present time she is not in condition to carry on her work as a seamstress, is she? A. No. I think she is too much emotionally upset now to carry on.

"Q. And you noticed, too, when she tried to put her hand some definite place, there was an indefinite wavering prior to touching the place indicated? A. Well, that is an emotional thing, what she did was something like this (indicating) and then hit the target. Often where there is an organic ataxia that incoordination reveals it. This represents indecision, and that sort of thing, rather than organic change or cerebellar incoordination.

"Q. You feel, then, within another twelve months she will be able to carry on her normal functions? A. Assuming her hypertension and arteriosclerotic condition do not interfere with it.

"Q. And do not increase? A. That is right. * * *

"Q. Doctor, some of this emotional trouble that you talk about, don't you think her lawsuit has something to do with that? A. I think it is unquestionably one factor.

"Q. And as soon as this is decided one way or the other, that will go away? A. That part of it will go away.

"Q. That is what brings on some of this hypertension? A. I think it is unquestionably one of the factors."

It may be noted here that Dr. Macklin who attended the plaintiff immediately after the accident found a contusion with swelling over the right side of the head and a swollen ankle and discoloration two days later in those areas, as well as in the back and thighs. He testified that within the next two days he placed the plaintiff in the hospital where she remained for about three weeks and that X-ray pictures showed that she had no broken bones; that he found something more than bruises and contusions; that he was compelled to make a diagnosis of concussion of the brain.

From this review it appears that of the four physicians who attended or examined appellant only two expressed an opinion as to whether her working ability was impaired by the accident. Neither Dr. Macklin nor Dr. Scholz testified on this subject, presumably because they were not questioned about it.

[2] In view of the medical testimony which was presented bearing on the question of appellant's ability to return to work we feel that a specific finding should have been made on the issue of how much time, if any, was lost by appellant from her regular employment, as a result of the acci-

dent. The general finding which was made as to appellant's physical condition does not go to that point. It is as follows: "That the plaintiff has recovered from the injuries received in said accident, but is now suffering, and had been for some time prior to said accident, from senility, myocardial degeneration, hypertensive reaction and arteriosclerosis, and that none of said ailments were caused or aggravated by any injuries received in said accident." We have examined the various cases cited by counsel affirming judgments in which certain items of damage were included in a lump sum, but are not persuaded that in this case the appellant, the prevailing party, was not entitled to have her damages separately fixed.

Respondent calls our attention to the adoption in 1926 of section 4¾ of Art. VI of the Constitution and to the enactment in 1927 of section 956a of the Code of Civil Procedure, and takes the position "that under the law as it stands today it is not necessary for an appellate court to reverse a judgment because of the mere failure of the trial court to find on an issue", citing Sessions v. Trott, 1934, 220 Cal. 714, 32 P.2d 374, and Gustafson v. Blunk, 1935, 4 Cal.App.2d 630, 41 P.2d 953. These cases approve and adopt the measures which now enable an appellant court, surveying the evidence in an appealed case, to "make findings of fact contrary to, or in addition to, those made by the trial court".

[3] Another case where the same course was followed is Sturdevant v. Sturdevant, 1934, 3 Cal.App.2d 443, 39 P.2d 433. There the appellate court made new findings, on the evidence brought before it, upon issues specially pleaded but upon which the trial court had failed to make specific findings. Holding this failure to be prejudicial error, the appellate court reversed the decision and remanded the cause to the trial court with instructions to enter a contrary judgment in accordance with the amended findings and the opinion on appeal. In its consideration of the case the court uses the following language (3 Cal.App.2d at page 446, 39 P.2d at page 434): "Under the system of express findings provided for by the Code of Civil Procedure (sections 632, 633) full findings, unless waived, are required on all material issues raised by the pleadings and evidence. * * * A failure to make a finding on a material issue results in prejudicial error entitling the complaining party to a reversal, provided it appears from the record that there was evidence introduced as to such issue, and the evidence was sufficient to sustain a finding in favor of such party."

[4] There can be no question that, when conditions warrant such action, appellate courts are vested with authority to determine without additional expense and loss of time whatever justice may require in any case submitted to them but clearly this does not mean that the old rule requiring findings on material issues has been abrogated. Whether it is feasible for the appellate court to exercise the powers granted by the cited additions to the Constitution and the Code of Civil Procedure must always depend upon the situation presented by each appeal.

In the instant case we feel that the better course is to remand the cause to the superior court for a new trial on the sole question of the amount of damages sustained by the appellant, separate findings to be made on the items of special damage. It is so ordered, the judgment being hereby reversed.

I concur: WHITE, J.

DORAN, Acting Presiding Justice (dissenting).

I dissent. In my opinion the judgment should be affirmed.

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46 Cal.App.2d 28

SCHIPPER v. PENKALSKI.

Civil No. 2753.

District Court of Appeal, Fourth District, California.

July 11, 1941.

1. Appeal and error 🔑907(2)

The reviewing court, where not supplied with a transcript of evidence, must conclusively presume that evidence sufficient to sustain every finding of trial court was received.

2. Husband and wife 🔑266

The fact that husband and wife took title to property involved in suit to quiet title as joint tenants was not conclusive on question of whether they thereafter held lot as joint tenants, since a husband and wife may by agreement transmute character of property held by them. Civ.Code, §§ 158, 159.

3. Husband and wife 🔑266

A husband and wife may by written agreement, or by an executed oral agreement, transmute the character of property held by them, and such agreement will be given effect by the law. Civ.Code, §§ 158, 159.

4. Appeal and error 🔑909(2)

On appeal in suit to quiet title, where reviewing court could not from the record determine character of property at time original plaintiff entered into possession, that character would be presumed which would best serve to sustain findings, conclusions and judgment of trial court.

5. Deeds 🔑58(1)

Where grantor places deed in escrow beyond power of recall and retains no further control over it, title immediately vests in the grantee.

6. Deeds 🔑61

A grantor who deposits a deed in escrow to be delivered to grantee upon grantor's death, retains a life estate.

7. Appeal and error 🔑934(2)

On appeal in suit to quiet title to property which original plaintiff had conveyed by deed placed in escrow, it would be presumed in support of judgment that evidence disclosed that original plaintiff retained some interest in the property until conditions of escrow were complied with.

8. Quieting title 🔑22

The owner of an estate or interest in land less than an estate in fee may maintain an action to determine an adverse claim made by another person. Code Civ.Proc. § 738.

9. Quieting title 🔑22

The fact that original plaintiff in suit to quiet title had conveyed property involved to substituted plaintiff by a deed which was placed in escrow did not establish that original plaintiff had no interest in property at time of commencing suit, where substituted plaintiff did not meet conditions of escrow and receive delivery of deed until after original plaintiff's death. Code Civ.Proc. § 738.

10. Tenancy in common 🔑38(1)

Although one who enters into possession of property avowedly as tenant in common with others cannot by a showing of adverse possession maintain action to quiet title against his cotenants, he may maintain such an action if his possession is hostile to his cotenants, of which they are put on notice.

11. Tenancy in common 🔑14

Any act of a cotenant in exclusive possession which manifests an intention on his part to hold exclusively for himself is equivalent in law to an actual "ouster".

> See Words and Phrases, Permanent Edition, for all other definitions of "Ouster".

12. Tenancy in common 🔑15(1)

A tenant in common who enters into actual possession of land under claim and color of title, and who maintains possession and exercises acts of ownership openly and notoriously, claiming the land adversely to other tenants and paying taxes for more than five years, acquires title by prescription under the statute of limitations.

13. Divorce 🔑255

Where it appeared that husband and wife involved in divorce action were mutually mistaken in description of property which was held to be community property and was awarded to wife by interlocutory decree, and that wife thereafter was in open and notorious possession of property for thirteen years and paid taxes thereon, wife's grantee, who was substituted as plaintiff upon wife's death, was entitled to have title quieted as against husband who claimed that property had been owned by parties as joint tenants. Code Civ.Proc. § 738.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by Annie Penkalski against Bassel Penkalski to have the pleadings and decrees in a divorce action amended, and to quiet title to property, wherein John H. Schipper was substituted as plaintiff in the place of Annie Penkalski who died subsequent to the filing of the complaint. Judgment in favor of the substituted plaintiff, and the defendant appeals.

Judgment affirmed.

Roland T. Williams, of Los Angeles, for appellant.

Julius A. Leibert, of Los Angeles, for respondent.

KELLY, Justice, pro tem.

This appeal comes up on the judgment roll alone. The outline of the facts chronologically considered, is as follows: Annie Penkalski sued Bassel Penkalski for divorce. On August 26, 1926, the interlocutory decree of divorce was entered in favor of Annie and against Bassel. The complaint alleged that the parties owned as community property, lot 35, tract 2871, as per book 33, page 96 of maps, records of Los Angeles county. This property was held to be community property and awarded to Annie. On September 16, 1927, the final decree was entered confirming the interlocutory decree as to the award of the community property. On February 26, 1929, plaintiff for the first time discovered that the description of the community property was erroneous in that the parties owned not lot 35, but lot 95, in the same tract. Seeking to correct the error, plaintiff moved the court for an order of modification of the final decree. On May 17, 1929, some 20 months after the final decree had been entered, the court made its order labeled "Amended Final Judgment of Divorce". This order recites the filing of the interlocutory decree and the substance thereof, but wholly ignores the entry of the final decree of September 16, 1927, and proceeds to execute the order as though it were the only final decree in the action. It confirms the award of the property as made in the interlocutory decree but recites that the property described in the complaint and in the interlocutory decree should be described as lot 95 instead of lot 35. On October 29, 1938, the plaintiff discovered that the amendment was of no validity and on November 5th of that year she filed her complaint herein in two counts, the first alleging that the error in the description of the property was typographical, both in the pleadings and in the decrees. She further alleges that she has owned and possessed the said lot 95 by virtue of the interlocutory decree of divorce since its entry and that she has paid all taxes and assessments thereon and that the defendant claims an interest therein adverse to her. She prays that the pleadings and decrees in the divorce action be amended to read "Lot 95, tract 2871, as per book 33, page 96 of maps, records of Los Angeles County". She further prays that her title be quieted. The defendant by his answer denies that lot 95 was owned by the parties as community property but alleges that on the contrary it was owned by them as joint tenants. On November 9, 1938, Annie died and one John H. Schipper moved the court for an order substituting him as plaintiff in the place and stead of Annie. His motion was granted. The defendant thereafter filed a supplemental answer. Thereafter, the court made findings of fact and conclusions of law and entered its judgment in favor of the substituted plaintiff and against the defendant, who takes this appeal.

[1] The court found "That it is true that said Anna Penkalski had occupied and exercised adverse possession over said property openly, notoriously, exclusively and continuously from the 26th day of August, 1926, and until her death, which occurred on the 9th day of November, 1938, and during said period paid all taxes on said land". This court, not being supplied with a transcript of the evidence, must conclusively presume that evidence sufficient to sustain every finding of the court was received. Berri v. Rogero, 168 Cal. 736, 145 P. 95; Haase v. Central Union H. S. Dist., 27 Cal.App.2d 319, 80 P.2d 1044.

[2-4] (1) In view of the somewhat confused state of the record, the court will direct its attention to the issues presented by the second count of the plaintiff's complaint and the defendant's answer thereto. It seems to be assumed by the brief writers that Annie and Bassel held lot 95 as joint tenants. In fact the answer of the defendant so alleges. We find, however, nothing in the findings of fact to sustain such a conclusion. Assuming, however, that the parties to the divorce action took title to the lot in question as joint tenants, the recitation of such in the title deed would not be conclusive. Husband and wife may, by a written agreement or by an executed oral agreement, transmute the character of the property held by them and such agreement will be given effect by the law. Civ.Code, §§ 158, 159; Yoakam v. Kingery, 126 Cal. 30, 58 P. 324; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 P. 190; Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; Thomas v. Hoffman, 122 Cal.App. 213, 9 P.2d 538; Estate of Sill, 121 Cal.App. 202, 9 P.2d 243; Estate of Wahlefeld, 105 Cal.App. 770, 288 P. 870; Estate of Henderson, 128 Cal.App. 397, 17 P.2d 786. In the present state of the record we cannot definitely say what was the character of lot 95 at the time that Annie entered into possession. However, that character must be presumed which best

serves to sustain the findings, conclusions, and judgment. The court found and decreed "that plaintiff Anna Penkalski acquired all the right, title and interest of defendant in and to the said premises by adverse possession."

(2) Appellant contends that at the time this action was instituted the original plaintiff, Annie, had no interest in the property and supports this contention by reference to the decision of the court. The court found as follows: "That it is true that prior to the death of said Anna Penkalski, to wit, on the 24th day of October, 1938, she entered into a contract with the now plaintiff, John H. Schipper, whereby she agreed for a valuable consideration to sell, transfer and convey all her right, title and interest in and to the said premises to said John H. Schipper by a deed and that the deed and all papers were to be placed in escrow with the Los Angeles Escrow Company until all conditions shall have been met. That it is true that since the commencement of this action and after the death of said Anna Penkalski, said John H. Schipper had met all the conditions and received delivery of the deed from the said Los Angeles Escrow Company." Schipper was substituted as plaintiff in place of Annie, by order of court.

[5-7] From this finding we cannot assume that Annie (sometimes referred to as Anna) had divested herself of title. Had she placed her deed in escrow beyond the power of recall and retained no further control over it, title would have immediately vested in the grantee, Schipper. Brereton v. Burton, 27 Cal.App.2d 464, 81 P.2d 238. If the deed was deposited in escrow to be delivered to the grantee upon the death of the grantor, the legal effect is that the grantor retains a life estate. Stewart v. Silva, 192 Cal. 405, 221 P. 191; Northern California Conference Ass'n, etc. v. Smith, 209 Cal. 26, 285 P. 314. In any event, it must be presumed, as necessary to support the judgment that the evidence discloses that the grantor Annie retained some interest in lot 95 until the conditions of the escrow were complied with. As those conditions do not appear in the record, such will be presumed as best favor the decision of the court.

[8, 9] Under Code of Civil Procedure, section 738, the owner of an estate or interest in land less than an estate in fee, can maintain an action to determine an adverse claim made by another person. Pierce v. Felter, 53 Cal. 18. There seems no doubt that section 738 of the Code of Civil Procedure is broad enough to sustain an action by one possessing or claiming an interest in real estate less than the fee. We conclude that it cannot be said that the original plaintiff was a stranger to the title because of the existing escrow.

[10-12] (3) It is not true that a tenant may not maintain an action to quiet title based upon adverse possession against his co-tenant. If the plaintiff's claim is hostile to the co-tenant, of which the co-tenant has notice, a quiet title suit may be maintained. Smith v. Barrick, 41 Cal.App. 28, 182 P. 56; Akley v. Bassett, 189 Cal. 625, 209 P. 576. Of course it is true that one who enters into possession of property avowedly as tenant in common with others, cannot, upon such showing, maintain an action to quiet title against his co-tenants, but if his possession is hostile to his co-tenants, of which they are put on notice, he may maintain such an action. Any act of the co-tenant in the exclusive possession which manifests an intention on his part to hold exclusively for himself is equivalent in law to an actual ouster. Feliz v. Feliz, 105 Cal. 1, 38 P. 521. A tenant in common who enters into the actual possession of land under claim and color of title and has maintained possession and exercised acts of ownership openly and notoriously, claiming same adversely to other tenants who are of age, and paying taxes assessed thereon for more than five years prior to the commencement of an action against him, thereby acquires a title by prescription under the statute of limitations. Gregory v. Gregory, 102 Cal. 50, 36 P. 364. See, also, Winterburn v. Chambers, 91 Cal. 170, 27 P. 658; Union Oil Company v. Stewart, 158 Cal. 149, 110 P. 313, Ann.Cas.1912A, 567.

[13] Regardless of the construction which we may place upon the rules of law, we deem it significant that all of the circumstances appearing in the record would indicate that it is true, as the court found, that the parties to the divorce action were mutually mistaken in their description of the property alleged by the plaintiff to be held as community property. There can be no doubt that both the plaintiff and the defendant to that action knew and understood that after the entry of the interlocutory decree the plaintiff therein went into possession of, and solely and alone possessed the only real estate owned by the

parties. There can be no doubt that the avarice of the defendant was awakened when the attempt was made by the original plaintiff to correct an error in her complaint which was carried through into the judgment. We deem such an inference the only reasonable one we can place upon the facts and circumstances of the transactions herein involved. Under these facts, we cannot disregard the plain intention of the trial court in the divorce action to find and hold that the lot thereafter possessed by the plaintiff was the lot which both the court and the litigants had in mind at the time of the entry of the interlocutory decree. Because of the conclusion we have reached with reference to the second count of the plaintiff's complaint, it becomes unnecessary to pass upon the issues raised by the first count and the defendant's answer thereto.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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46 Cal.App.2d 16

In re CHAMBERLAIN'S ESTATE.

JORDAN v. CHAMBERLAIN et al.

Civ. 13131.

District Court of Appeal, Second District, Division 2, California.

July 10, 1941.

Rehearing Denied Aug. 4, 1941.

Hearing Denied Sept. 4, 1941.

1. Wills 🔑440, 487(1)

Where language of a will is definite, certain and unambiguous, it will be taken to be an accurate and precise expression of decedent's intention, and the courts may not consider extrinsic evidence or extraneous circumstances in arriving at decedent's intent.

2. Wills 🔑587(1)

A general residuary clause precludes intestacy as to any part of the estate unless clear intent of will prevents such construction.

3. Wills 🔑587(1)

The words "rest and residue" are in themselves comprehensive enough to include any interest in the estate of testator not previously devised or bequeathed, and the safest course is to abide by the words unless upon the whole will there is something amounting almost to demonstration that plain meaning of words is not the meaning of the testator.

See Words and Phrases, Permanent Edition, for all other definitions of "Rest and Residue".

4. Wills 🔑587(1)

The words "rest", "residue", or "remainder" are commonly used in a residuary clause, but all that is necessary is an adequate designation of what has not otherwise been disposed of, and the fact that a provision so operating is not called a residuary clause is immaterial.

"Residue" means that which remains.

See Words and Phrases, Permanent Edition, for all other definitions of "Rest", "Residue" and "Remainder".

5. Wills 🔑587(2)

A recital in will that after distributing a few personal possessions listed on other pages, all the rest and residue, decedent gave to a designated beneficiary including any furniture, rugs and personal apparel, operated to dispose by will of the rest and residue of decedent's estate.

6. Wills 🔑456

The words of a will are to be taken in their ordinary and grammatical sense, unless there be a clear intention to use them in another sense, and unless that other sense can be ascertained from the will. Probate Code, § 106.

7. Wills 🔑566

"Cash" within recital of will that "after paying these amounts—and amts. due for administrator and attorney, whatever remains of cash—shall be divided between" designated individuals, did not include United States bonds, shares of stock, etc., in absence of indication that testatrix intended that the word "cash" be used in other than ordinary sense. Probate Code, § 106.

"Cash" is current money in hand, or readily available. Cash means especially ready money at command, subject to free disposal; not tied up in a fixed state, and is almost the equivalent of the term "loose money".

See Words and Phrases, Permanent Edition, for all other definitions of "Cash" and "Loose Money".

8. Appeal and error 🔑790(3)

Where determination of the District Court of Appeal that residue of estate was disposed of by will rendered immaterial the question of whether certain individuals were the legal heirs of decedent to exclusion of certain others, the questions raised on appeal by the latter were "moot questions", and their appeal would be dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

9. Appeal and error 🔑781(2)

Where, if trust was void for uncertainty as contended by certain appellants, the trustee as an individual would in any event receive the property covered by the trust as a residuary legatee, the question raised by the appeal of such appellants was a "moot question", and their appeal would be dismissed.

◆

Appeals from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding in the matter of the estate of Frances R. Chamberlain, deceased, by Mildred Jordan against Henry Chamberlain and others to determine heirship. From the order entered therein, Henry Chamberlain and others, contestants, Charles H. English and others, claimants, and Mildred Jordan, petitioner, appeal.

Appeals by contestants and claimants dismissed.

Reversed, with directions on appeal by Mildred Jordan.

Howard F. Shepherd, of Los Angeles, for appellant Mildred Jordan.

Nourse & Jones, of Los Angeles, for appellants Horace and Charles H. English and Dorothy English Sampson.

Frank Mergenthaler, Salisbury, Robinson & Himrod, and Charles A. Loring, all of Los Angeles, for appellants Henry and Mary Lee Chamberlain and Lois C. Salisbury.

Ernest C. Griffith, of Los Angeles, for respondent Royden Ingham.

McCOMB, Justice.

These appeals, transferred from the Supreme Court to this court for decision, pursuant to the provisions of article VI, section 4c of the Constitution of the State of California, are from a decree of the superior court sitting in probate in a proceeding to determine heirship, finding that (1) Horace B. English, Charles H. English, and Dorothy English Sampson are the residuary legatees of decedent, and (2) Charles H. English, Horace B. English, and Dorothy English Sampson are the heirs of decedent, and (3) Mildred Jordan is entitled to certain property mentioned in the will of decedent.

The essential facts are:

Frances R. Chamberlain died testate in Los Angeles County October 12, 1939. She left an olographic will dated March 29, 1939, which was duly admitted to probate. The olographic will written on twenty-four sheets of paper contained, so far as material here, the following provisions:

"Will of Frances R. Chamberlain.
After paying these amounts—
and amts. due for administrator
and attorney, whatever remains
of cash—shall be devided between
Charles English
Horace English
Dorothy Sampson
children of my deceased sister,
'share & share alike'—
After distributing the few personal
possessions listed on other pages—
all the rest & residue, I give to Mrs.
Mildred Jordan—this includes any
furniture rugs—& personal apparel &c.
nothing of much value—but may
be helpful to dear friends—To whom
she will distribute said belongings
with the help of Bert Mankin and
Mary Dale—or Mrs. Gladys Rice."

These are the only questions necessary for us to determine:

First: Did decedent dispose of the rest and residue of her estate by her will?

Second: Did the word "cash", as used by decedent in the portion of her will above mentioned, include stocks and bonds?

[1] The first question must be answered in the affirmative. The law is established that, if the language of a will is definite, certain and unambiguous, it will be taken to be an accurate and precise expression of decedent's intention, and the court is without authority to consider extrinsic evidence or extraneous circumstances in arriving at the decedent's intent (see cases cited, 26 Cal.Jur. [1926] 889, sec. 205, note 12).

[2-5] Applying the foregoing rule to the will in the instant case, it appears that the decedent clearly disposed of the rest and residue of her estate. She said, "After distributing the few personal possessions listed on other pages—*all the rest & residue,* I give to Mrs. Mildred Jordan—this includes any furniture rugs—& personal apparel &c. nothing of much value—but may be helpful to dear friends—To whom she will distribute said belongings with the help of Bert Mankin and Mary Dale—or Mrs. Gladys Rice."

It appears to us that the foregoing expression means exactly what it says, that is, that Mildred Jordan was to have the rest and residue of decedent's estate, which estate included furniture, rugs, and personal apparel, the latter of which were not of much value.

The foregoing construction of the will is in line with the views expressed by Mr. Justice Urner in Holmes v. Mackenzie, 118 Md. 210, 84 A. 340, 342, as follows:

"The principle is elementary that a general residuary clause will be held to preclude intestacy as to any part of the estate, unless the clear intent of the will prevents such a construction. As the words 'rest and residue' are in themselves comprehensive enough to include any interest in the estate of the testator not previously devised or bequeathed, 'the safest course,' to use the language of Lord Eldon, 'is to abide by the words unless upon the whole will there is something amounting almost to demonstration that the plain meaning of the words is not the meaning of the testator.' "

See, also, Faison v. Middleton, 171 N.C. 170, 88 S.E. 141, 142, Ann.Cas.1917E, 72, where the court says:

" 'Residue' meaning that which remains, no particular mode of expression is necessary to constitute a residuary clause. The words 'rest,' 'residue,' or 'remainder' are commonly used in the residuary clause, whose natural position is at the end of the disposing portion of the will, but all that is necessary is an adequate designation of what has not otherwise been disposed of, and the fact that a provision so operating is not called the residuary clause is immaterial."

It was, therefore, error for the trial court to hold that Horace B. English, Charles H. English, and Dorothy English Sampson were the residuary legatees.

The second question must be answered in the negative. Decedent said, "After paying these amounts—and amts. due for administrator and attorney, whatever remains of cash—shall be devided between Charles English, Horace English, Dorothy Sampson, children of my deceased sister, 'share & share alike' . . ."

[6, 7] The words of a will are to be taken in their ordinary and grammatical sense, unless there be a clear intention to use them in another sense and unless that other sense can be ascertained from the will (sec. 106 Probate Code; Estate of Boyle, 2 Cal.App.2d 234, 236, 37 P.2d 841). In the instant case there is nothing to indicate that the decedent intended that the word "cash" be used in any other or different sense from that which ordinarily attaches to it. Cash is "current money in hand or readily available." (Funk & Wagnalls Practical Standard Dictionary [1938] 190.) See also, In re Feist's Will, 170 Misc. 497, 10 N.Y.S.2d 506, 508, where the court says:

" 'Cash' means especially 'ready money' at command, subject to free disposal; not tied up in a fixed state. It is almost the equivalent of the term 'loose money'."

From the foregoing it is evident that the trial court erred in holding that the word "cash" included United States bonds, shares of stock, etc.

[8] It is immaterial, in view of our conclusions, whether Horace B. English, Charles H. English, and Dorothy English Sampson are the legal heirs of decedent to the exclusion of Henry Chamberlain, Mary Lee Chamberlain, and Lois C. Salisbury, and the questions raised on the appeal of Henry Chamberlain, Mary Lee Chamberlain, and Lois C. Salisbury are moot. Therefore, on this ground their appeal is dismissed.

[9] Likewise it is immaterial for the same reasons whether decedent left her personal effects in trust to Mildred Jordan, which trust was void for uncertainty, as contended by appellants Horace B. English, Charles H. English, and Dorothy English Sampson, since in any event Mildred Jordan would receive the property as a residuary legatee. Therefore, the question raised by their appeal is also moot. Such appeal is dismissed.

The order appealed from by Mildred Jordan is reversed with directions to the trial court to enter a decree in accordance with the views expressed in this opinion.

MOORE, P. J., concurred.

46 Cal.App.2d 54

ALBERS et al. v. VILLA MORET, Inc., et al.

Civ. 11700.

District Court of Appeal, First District,
Division 1, California.

July 15, 1941.

Hearing Denied Sept. 11, 1941.

1. Corporations 🔑370(1)

Where corporation was organized primarily to engage in business of producing, developing, and selling sheet music, but articles of incorporation bestowed broad general powers, including power to acquire realty, erect buildings, deal in stocks and bonds, borrow and loan money, etc., purchase of building and loan certificates, erection of buildings, and investment in fruit distributing company, was proper unless in connection therewith there was proof of gross abuse of authority or discretion sufficient at least to approach negligence or fraud.

2. Corporations 🔑320(11)

In stockholders' suit against corporation and two of directors, evidence did not show gross abuse of authority or discretion sufficient at least to approach negligence or fraud in connection with purchase of building and loan certificates, erection of buildings, and investment in fruit distributing company.

3. Corporations 🔑294, 317(5)

If transfer of company's stock to defendant who was president and director was fraudulent, not only would suit in accounting by stockholders be proper, but provisions of sections of Civil Code would govern in removal of director engaging in transaction to his private interest in violation of its duty to stockholders. Civ.Code, §§ 310, 311.

4. Corporations 🔑153, 310(4), 317(5)

If there was any merit in stockholders' claim that president and director should be compelled to return dividend which was declared six weeks after he purchased company's stock, all of stockholders should do likewise unless it appeared that in causing sale of stock to himself, president and director took advantage of company. Civ.Code, §§ 310, 311.

5. Corporations 🔑294

If allegation of stockholders' complaint that individual defendants were managing agents and executive officers of defendant corporation was true, reversal of judgment refusing to remove the two directors might tend to throw affairs of corporation into confusion, and therefore District Court of Appeal would approach subject of their removal with a degree of caution.

6. Corporations 🔑294, 320(11)

In stockholders' action for accounting and for removal of two of officers and directors, evidence substantiated finding that such defendants were not in complete control of corporation, that they were directors of corporation, that there was no gross abuse of authority, nor any abuse of authority or discretion by them with reference to corporation or to plaintiffs or other stockholders, that there was no evidence sufficiently substantial or convincing to show that such defendants had been guilty of misconduct or neglect or interference, or destruction of corporation or its assets or interests of stockholders. Civ.Code, §§ 310, 311.

7. Corporations 🔑320(11)

In stockholders' action, evidence supported finding that salaries paid to defendant officers and directors were not excessive.

8. Corporations 🔑320(11)

In stockholders' action against corporation and two of its officers and directors for accounting and removal of individual defendants, evidence supported findings that annual balance or profit and loss statement substantially complied with Civil Code, that there was no intentional or wilful refusal to hold annual meetings of stockholders or directors or to keep full statement in writing of proceedings of such meetings, that individual defendants used their best endeavors to carry out purposes of corporation, and that they were not in complete control thereof. Civ.Code, § 358.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by H. Albers and others against Villa Moret, Incorporated, and others, for an accounting and for the removal of two of defendants as directors and officers of the named defendant, in which plaintiffs were stockholders. From a judgment for defendants, plaintiffs appeal.

Affirmed.

James W. Harvey, of San Francisco (Byron Coleman, of San Francisco, of counsel), for appellants.

Leo A. Cunningham, of San Francisco, for respondents.

WARD, Justice.

This is an action brought by a group of stockholders on behalf of defendant corporation and "all other share holders" against the corporation and two of its directors, viz., F. L. Owens and Sally Simpson, for an accounting and for the removal of such persons as directors and officers of the corporation, upon the ground, based on information and belief, that these persons had used the assets and property of the corporation for their own advantage and benefit, to the damage of the corporation. The removal of officers or directors other than those named was not sought. The appeal is from a judgment in favor of defendant corporation and the directors sought to be removed.

Appellants, as plaintiffs, alleged in their complaint that certain annual reports of Villa Moret, Inc., did not conform to the provisions of section 358 of the Civil Code; that the failure of the board of directors of the corporation to hold meetings and keep records was a gross abuse of discretion on their part; that the purchase of certificates in two building and loan associations and an investment in a fruit distributing company were an abuse of authority as well as discretion; that the sale of certain stock to defendant Owens should be set aside, and the stock, with dividends received by him thereon, returned to the corporation treasury. It is also alleged that defendants Owens and Simpson were paid salaries in excess of reasonable amounts, and that such excess should be repaid the corporation. The allegations of the complaint are denied in the answer. The trial court signed findings of fact and conclusions of law denying the truth of the allegations of the complaint and affirming those of the answer. If upheld by the evidence, the findings appear to be a complete answer to appellants' contention that an accounting should be had, a receiver appointed and the two officers and directors removed.

The evidence in support of appellants' position is meager and this fact evidently is recognized by them. They contend that all of the above acts or omissions on the part of the two directors were unjustified, but that if "any one of these acts did not constitute gross abuse of authority or discretion, nevertheless when the entire course of conduct for the five years in which these defendants exercised their authority is viewed cumulatively, the answer seems conclusive". The difficulty with appellants' position is that while some of the acts of the directors resulted in unwise investment, particularly as viewed in retrospect, they do not necessarily—depending upon the facts—constitute gross abuse of discretion.

[1-4] The corporation was organized in 1923, primarily to engage in the business of producing, developing and selling sheet music. Its articles of incorporation, however, bestowed broad general powers, including that to acquire real property, erect buildings, deal in stocks and bonds, borrow and loan money, etc. Accordingly, the purchase of building and loan certificates, the erection of buildings and the investment in the fruit distributing company may be dismissed without further consideration unless in connection therewith there is proof of gross abuse of authority or discretion sufficient at least to approach negligence or fraud. The evidence herein may not be so characterized. Consideration should, however, be given to the transfer of the company stock to defendant Owens. This phase of the case is important, and upon it is based primarily the effort to remove the two directors, to which the question of accounting is subordinate. If the transaction was fraudulent, not only would a suit in accounting be proper, but the provisions of section 310 of the Civil Code would govern in the removal of a director engaging in a transaction to his private interest in violation of his duty to stockholders. Lawrence v. I. N. Parlier Estate Co., 15 Cal.2d 220, 100 P.2d 765; Schwab v. Schwab-Wilson Machine Corp., 13 Cal.App.2d 1, 55 P.2d 1268; Angelus Security Corporation v. Ball, 20 Cal.App.2d 423, 67 P.2d 152; Angelus Security Corporation v. Ball, 20 Cal.App.2d 436, 67 P.2d 158; Civil Code, sec. 311. The facts with relation to this matter are as follows: Certain shares of stock of Villa Moret, Inc., were sold to defendant Owens, pursuant to a resolution of the board of directors, at fifty cents a share, payment to be made in installments. Six weeks later the corporation voted a dividend of one dollar a share. Whether in the financial condition of the corporation this dividend should have been declared, is a matter of opinion. Appellants contend that not only the dividend but the stock should be returned to the corporation. No effort is made to force the

other stockholders to return such dividend. The attack is leveled at Owens. If there is any merit in the claim that he should be compelled to return the dividend, then all of the stockholders should do likewise, unless it appears that, in causing the sale of the stock to himself, Owens took advantage of the company. In this respect the record shows that the stock was transferred in consideration of extraordinary services by him covering a period of over three years, in reducing expenses of the company and making a substantial reduction in its deficit, for further services to be rendered, and for an additional consideration of fifty cents a share. Our attention has not been called to any evidence indicating untruthfulness in the statement as to performance of extraordinary services by Owens. In passing, it may not be inappropriate to mention that in 1930, the year preceding that of the sale of the stock to Owens, the profit of the company as the result of its copyright on a song hit was $112,577.15. While this is the only year in which a profit in excess of $9,000 is shown, we are not prepared to say that Owens was wholly responsible for such unusual profit. The record also shows that three directors were present at the meeting, and that defendant Owens "as a party in interest" did not vote. The market value of the stock is not shown, but, following the payment of the dividend in question, shares were sold at between thirty-five and seventy cents. The record does not show that defendant Sally Simpson participated in the sale of this stock other than as a director voting in favor of the resolution of sale to Owens.

[**5, 6**] The complaint in this action was filed on January 20, 1936, and alleges: "Defendants F. L. Owens and Sally Simpson now are and at all times herein mentioned were the managing agents and executive officers of defendant corporation." If this allegation is true, and the record seems to bear it out, then a reversal of the judgment refusing to remove the two directors might tend to throw the affairs of the corporation into confusion. Therefore we have approached the subject of their removal with a degree of caution. An examination of the record, however, substantiates the finding of the trial court: "That it is not true that said defendants are in complete control of said defendant corporation. That it is true that they are directors of said corporation. That it is not true that any of the acts or things done by the said defendants constitute a gross abuse of authority or any abuse of authority or discretion by them with reference to the said defendant corporation or to said plaintiffs or other stockholders. * * * That there is no evidence sufficiently substantial or convincing to show that said defendants have been guilty of misconduct or neglect or interference or destruction of the said corporation or its assets or the interests of the said stockholders."

[7] Appellants contend that the two directors, Owens and Simpson, as president (Owens was elected president in 1932) and secretary, respectively, donated a part of their time to the interests of another corporation; that for some time past the work for the song publishing business practically ceased, and that the only present duties of the president and secretary consist of publishing sheet music, forwarding it to New York and collecting royalties thereon. It appears that after the institution of the present action the president and secretary decreased their salaries thirty-five and twenty-five dollars a week, respectively. Appellants cite authorities in which it has been held that directors may be required to disgorge excessive salaries which they received as officers or directors where the sums are so large as to amount to a spoliation or waste of the company's funds. Rogers v. Hill, 289 U.S. 582, 53 S.Ct. 731, 77 L.Ed. 1385, 88 A.L.R. 744. The difficulty on appeal is that there is a failure of proof as to what would have constituted reasonable salaries prior to the voluntary reductions by defendants. The court found that the salaries paid were not excessive and there is evidence to support this finding. The secretary generally put in eight hours a day, and the president devoted much of his time to the business, it being necessary to examine and pass upon from fifty to ninety manuscripts each month in addition to other work.

[8] The findings separately attacked are that the annual balance or profit and loss statement substantially complied with Civil Code, section 358; that there was no intentional or wilful refusal to hold annual meetings of stockholders or directors' meetings, or to keep a full statement in writing of the proceedings of such meetings; that the defendants used their best endeavors to carry out the purposes of the corporation, and that they are not in complete control thereof. The attack, however, is primarily based upon inferences that appellants claim may be drawn from the evidence. Suffice to say

that reasonable inferences may be drawn the other way, and that it would unduly lengthen this opinion to designate precisely the evidence supporting the trial court's findings. The salient features of this appeal as well as the numerous unimportant contentions have been examined and considered. The evidence in each instance supports the findings of the trial court.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

46 Cal.App.2d 35

In re SORENSEN'S ESTATE.

CLARE v. JONES et al.

Civ. 2804.

District Court of Appeal, Fourth District, California.

July 14, 1941.

1. Wills 🔑764

"Ademption" of a specific legacy is the extinction or withdrawal of it in consequence of some act of testator equivalent to its revocation, or clearly indicative of an intention to revoke. Probate Code, § 73.

See Words and Phrases, Permanent Edition, for all other definitions of "Ademption".

2. Wills 🔑767, 768

An "ademption" is effected by extinction of the thing or fund bequeathed or by a disposition of it subsequent to the will, which prevents its passing by the will, from which an intention that the legacy should fail is presumed. Probate Code, § 73.

3. Wills 🔑484

Where a will directs sale of specific property after testatrix' death and payment of proceeds to a designated legatee, and thereafter a sale is effected by testator in his lifetime of such property and proceeds are identifiable, designated legatee is entitled to the proceeds, the sale by testator being deemed to have been made merely to facilitate creation of fund which was designed for legatee.

4. Wills 🔑194, 767

Where will specifically devised testatrix' home to designated legatee for life with remainder over to three other designated legatees, with provision that, if life tenant desired, he could sell property and divide proceeds four ways among himself and remaindermen, and thereafter a sale of the property was effected by testatrix in her lifetime, conveyance of property by testatrix constituted a "revocation" or "ademption" of specific devise of the property. Probate Code, § 73.

See Words and Phrases, Permanent Edition, for all other definitions of "Revocation".

5. Wills 🔑587(1)

Under holographic will specifically devising testatrix' home to designated legatee and devising $1 each to testatrix' three half-brothers or anyone contesting will, and then providing "all jewelry and personal effects * * * go to (named person)", the latter provision referred only to clothing and ornaments or any other small articles which usually attend the person, and was not a "general residuary clause".

See Words and Phrases, Permanent Edition, for all other definitions of "General Residuary Clause".

6. Wills 🔑565(1)

In common understanding, the expression "personal effects", without qualifying words, when used in will, includes only such tangible property as attended the person, or such tangible property as is worn or carried about the person.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Effects".

7. Wills 🔑587(1)

Where an ademption of a specific devise of testatrix' home was worked by sale of property during testatrix' lifetime, provision in holographic will that "all jewelry and personal effects * * * go to (named person)" was not a "general residuary clause", so as to dispose of money derived from sale of the property. Probate Code, § 73.

8. Appeal and error 🔑672

Where an appeal from a decree of distribution was taken on judgment roll alone, District Court of Appeal would reverse the decree upon error appearing on face of the record.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding in the matter of the estate of Mary Sorensen, deceased. From a decree of distribution, Mrs. Frank Clare appeals, opposed by D. S. Jones and others.

Reversed.

Frederick E. Stone, of Porterville, for appellant.

N. Lindsay South and Lawrence W. Young, both of Fresno, for respondents.

MUNDO, Justice pro tem.

Mary Sorensen executed an holographic will as follows:

"My Last Will
Dated Sept 18 - 1939

"To Whom It May Consern

"My home goes to C. K. Sorensen as a home for him during his life—after that to go to D. S. Jones—Mrs. Frank Clare George Camp to be divided 3 ways. The home to be kept free from morgages and indebtedness. Taxes to be kept paid and property to be kept up. If Mr. C. K. Sorensen does not at any time wish to keep same for a home it is to be sold and divided 4 ways equal D. S. Jones, C. K. Sorensen. Mrs. Frank Clare-Mr. Geo Camp to share alike. if D. S. Jones dies before the others his share goes to Mrs. Frank Clare. My three ½ brothers to *recive* 1 dollar each. or any one contesting this will to receive 1 dollar. All Jewelry and personal effects and any house hold things she may want go to Mrs. Frank Clare.

"All bills to be paid

"Hoping this meets with the approval of all concerned.

"Signed
"Mary Sorensen
"Rt. 1 box 473
"Fresno, Cal."

On November 13, 1939, Mary Sorensen sold the property referred to in her will as "my home" and the purchase price was delivered to Mary Sorensen in the form of a check which was in her possession uncashed at the time of her death on December 8, 1939. The check was delivered to the administrator. Upon the hearing of the petition for distribution the court concluded that the funds representing the sale of "my home" should be distributed in four equal shares to the parties named in the will.

Mrs. Frank Clare appeals from the decree of distribution on the ground that the amounts decreed to D. S. Jones, C. K. Sorensen and George Camp, were a part of the residue and remainder of the estate and should have been distributed to her as residuary legatee.

The question to be decided is whether the conveyance of the real property devised in the will by the testatrix after the execution of the will constituted an ademption of the devise of said real property.

[1, 2] "Ademption of a specific legacy is the extinction or withdrawal of it in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. The ademption is effected by the extinction of the thing or fund bequeathed, or by a disposition of it subsequent to the will, which prevents its passing by the will, from which an intention that the legacy should fail is presumed." Kramer v. Kramer, 5 Cir., 201 F. 248, 253, 119 C.C.A. 482. See also, Estate of Goodfellow, 166 Cal. 409, 137 P. 12.

This definition accurately fits the facts of the case at bar. The month before Mary Sorensen died she had sold the property which was mentioned in the will and thus the ademption was effected by the disposal of the property, by an act which prevented its passing by the will.

Section 73 of the Probate Code provides: "If the instrument by which an alteration is made in the testator's interest in any property previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect."

When Mary Sorensen conveyed the property to the purchaser the conveyance operated as a revocation of the testamentary disposition. As was said in Estate of Benner, 155 Cal. 153, 155, 99 P. 715, 716: "The case * * * presented is one of a devise of land, it mattering not whether the devise be considered special or general, and a sale of that land before the death of the testator. Such a sale being wholly inconsistent with the devise, operates as a revocation of it, as contemplated by section 1304, Civ.Code." (Now Probate Code section 73.)

[3] Another rule applies when the will directs the sale of specific property after

the testator's death and payment of the proceeds to a designated legatee. In such event, the latter, in case a sale was effected by the testator in his lifetime and the proceeds are identifiable, is held to be entitled to the money, the sale by the testator being deemed to have been made merely to facilitate the creation of the fund which was designed for the legatee. Estate of Dwyer, 159 Cal. 664, 115 P. 235.

[4] In the case at bar the will did not direct the executor to sell the specific property after the testatrix's death and divide the proceeds. Here the testatrix made a specific devise of her home, devising the same to C. K. Sorensen for his lifetime with the remainder over to D. S. Jones, Mrs. Frank Clare and George Camp. The administrator with the will annexed had no authority to sell the property or to divide the proceeds. If, after the property was distributed to Mr. C. K. Sorensen in accordance with the terms of the will and during his lifetime he desired to sell the property and divide the proceeds four ways, he had the privilege of so doing, but the property had to be distributed first under the terms of the will. When the property was sold prior to decedent's death there was nothing to pass under the will so far as the specific devise of the home was concerned. Mr. Sorensen could not make the election as to whether he would use it for his lifetime and allow the remainder over to the other three or sell it and divide the proceeds. The sale constituted an ademption and there was nothing to pass to the devisees.

[5, 6] The question now arises, to whom should the court distribute the money that came from the sale of "my home"? No provision for it, of course, is made in the will for the reason that when the will was made the testatrix apparently had no idea of selling the property. After she had sold the property and adeemed the specific devises, she passed away before having an opportunity to execute a codicil or a new will in conformity with the ademption. There is no residuary clause in the will which would direct the distribution of this money. The clause in the will: "All jewelry and personal effects * * * go to Mrs. Frank Clare" cannot govern, for it is obvious that this clause refers to clothing and ornaments or any other small articles which usually attend the person, and is not a general residuary clause. Estate of Lovejoy, 38 Cal.App.2d 69, 100 P.2d 547.

In Re May's Estate, 135 Minn. 299, 160 N.W. 790, 791, the court said: "The word 'personal,' used with 'effects,' much restricts its meaning. In common understanding the expression 'personal effects,' without qualifying words, includes only such tangible property as attends the person, or, as variously stated, 'such tangible property as is worn or carried about the person' (Brandon v. Yeakle, 66 Ark. 377, 50 S.W. 1004; Lippincott's Estate, 173 Pa. 368, 34 A. 58), or 'goods and items of property having a more or less intimate relation to the person.' * * * But to hold that the term 'personal effects,' as used here, includes a large residue of money and securities, nothing of which she then owned, and which she evidently did not have in mind, would do violence to the language of the will. This view is supported by the authorities."

[7] We hold that the will does not dispose of the money derived from the sale of "my home".

[8] When the appeal is taken on the judgment roll alone, this court will reverse a decree of distribution when the error appears as it does here on the face of the record.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

18 Cal.2d 275

UNION LEAGUE CLUB v. JOHNSON.

Sac. 5325.

Supreme Court of California.

July 23, 1941.

Rehearing Denied Aug. 22, 1941.

1. Licenses 🔑15(1)

The furnishing of food and drink, without profit, by social club to its members and their guests constituted "sales" within the Retail Sales Tax Act. Gen.Laws 1937, Act 8493, § 2(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

2. Licenses 🔑15(1)

Under the Retail Sales Tax Act, defining "retailer" as every person engaged in business of making sales at retail, and defining "business" as any activity engaged in with the object of "gain, benefit or advantage", social club which furnished, without profit, food and drink to its members and their guests was subject to tax, since, although club realized no "profit" from furnishing of food and drink, it did realize "gain, benefit or advantage". Gen.Laws 1937, Act 8493, § 2(c–e).

"Profit" may be said to be "gain, benefit or advantage", but "gain, benefit or advantage" does not necessarily mean only "profit".

See Words and Phrases, Permanent Edition, for all other definitions of "Business", "Gain, Benefit or Advantage", "Profit" and "Retailer".

3. Statutes 🔑212

Ordinarily, courts assume from a new enactment a legislative purpose to change the existing law.

4. Licenses 🔑15(1)

That the Legislature, in 1939, expressly amended the Retail Sales Tax Act so as to impose tax on social clubs did not require construction of the act, before amendment, as excluding social clubs, where, when amendment was made, such clubs were resisting collection of taxes, and legislative intent to clarify, rather than change, the law could be inferred. St.1939, p. 2169.

In Bank.

Appeal from Superior Court, City and County of Sacramento; Peter J. Shields, Judge.

Action by the Union League Club against Charles G. Johnson, State Treasurer, for recovery of sales taxes paid under protest. From a judgment for plaintiff, defendant appeals.

Reversed, with direction.

Prior opinion, 108 P.2d 487.

Rehearing denied; TRAYNOR, J., did not participate.

Earl Warren, Atty. Gen.; H. H. Linney, Adrain A. Kragen and James J. Arditto, Deputies Atty. Gen. for appellant.

Peter tum Suden and Richard tum Suden, both of San Francisco, for respondent.

Gavin McNab, Schmulowitz, Aikins & Wyman, of San Francisco (Nat Schmulowitz and Peter S. Sommer, both of San Francisco, of counsel), amici curiae for respondent.

EDMONDS, Justice.

The State Treasurer complains that the superior court in rendering a judgment for the amount of taxes paid by the respondent under protest, improperly construed the Retail Sales Tax Act (Stats. 1933, p. 2599; Deering's Gen.Laws, Act 8493). The taxpayer was allowed to recover upon the theory that this act, as in effect at the time the assessment was made, does not include a bona fide social club.

The respondent is a non-profit corporation, organized for social and political purposes. It occupies a building in San Francisco in which it maintains all the facilities of a modern club, including dining rooms and a bar. The building is open only to members, which number between five and six hundred, and their guests. Apparently the operations of the dining rooms and bar are carried on at a loss the deficit being made up from the fixed dues paid by members and assessments made upon them. In 1936 and to September 30, 1937, the club furnished liquor and meals to its members and their guests in an amount which required the payment of the amount sued for in this action if it was at that time a "retailer" engaged in "business", as these terms were defined by the Retail Sales Tax Act, supra, as then in effect.

The State Treasurer declares that the respondent is included within the definitions of these terms as stated in the act, and if the statute is ambiguous, it should be construed in the light of the administrative interpretation of it by the board of equalization. The respondent contends that a bona fide social club with a limited and selected membership, which incidentally furnishes food to its members, is not engaged in business in a commercial and trade sense, and therefore is not a retailer within the scope of the act. More specifically, it declares that there is no sale by such a club when food or liquor is served because the transaction is not the transfer of title or possession "of tangible personal property" for a consideration by one "engaged in the business of making sales at retail * * * with the object of gain, benefit or advantage, either direct or indirect" which are the requirements of the tax law. Secs. 2(c), 2(d), 2(e). It also relies upon the fact that in 1939 the statute was amended so as to expressly include social clubs in the definitions of persons and sales and no administrative interpretation of the provisions of the act, in so far as social organizations are concerned, had theretofore been made.

At the time the respondent was assessed, the Retail Sales Tax Act, as amended in 1935 (Stats.1935, p. 1256), required the payment of a tax upon every "retail sale" or "sale at retail". These were defined as "a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property * * *." (2(c) A "retailer", in the language of the act, was "every person engaged in the business of making sales at retail" (2(e) and "business" was said to be "any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect". (2(d)

[1] The transactions for which the respondent was assessed were sales within the statutory meaning of that term (Ada County v. Boise Commercial Club, 20 Idaho 421, 118 P. 1086, 38 L.R.A.,N.S., 101), and the club admits that it is a "person" as defined by the act. But it insists that the statute applies only to those engaged in "business" for profit because the taxable activity was required to be "with the object of gain, benefit or advantage, either direct or indirect." As its purpose is not to make a profit but to serve its members, it argues, the judgment should be affirmed.

[2] It is significant that the statute does not include the word "profit" in its definitions but imposed a tax upon the transactions of one conducting business "with the object of gain, benefit or advantage, either direct or indirect". Assuming that no profit was either intended or realized by the club from the operations of its dining rooms and bar, it does not follow that there was no "gain, benefit or advantage". Few persons would go to a club without these facilities and they undoubtedly largely contribute to the success of such an enterprise. In construing a statute using the identical language of our own, the supreme court of Ohio aptly remarked: "'Profit' may be said to be 'gain, benefit, or advantage,' but 'gain, benefit, or advantage,' does not necessarily mean only 'profit.'" State v. Zellner, 133 Ohio St. 263, 13 N.E.2d 235, 238.

The respondent relies upon Cuzner v. California Club, 155 Cal. 303, 100 P. 868, 20 L.R.A., N.S., 1095, and Varcoe v. Alameda Lodge, 174 Cal. 549, 163 P. 909, in support of his position but these decisions are not determinative of the question. In the Cuzner case the court held that a bona fide social club selling liquor only to members was not subject to an ordinance requiring those engaged in that business to obtain a license. But the ordinance did not define the word "business", and the court pointed out that this term "as used in a law imposing a license tax on businesses, trades, professions, and callings, ordinarily means a business in the trade or commercial sense, one carried on with a view to profit or livelihood." [155 Cal. 303, 100 P. 871, 20 L.R.A.,N.S., 1095.] The later decision was placed upon the same ground.

[3, 4] As against these contentions, the respondent takes the position that because the legislature in 1939, St.1939, p. 2169, expressly amended the statute to impose a tax upon social clubs, this court should construe the former law as not including them. This statement is based upon the general rule that courts ordinarily assume from a new enactment, a legislative purpose to change the existing law. People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811; Loew's, Inc., v. Byram, 11 Cal. 2d 746, 82 P.2d 1. But in view of the fact that at the time this amendment was made, social clubs were resisting the collection of sales taxes, a legislative intent to clarify rather than to change the law, may well be inferred.

The judgment is reversed with direction to enter judgment for the appellant.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; CARTER, J.; SPENCE, J. pro tem.

18 Cal.2d 266

PEOPLE v. HEADLEE.

Cr. 4349.

Supreme Court of California.
July 23, 1941.

1. Criminal law 🔑1159(2)

It is not the function of appellate courts to weigh evidence, but where evidence relied upon by prosecution is so improbable as to be incredible, and amounts to no evidence, a "question of law" is presented which authorizes appellate court to set aside conviction on ground that verdict was result of passion and prejudice.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

2. Criminal law 🔑1159(2)

To be "improbable" on its face, as ground for setting aside conviction, evidence must assert that something has occurred that does not seem possible under the circumstances disclosed, but improbability must be apparent, and evidence which is unusual or inconsistent is not necessarily "improbable".

See Words and Phrases, Permanent Edition, for all other definitions of "Improbable".

3. Kidnapping 🔑5
Rape 🔑51(1)
Robbery 🔑24(1)

Evidence *held* not to sustain conviction of kidnapping for purpose of robbery, robbery and rape, in view of inherent improbability of testimony for prosecution and evidence indicating consent of alleged victims.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Orville M. Headlee was convicted of kidnapping for purpose of robbery, robbery, and rape, and he appeals.

Reversed.

Prior opinion, 108 P.2d 933.

Mark F. Jones, of Los Angeles, and Orville M. Headlee, in pro. per. (W. L. Engelhardt, of Los Angeles, of counsel), for appellant.

Earl Warren, Atty. Gen. and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

PER CURIAM.

In an information filed by the district attorney of Los Angeles county, the defendant was charged with the commission of five distinct offenses. A jury trial resulted in his conviction and sentence on the three counts of kidnaping for purpose of robbery, robbery, and rape, the sentences thereon to run concurrently. The defendant was acquitted on two other counts charging another rape and grand theft. Upon this appeal he challenges the sufficiency of the evidence to support the three verdicts of conviction and the judgments based thereon.

[1-3] It is not the function of appellate courts to weigh evidence. People v. Tom Woo, 181 Cal. 315, 184 P. 389; People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631. Where, however, the evidence relied upon by the prosecution is so improbable as to be incredible, and amounts to no evidence, a question of law is presented which authorizes an appellate court in setting aside a conviction. People v. Dorland, 2 Cal.2d 235, 32 P.2d 1097, 40 P.2d 474. Under such circumstances an appellate court will assume that the verdict was the result of passion and prejudice. People v. Niino, 183 Cal. 126, 190 P. 626. To be improbable on its face the evidence must assert that something has occurred that does not seem possible could have occurred under the circumstances disclosed. The improbability must be apparent; evidence which is unusual or inconsistent is not necessarily improbable. People v. Braun, 14 Cal.2d 1, 92 P.2d 402; People v. Moreno, 26 Cal.App.2d 334, 79 P.2d 390. In this case the inherent improbability of the testimony of the principal witnesses is readily apparent from an examination of the record. The five charges contained in the information arose out of a sequence of alleged acts purportedly occurring within a few hours. In considering the evidence it is relevant to consider the evidence addressed to the two charges of which the defendant stands acquitted, for it contributes to the improbability of the evidence addressed to the three charges of which the defendant stands convicted.

Miss Helen Cash, 22 years of age, testified as follows: On the evening of April 14, 1940, she left a moving picture theatre in Compton with her friend Mrs. Goodwin at approximately 10:50 p. m., and hailed a taxicab. She had met the driver, John Fontana, on a previous occasion, and she and Mrs. Goodwin sat in the front seat with Fontana. Shortly after they entered the cab Fontana made a stop and received a call to go to the McDonald party house, a highway tavern. They arrived there at about 11 p. m. Fontana went to the tavern and came back to the cab with the defendant who said he wanted to go to Southgate. The defendant sat in the back seat and during the ride "pulled guns" on them. At the time she saw only one gun which the defendant held in his right hand "on Mr. Fontana's neck" while telling him to keep going and threatening them if they attemped to attract attention. Later, the defendant asked Fontana "what girl belonged to him", and when Mrs. Goodwin replied "I do" the defendant put the gun on the shoulder of the witness and told her to get in the back seat with him. She looked at Fontana who suggested compliance, whereupon she climbed into the back seat with the defendant. The defendant then placed his right arm around her with the gun against her right temple, began to fondle her person and then, as she related, "he laid me down on the seat and attacked me". Nothing was said by anyone, and during the act of intercourse she did not see the gun. Subsequently, the defendant told Fontana to drive into an auto court, which in time he did. Thereupon the defendant put the gun in Fontana's ribs, told him to get out of the cab and directed the witness to get back into the front seat with Mrs. Goodwin while he and Fontana proceeded to the office of the auto court.

At this point, in answering a question of the district attorney, the witness volunteered the information that, when leaving with the defendant for the auto court office, "Mr. Fontana left the car running so if we wanted to we could drive it off." Immediately the district attorney said, "I ask that be stricken out", to which the trial court replied "Yes." How much of the answer, of which the foregoing was only a part, was requested by the district attorney to be stricken is uncertain.

The witness then went on to testify: As the two men went into the office of the auto court she did not see the defendant do anything to conceal the gun he held on Fontana's ribs. The two men returned shortly, the defendant getting into the back seat. Fontana drove the cab to cabins numbered 11 and 12 and put the cab in the shelter provided therefor. The witness did not see the gun during these proceedings. The defendant asked for the key to the cab, which Fontana gave him. He then displayed two guns and threatened them if they "tried to do anything". Mrs. Goodwin and Fontana went into cabin 12 and the witness and the defendant into cabin 11. She closed the door behind her, and it was not thereafter locked. She inquired "where do you turn the light on here", whereupon the defendant lighted the cabin. The defendant placed one gun on the dresser and pointed the other at her and told her to undress. She undressed and got into bed. The defendant undressed, placed a pistol under the pillow and got into bed. In response to a query as to what then happened, the witness replied, "Well, we had sexual intercourse again." She did not remember the defendant saying anything immediately preceding and during this time. The defendant then told her to do a revolting act, which she did, assertedly in fear of bodily harm from the gun. She submitted each time, however, without any plea, remonstrance or struggle. Shortly after, when officers knocked at the door she went to the bathroom, dressed, and then told the officers what the defendant had done.

On cross-examination the witness again related substantially the same story with the addition of the following: The defendant and Fontana were in the office of the auto court for about five minutes. During that time she did not always watch the defendant but talked to Mrs Goodwin. The latter suggested getting out and running, but the witness rejected the idea because the defendant would shoot them or Fontana. During the episode in the cab Mrs. Goodwin looked around to the back seat but none of the three protested the defendant's conduct. The witness was assertedly in fear because of the gun and defendant's earlier threats. Just before entering the cabin the defendant requested Fontana to awaken him in the morning and said, "I will buy breakfast because I have five fifty-dollar bills in my pocket." Before entering the cabin she did not plead or remonstrate with the defendant. When the defendant told her to undress she did not protest; instead, she "never said a thing".

Mike Gasparich, a garage owner, testified that the defendant had worked for him. He identified the two guns possessed by the defendant as having been found in the glove compartment of a wrecked car which had been towed into his garage. The guns and other things, he testified, had been removed with the defendant's assistance from the car and placed in a box in the garage office.

Robert Thomas, a bartender at the McDonald party house, testified that the defendant appeared there about 9:30 p. m., and ordered a drink; that he was showing off two pistols; that the witness asked for them and "put them behind the bar"; and that he returned them to the defendant before he left at about 11 p. m. in a cab which had been called at his request.

John Fontana, the cab driver, related a series of events substantially similar to Miss Cash's testimony. He testified as follows: As he drove along with the two women in the front seat the defendant in the back seat said "get going", and he felt "cold steel" against his neck. He did not see what later occurred in the back seat between the defendant and Miss Cash, but in the rear-view mirror he could see the defendant who kept his face toward him most of the time. When he entered the office of the auto court he left the motor running, the lights on, and the key in the car. The defendant kept the gun against his ribs at all times, and there was light enough at one time for it to be seen by the proprietor. The defendant started paying the proprietor for the two cabins rented and then said to the witness, "You pay the balance whatever it is." He paid the balance ($1.50) at the defendant's command. (This transaction constitutes the basis of the robbery conviction.) After the witness had signed the register the proprietor asked for the license number of the car, and he went to the door of the office to look at the license with the defendant at his back at all times. He and Mrs. Goodwin entered cabin 12 pursuant to the defendant's directions and he later got out through the bathroom window and summoned police officers.

On cross-examination the witness testified that when he and Mrs. Goodwin entered cabin 12 the defendant told them to lock themselves in, but that the defendant did not ask for the key. He stated that at the time of trial he was out of the taxicab business, the adverse publicity resulting therefrom causing women to refuse to ride with him.

Mrs. Goodwin told substantially the same story as Miss Cash and Fontana. It is relevant here only to note that she testified that she saw the defendant on top of Miss Cash in the back seat of the car with a gun at her head, and that she (the witness) thereupon "jabbed" Fontana in the ribs and he looked at her and smiled.

James Roberts, proprietor of the auto court where the quartet stopped, testified as follows: The defendant and Fontana came to his office about 12:15 a. m., and said they wanted two cabins. He told them they would have to register their "wives" and the license number of their car. Fontana "went out far enough so he could see it" and "then he came back and put the license down". Upon inquiry Fontana was informed that the charge for the cabins would be $4, whereupon the defendant, after searching his pockets, found some small change which he placed on the counter with the request that it be counted. It added up to $2.50, whereupon the defendant asked Fontana if he had any money. Fontana then turned over $1.50 which made up the difference. On cross-examination the witness testified that when Fontana left the office to get the car license number "he went out past this Mr. Headlee [defendant] and went out on the step and looked down * * * and came back and put it down". During all of this time the defendant was doing nothing other than leaning against the office desk. The car was so parked that the witness "could not see it from the office".

The defendant, who is 25 years of age, took the stand in his own defense and testified as follows: He and the proprietor of the garage where he worked found two guns in a wrecked car which had been brought into the garage. On the afternoon of April 14, 1940, he took the guns with him to deliver them to the sheriff's office at Firestone Station and on the way stopped at a tavern. He later proceeded with a friend in the latter's car to the McDonald party house which his friend subsequently left. The witness then took the guns from the car and openly carried them into the McDonald party house where he showed them to a person sitting at the bar. The bartender placed them under the bar to obviate any fear among other patrons. The witness later had a cab called and took back the guns as he left. As he walked to the cab with Fontana the latter said, "I have a couple of hot shot girls out here, do you mind if they go along * * * they are hustlers." The defendant said it was all right with him. As he walked to the cab he had one gun in his pocket and the other in its holster in his hand, and as he entered the cab he placed the latter weapon on the seat beside him. As they were riding he asked Fontana which girl was with him, to which Mrs. Goodwin replied, "I am." He then asked Miss Cash if she would join him in the back seat, which she did by climbing over the front seat. He "loved her up a little" and she offered no objection. After a while Miss Cash asked him if he wanted to go to a cabin. He assented. Fontana said he knew of an auto court and drove there. The witness and Fontana entered the office and the latter signed the register. When informed that the cabins would cost $4 the defendant went through his pockets and brought out $2.50 which he placed on the counter and then asked Fontana if he had any money. Fontana replied affirmatively and brought out $1.50, which he pushed over the desk to the proprietor. The quartet then proceeded to the cabins. While opening the cabin doors he asked Fontana not to run off and leave him out there. Fontana promised not to and gave the defendant the key to the car. The witness and Miss Cash entered one of the cabins and he placed one gun in a dresser drawer and, as was his custom at his garage headquarters, placed one gun under a pillow. Miss Cash said she would have to have her money first. Upon objection that she asked too much money she replied, "Well, Johnny [Fontana] will have to have his part of it." They undressed and engaged in an act of intercourse and other conduct with the consent and solicitation of Miss Cash. When the officers knocked he told them to come in, that the door was open. He denied having intercourse with Miss Cash in the cab and also denied ever threatening any of the three or making them do anything against their will.

From the foregoing testimony of the principal prosecution witnesses, the conclusion that those witnesses did not consent, either actively or passively, to the occurrences of that evening is incredible. None of them offered any objection when the defendant allegedly engaged in an act of sexual intercourse with Miss Cash in the cab against her will. Nor did they in any manner attempt to prevent the defendant from carrying out his act. On the contrary, Mrs. Goodwin testified that when she "jabbed" Fontana in the ribs during this episode he looked at her and smiled. These are not the normal actions of persons outraged by conduct such as that charged to the defendant. They claim to have been in fear of the defendant's guns, yet Miss Cash testified that the defendant kept the gun against her head and person during the act of intercourse, while according to Fontana's story the gun was pressed against his neck at all times.

It is significant that Fontana and the defendant left the cab for five minutes or more to make arrangements for cabins at the auto court office. Both Miss Cash and Fontana testified that the motor of the car was running all during this period. The proprietor of the auto court testified that he could not see the cab from the office. Miss Cash admitted that she was not watching the men at all times when they were in the office, but, instead, was talking with Mrs. Goodwin. No effort was made by either woman to drive the car away or to leave the car and attempt an escape by foot under cover of darkness, though admittedly Mrs. Goodwin had suggested the latter course. This is not the conduct of a person who has been kidnaped or assertedly the victim of a previous attack.

The conduct of Fontana while in the office of the auto court was not that of a person who was being kidnaped and robbed. According to his own testimony he went beyond the door of the office to ascertain the license number of his car. The proprietor of the auto court testified that Fontana went out on the step of the office past the defendant, who at the time was merely leaning on the desk. According to his testimony, the two men were some distance apart at that point and he observed no gun being held by the defendant. The money transaction in the office discloses only a financial inability on the defendant's part to defray the entire cost of the cabin rentals, and a request that Fontana contribute thereto.

The improbability of the prosecution testimony that defendant demanded the key to the car to prevent the escape of his asserted victims, and the reasonableness of defendant's explanation that the key was voluntarily delivered him as a gesture of good faith in response to his request that the parties not leave him at the auto court, are attested by the fact that defendant concededly permitted Fontana and Mrs. Goodwin to enter a separate cabin, they retaining the key therefor, thus freeing themselves from the asserted coercion.

The conduct of Miss Cash in the cabin does not reveal any opposition on her part to the proceedings. She made no objection to entering the cabin with the defendant. Upon entering the cabin she closed the door behind her and inquired where the light could be turned on. This action indicates that the defendant must have preceded her into the cabin and thus did not force her to enter. The asserted attack in the cabin admittedly took place without any plea or word of protest or objection from her. Concededly, she exerted no physical effort to prevent the alleged assault. Certain parts of her testimony indicate that, although unmarried, she had previously engaged in acts of sexual intercourse. In the light of all that had gone before, with the opportunities of escape above mentioned, we think it highly improbable that the total absence of objection and resistance was prompted by the defendant's asserted earlier threats.

The jury acquitted the defendant of the charge of rape in the taxicab, yet Miss Cash testified unequivocally to the occurrence of an act of sexual intercourse between her and the defendant at that time. The jury therefore either entirely disbelieved the prosecution testimony and concluded that the act did not occur, or it concluded that the act was performed with the consent of Miss Cash. If the jury entirely disbelieved the witnesses as to the occurrence of the first act of intercourse, it could not reasonably believe the testimony as to the second act of intercourse, and its verdict to the contrary must have been the result of passion and prejudice. The first act was assertedly committed in the presence of all three witnesses; the second act supposedly occurred when the defendant and Miss Cash were alone in the cabin and Miss Cash was the only prosecution witness to testify to its occurrence. Her testimony as to the occurrence of the first act was just as positive as her testimony as to the occurrence of the second. If the jury concluded that the first act of intercourse actually took place but that it occurred with the consent of Miss Cash, it is highly improbable that she did not consent to the second act, particularly in view of the fact that she offered no objection or resistance to it.

The asserted silence or admissions of the defendant in response to questions by the officers as to his having had intercourse with Miss Cash do not require a different conclusion. Read in its entirety the evidence merely shows an admission by the defendant of sexual intercourse with Miss Cash, with her consent. The testimony of the deputy sheriff Welever as to the girl's charge made in the cabin and the defendant's response thereto, when read in connection with the girl's testimony at the trial describing the circumstances surrounding commission of the alleged attacks, definitely indicates that she was referring to the asserted rape in the cab, of which the defendant stands acquitted. It is significant that there is no reference in the testimony of the officers to questions addressed by them to the defendant with respect to the asserted charges of kidnaping for the purpose of robbery, or robbery.

The judgments and order denying a new trial are, and each is, hereby reversed.

18 Cal.2d 237

In re CHILDS' ESTATE.

DWIGHT et al. v. RILEY.

L. A. 17435.

Supreme Court of California.

July 16, 1941.

Rehearing Denied Aug. 14, 1941.

1. Taxation ⊂⇒862

Where acts repealing existing Inheritance Tax Acts were embraced within new Inheritance Tax Acts, covering the same subject-matter as the repealed acts, the new acts were re-enactments and there was a continuation in the new acts of those provisions of the repealed acts which were carried over without alteration into the new acts. St. 1917, p. 881, § 2(9); St.1921, p. 1500; St.1935, p. 1268, § 2(10).

2. Taxation ⊂⇒862

Where provision for aggregation of taxable transfers to same person, which first appeared in Inheritance Tax Act of 1917, was carried over into subsequent amendments and new acts, which also provided for repeal of preceding act, such provision with respect to aggregation remained in force and continued to be the law from the time of its adoption in 1917. St.1917, p. 881, § 2(9); St.1921, p. 1500; St.1935, p. 1268, § 2(10).

3. Taxation ⊂⇒862

Where provision for aggregation of taxable transfers to one person, which first appeared in Inheritance Tax Act of 1917, was carried over into subsequent amendments and new acts, providing for repeal of preceding act, the description of such transfers as those occurring "either before or after the passage of this act" referred not to the passage of the new act or amendment in which such words also appeared, but rather to the passage of the 1917 act, wherein the provision originally appeared. St.1917, p. 881, § 2(9); St.1921, p. 1500; St.1935, p. 1268, § 2(10).

4. Taxation ⊂⇒872

The statutory authority to aggregate several taxable transfers at death and inter vivos to same person and impose a transfer tax the same as on a single transfer means that but one exemption shall be allowed such person and that the aggregate value will be such that a higher tax rate bracket will be reached or at least approached. St.1917, p. 881, § 2(9); St.1921, p. 1500; St.1935, p. 1268, § 2(10).

5. Taxation ⊂⇒872

The import of statute providing that in computing tax upon transfers exemptions should be deducted from the aggregate amount of property transferred is that only one exemption is to be allowed on a transfer, and where under statutory authority to aggregate, several taxable transfers are made one in legal effect, the rule of only one exemption still applies. St.1935, pp. 1268, 1273, §§ 2(10), 6(6).

6. Taxation ⊂⇒861

Where Successive Inheritance Tax Acts in force at the time decedent made various transfers inter vivos to the same person to take effect in possession at or after donor's death, as well as Inheritance Tax Act of 1935 in effect at time of donor's death authorized the aggregation of such transfers for the purpose of computing transfer and inheritance taxes, the application of rates and exemptions under laws in effect at time of transfers inter vivos, the application of rates imposed by 1935 act to property transferred to same donee by donor's will, and the aggregation of all transfers, resulting in raising testamentary transfer into higher tax brackets, did not constitute a retroactive application of the 1935 act. St.1917, p. 881, § 2(9); St.1921, p. 1500; St.1935, pp. 1268, 1272, 1273, §§ 2(10), 4, 5, 6.

7. Taxation ⊂⇒861

Where court in computing inheritance and transfer taxes on transfers inter vivos and by will to same beneficiary applied rates under laws in effect at time of respective transfers, transferees could not challenge constitutionality of Inheritance Tax Act of 1935, which was in effect at time of transferor's death, on the ground that such act was retroactive in that it provided that the rates and exemptions provided for by the law in effect at the time of death of transferor were applicable to aggregated transfers. St.1935, p. 1268, § 2(10).

8. Statutes ⊂⇒64(8)

If the provision that values, rates and exemptions as of the date of transferor's death should be applied to aggregated transfers to same person, which was added by Inheritance Tax Act of 1935 to statutory provision for the aggregation of several taxable transfers to same person, contained in prior tax act, is retroactive as to rates and exemptions and therefore unconstitutional, such added provision may be separated from balance of statute without stripping statute of its effect as authorizing the aggregation of such transfers. St.1935, pp. 1268, 1292, §§ 2(10), 24.

9. Statutes ⚷64(1)

A portion of statute may be declared unconstitutional without affecting the remainder of statute, when the result of deletion of the unconstitutional portion will not make the statute meaningless and it can be said to have been the intention of the legislature to have the act stand with such deletion.

10. Statutes ⚷230

The portion of an amended statute which remains the same as it was prior to the amendment continues to be the law from the time of its original enactment and any changes or additions are considered as having been enacted at the time of the amendment.

11. Statutes ⚷270

A law, when amended, may be effective in its original form as to past transactions and effective in its amended form as to future transactions.

12. Statutes ⚷263

It is a general rule that a statute is not retroactive in operation unless the legislative intent to the contrary is clear.

13. Appeal and error ⚷843(2)
Taxation ⚷859(1)

Where a change in the inheritance and transfer tax laws made subsequent to transfers inter vivos, intended to take effect in possession at transferor's death, but prior to death of transferor did not result in increasing the amount of the tax computed on the total value of all the property so transferred because the rate on the level reached by the aggregation of such property was the same both prior and subsequent to such change, transferee was not injured and court would not pass upon hypothetical case as to what would be the result if such change in law increased the amount of the tax computed on the total value of the property transferred. St.1917, p. 881; St.1935, pp. 1268, 1272, 1273, §§ 2(10), 4, 5, 6.

14. Taxation ⚷862

If changes in inheritance and transfer tax laws made subsequent to transfers inter vivos, intended to take effect at or after transferor's death, and prior to death of transferor at which time same transferee received property as testamentary beneficiary resulted in changes in the rates and exemptions applicable, the aggregate value of property thus transferred would fix the rate bracket in which each transfer would fall, the rate in effect at the time of the transfer could be applied, and any changes in exemptions could be apportioned.

In Banc.

Appeal from Superior Court, Los Angeles County; Jess E. Shephens, Judge.

Proceeding in the matter of the estate of Emeline Childs, deceased, wherein Emeline Childs Dwight and others instituted a proceeding against Harry B. Riley, etc. From an order fixing an inheritance and transfer tax upon gifts by the decedent before her death and upon the estate of decedent, Emeline Childs Dwight and others appeal.

Order affirmed.

For prior opinion, see 108 P.2d 757.

Burr & Smith, of Los Angeles (A. J. Cathcart, of Los Angeles, of counsel), for appellants.

James W. Hickey, Inheritance Tax Atty., of Sacramento, Raymond G. La Noue, of Los Angeles, Alvin P. Jacobs, Asst. Inheritance Tax Attys., of Sacramento, and Donald R. Peck, of Los Angeles, for respondents.

CARTER, Justice.

This appeal presents a controversy in relation to the rate and method of computation of the inheritance tax payable by reason of property transfers to appellants at death and prior thereto designed to take effect in enjoyment or possession at death. It is conceded by appellants and respondent that both the transfers before death and at death are subject to inheritance tax, those before death taking effect in possession or enjoyment at or after death. Stats.1935, pp. 1266, 1268, § 2 (3).

The three appellants are adult daughters of the deceased. The taxable transfers made to them by the deceased prior to her death were as follows: First, in June, 1920, when each of the appellants received property of the value of $15,000; second, on December 13, 1926, when each appellant received property valued at $7,000; and third, on June 20, 1927, when each appellant received property valued at $92,163.51. Thus each appellant received by reason of the ante death transfers, property of a total value of $114,163.51. The deceased died on

September 24, 1935, and each of the appellants received by her will, after deductions were made, property of the value of $36,909.58. In the probate proceeding on deceased's estate, and pursuant to the report of the Inheritance Tax Appraiser, the court below, by its order here appealed from, fixed the inheritance tax on the transfer of the property to each appellant at $6,225.12. In computing this tax with reference to the exemptions and the rate bracket applicable, the court chose as the figure upon which to make its calculation the total amount of the transfers received by each appellant before and at decedent's death, or the sum of $151,073.09. The four transfers were thus treated as one or as one taxable unit. One exemption of $10,000 was allowed to each appellant, and the rate applied was 1 per cent on the first $25,000, 2 per cent on the next $25,000, 4 per cent on the next $50,000, 7 per cent on the next $14,163.51, and 7 per cent on the next $36,909.58.

It is appellants' contention that the transfer at death of $36,909.58 should have been treated separately from the inter vivos transfers and taxed according to the rates provided for in the Inheritance Tax Act of 1935 in effect at the time of decedent's death; Stats.1935, p. 1266, that the inter vivos transfers should have been aggregated, a $10,000 exemption allowed, and the rates fixed at 1 per cent, 2 per cent, 4 per cent and 7 per cent on the amounts above mentioned; and that on the transfer at death an additional exemption of $5,000 should have been allowed and and a rate of 2 per cent on $25,000, and 3 per cent on $11,909.58 applied. The total tax on all the transfers to each appellant would thus be $1,826.39 less than that fixed by the court. The basis of appellants' theory is that the rates and exemptions provided for in the 1935 Inheritance Tax Act could apply only to the transfer at death, and that the transfers inter vivos must be treated as separate transfers and governed by the law in effect prior to 1935. The rates under the 1935 act are 2 per cent on the first $25,000, 3 per cent on the next $25,000, 4 per cent on the next $50,000 and 7 per cent on the next $100,000.

In general, appellants endeavor to raise the question as to whether taxable transfers inter vivos and at death may be aggregated and treated as one transfer occurring at death, with the result that the law with reference to rates and exemptions in force at the time of death is applied, rather than that in effect when the transfers inter vivos were made. This includes the further question of whether only one exemption should be allowed. If all the transfers are considered as a single transfer, then, of course, only one exemption would be permitted and the aggregation of the transfers would raise the total value of the property transferred to a point where it, or at least a portion thereof, might reach the higher tax rate brackets, inasmuch as under the general scheme of the inheritance tax laws the rate of the tax increases as the value of the property transferred becomes greater.

Appellants cite and rely upon the cases of Riley v. Havens, 193 Cal. 432, 225 P. 275, and Estate of Potter, 188 Cal. 55, 204 P. 826, as supporting the proposition that the rate of taxation on the property transferred by gift or succession under the inheritance tax laws cannot be lawfully increased or the exemption lowered by the legislature to affect taxable transfers that have been made prior to the enactment of the legislation raising the rates or lowering the exemption, but in view of the theory adopted by the trial court in fixing the tax in the case at bar, it cannot be said that the decision of the trial court violates the rule announced in the above-cited cases. Moreover, these cases were decided prior to the 1935 amendment to the Inheritance Tax Act which would have the effect of changing the rule applicable to transfers subject to the provisions of said act as amended. Stats.1935, pp. 1266, 1268, § 2 (10).

[1-3] Let us first ascertain precisely what was done by the trial court in the case at bar. It did not, in computing the tax, impose on the transferees all of the tax burden which might have resulted from the aggregation of the transfers, nor did it follow exclusively either the 1935 Inheritance Tax Act or the prior acts. The exemption under the 1935 act, when the transferee is an adult child, is $5,000, rather than the $10,000 allowed by the court. Stats.1935, pp. 1266, 1273, § 6. The rate of taxation under that act for an adult child is 2 per cent on the first $25,000, 3 per cent on the next $25,000, 4 per cent on the next $50,000, and 7 per cent on the next $100,000. Stats.1935, pp. 1266, 1272, §§ 4 and 5. The rates under the 1917 act are 1 per cent on the first $25,000, 2 per cent on the next $25,000, 4 per cent on the next $50,000, and 7 per cent on the next $100,000. The court applied the exemption provided for by the 1917 Inheritance Tax Act, Stats.1917, p. 880, 884–886, §§ 4, 5 and 6, and as to the rates, it applied

the 1917 act to the transfers inter vivos and the 1935 act to the $36,909.58 transferred at death, that rate being 7 per cent because the aggregation forced that transfer into the higher rate bracket. In respect to that rate, the result would have been the same upon the application of either of the acts because it is the same under both. However, as appellants point out, the court did aggregate the transfers to the extent of accomplishing two results, of which appellants complain. First, that only one exemption was allowed, to-wit $10,000, whereas, if the tax on the transfers inter vivos and at death had been computed separately, an exemption of $10,000 would have been allowed on the inter vivos transfers under the 1917 act, and one of $5,000 on the transfer at death under the 1935 act. Second, that the aggregation caused all of the $36,909.58 transfer at death to fall in the higher rate bracket calling for a 7 per cent tax, rather than computing the tax on that transfer separately and at the primary or lower bracket rates. They concede that the rates applied on the transfer at death should be calculated on the rates provided for in the 1935 act. Appellants then conclude that because of the above-mentioned results, the court gave retroactive effect to the 1935 act, which would render such act unconstitutional. Whether such effect was given, regardless of whether it is proper or improper, depends first upon what changes, if any, were made in the law between the date of the first transfer and the effective date of the 1935 act. We have seen that the rates on the first two $25,000 brackets were increased by the 1935 act from 1 per cent and 2 per cent, respectively, to 2 per cent and 3 per cent. The third and fourth brackets of $50,000 and $100,000, respectively, remained unaltered at 4 per cent and 7 per cent. The exemption was reduced from $10,000 to $5,000. In respect to the right to aggregate the transfers in computing the tax, section 2 (9) of the 1917 act provided as follows: "When *more than one transfer* within the meaning of any of the preceding subdivisions [subdivisions dealing with *transfers at death and inter vivos*] of this section has been made, either before or after the passage of this act, by a *decedent* to one person, the tax shall be imposed upon the *aggregate market value of all of the property so transferred* to such person *in the same manner and to the same extent* as if all of the property so transferred were actually transferred by *one transfer*." (Emphasis added.) The 1917 act was repealed and a new inheritance tax act was enacted in 1921. Stats.1921, p. 1500. Section 2 (the section which contains the provision with reference to aggregation) of the 1921 act was amended in 1925, Stats. 1925, p. 473 and in 1929, Stats.1929, p. 1834. At no time, however, was the wording of the above-quoted portion of section 2 altered or added to in any respect. The rates of taxation and exemptions were not changed until the adoption of the 1935 act. The 1921 act was repealed by the 1935 act, but the 1935 act contains a provision identical with the above-quoted provision from the 1917 act with respect to aggregation, with the addition, however, at the end thereof of the words: "* * * made at the date of the transferor's death and with the value, rates and exemptions as of that date." Stats.1935, pp. 1266, 1268, § 2 (10). It should be observed that although both the 1917 and 1921 acts were repealed, the repealing acts were embraced within the new acts covering the same subject matter as the repealed acts. Under such circumstances it cannot be doubted that the new acts were reenactments and that there was a continuation in the new acts of those provisions of the repealed acts which were carried over without alteration into the former. Therefore, the provision above quoted concerning aggregation remained in force and has continuously been the law since its original adoption in 1917. Estate of Martin, 153 Cal. 225, 94 P. 1053; Perkins Mfg. Co. v. Clinton Const. Co., 211 Cal. 228, 295 P. 1, 75 A. L.R. 439. It also should be noted that the description of the transfers in the above quoted provision in the 1917 act are those occurring "either before or after the passage of *this act*". The same clause appears in subsequent amendments and the new acts, including the 1935 act. The words "passage of this act" refer, however, not to the passage of the new act or amendment, but rather to the passage of the 1917 act, where the provision originally appeared. Greeley v. Suey Sing Benev. Ass'n, 28 Cal.App.2d 536, 83 P.2d 54.

[4-7] It is clear, therefore, that at the time all the transfers here involved were made, there was statutory authority to aggregate the market value of all the property so transferred, and to impose a tax based on such aggregated value to the same extent and in the same manner as if there had been only a single transfer. That authority has existed continuously since the enactment of the 1917 act, which was prior to the first transfer here involved. Disregard-

ing the provision in the 1935 act, specifying that the aggregated value of all transfers shall be taxed as a single transfer at death, and according to the rates and exemptions then in effect (such provision was not in the 1917 act), it remains only to ascertain what effects may reasonably be said to flow from such aggregation. Certainly it is obvious that the authority to aggregate and impose a tax the same as on a single transfer carries with it at least two results, namely, that several transfers being treated as one and taxed accordingly, necessarily means that but one exemption shall be allowed, and that such aggregation would also necessarily result in the aggregate value being such that a higher tax rate bracket would be reached or at least approached. If these results did not follow, the aggregation provision as enacted in 1917 would be meaningless. We see no other purpose to be accomplished by it. In respect to exemptions, section 6(6) of the 1935 act provides:

"In computing the tax upon transfers subject to tax * * * the exemptions * * * shall be deducted from the *aggregate* amount of property transferred, and the transfer of the remainder of the property after making such deduction shall be taxed at the rates at which it would have been taxed had no exemption * * * been allowed." The import of this provision is that only one exemption is to be allowed on a transfer, and where under the authority to aggregate, several transfers are made one in legal effect, the rule of only one exemption still applies. See Estate of Brown, 196 Cal. 114, 236 P. 144, for discussion in passing on the effect on rates and exemptions of statutory authority to aggregate. Here there was a statute in effect authorizing aggregation at the time all the transfers were made. From what we have said it is obvious that the trial court did not give retroactive effect to the 1935 act in determining that the aggregated transfers should be considered as a single transfer, for the reason that the court, although treating the transfers as one, applied the rates and exemption existing under the law prior to the passage of the 1935 act, with the exception of the transfer at death where the rates provided for in the 1935 act were applied. Therefore, appellants are not in a position to complain, as they have not been injured by any claimed retroactive operation of the 1935 act with reference to the rates and exemptions provided for therein. The two results above mentioned, namely, the allowance of only one exemption and the raising of the market value of the transfers by aggregation into higher tax brackets, as we have seen, were authorized by prior acts as well as the 1935 act, and the court, having done no more than reach the results contemplated by these acts, there has been no retroactive effect given to any law in the instant case. It cannot be denied that the court in fixing the amount of the tax had authority to do at least what it did. Whether it could have gone farther and applied the exemption and rates provided for in the 1935 act to the aggregated transfers is a matter with which we are not here concerned. The respondent has not appealed from the order of the court fixing the amount of the tax. Even if it should be held that the clause which was added by the 1935 act (heretofore quoted) providing that the rates and exemptions provided for by the law in effect at the time of death were applicable to the aggregated transfers, and that said act was therefore in violation of the Constitution because retroactive in operation, appellants are not in a position to raise this issue, as such clause was not applied to them and they have not therefore been injured by the retroactive operation of any statute.

[8-12] As we understand appellants' argument, they assert that the 1917 provision by reason of the 1935 addition thereto must necessarily be considered as retroactive as to rates and exemptions and therefore unconstitutional, and that when so considered, the whole authority to aggregate transfers is wiped out. If the portion added in 1935 is unconstitutional because retroactive, it is apparent from what has heretofore been said that it may be separated from the balance of the provision without stripping it of meaning or effect. This would be in accord with the well-established rule that a portion of a statute may be declared unconstitutional without affecting the remainder of the act when the result of the deletion of the unconstitutional portion will not make the statute meaningless and it can be said to have been the intention of the legislature to have the act stand with such deletion. The 1935 act contains the customary declaration of legislative intent that the unconstitutionality of a part of the act shall not invalidate the remainder. Stats.1935, pp. 1266, 1292, § 24. Moreover the conclusion urged by appellants does not necessarily follow. The portion of the provision authorizing aggregation and appearing before the 1935 addi-

tion, has been, as we have seen, the law ever since 1917 and still was the law after the adoption of the 1935 act. The portion of an amended statute which remains the same as it was prior to the amendment, continues to be the law from the time of its original enactment and any changes or additions are considered as having been enacted at the time of the amendment. Carter v. Stevens, 208 Cal. 649, 284 P. 217; Estate of Martin, supra. There was, therefore, a law in effect before and after the 1935 act authorizing aggregation, and it might well be a justifiable assumption that the 1935 addition to the provision and its effect on that provision were intended to operate prospectively only, that is to say, that transfers made after the effective date of the 1935 act could not only be so aggregated as to result in the allowance of a single exemption and a reaching of a higher tax rate bracket, but also that the tax rate and amount of exemption governing would be determined by the law in force at the death of the transferor. Whereas transfers made prior to 1935 would be aggregated to the end that only one exemption would be allowed and a higher rate bracket might be attained, but the rates and exemptions applied would be those provided by prior statutes. To so conclude would be to do nothing more than state that a law when amended may be effective in its original form as to past transactions and effective in its amended form as to future transactions. It is the general rule that a statute is not retroactive in operation unless the legislative intent to the contrary is clear. 23 Cal.Jur. 629.

[13, 14] We are not concerned here with a case in which a change in the law subsequent to some of the transfers has resulted in increasing the amount of the tax computed on the total value of all of the property so transferred. In such a case it might be claimed that such change could not affect the prior transfers. But as pointed out heretofore, the rate on the level reached by the aggregation in this case is the same in both the 1917 and 1935 acts. Appellant is not injured and we are not disposed to pass upon a hypothetical case. Nor are we concerned with what formula would have to be applied, that is, the rates and exemptions to be applied, if the rates and exemptions here applicable had been changed between the times of the various transfers, when the transfers are aggregated, because there was no such change. However, there is no difficulty concerning the formula even in such event. The aggregation would fix the rate bracket in which each transfer would fall and the rate at the time of the transfer could be applied. Any changes in exemptions could be apportioned.

The order is affirmed.

We concur: GIBSON, C. J.; TRAYNOR, J.; SHENK, J.; PULLEN, J. pro tem.; EDMONDS, J.

18 Cal.2d 366

BAUMANN et al. v. BEDFORD et al.

L. A. 16879.

Supreme Court of California.

July 31, 1941.

Rehearing Denied Aug. 26, 1941.

1. Courts 🔑500

In partition action, trial court did not exceed its jurisdiction in appointing receiver, notwithstanding that in another action receivers had been appointed for same realty, where it appeared that both actions were before same court, presided over by same judge, who had first made order directing receivers appointed in first action to turn property over to lawful owners thereof, and then upon petition of plaintiffs in partition proceedings appointed a receiver to take charge of realty.

2. Partition 🔑53

In partition action brought by part of bondholders as representative suit to determine their rights in property as purchasers under deed of trust, where amended complaint showed that names of many of bondholders and their whereabouts had not been ascertained, and for that reason deed from trustee after making sale had not been executed, and it was alleged that all of plaintiffs were owners of bonds secured by trust deed, and that all other known owners not joined as plaintiffs were made defendants in action, together with unknown owners under fictitious names, all necessary parties were before trial court, so as to give court jurisdiction to make order appointing receiver to take charge of property. Code Civ.Proc. § 382.

3. Partition ⚷53

Where all interest of all parties in prior action in which receivers had been appointed for realty had been wiped out by absolute sale of realty under prior deed of trust without any right of redemption, and court ordered receivers to surrender the property to purchasers, court properly made a further order, in partition action, thereafter brought by part of purchasers before same court, appointing a receiver to take charge of realty for purchasers, where names and whereabouts of all purchasers had not been ascertained.

In Bank.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action for partition of realty by Anna Baumann and others against Henry G. Bedford and others. From an order appointing a receiver to take charge of and operate real property, the defendants appeal.

Affirmed.

Prior opinion, 108 P.2d 722.

C. E. Spencer and Henry O. Wackerbarth, both of Los Angeles, for appellants.

Pacht, Pelton, Warne & Black and Charles H. Scharnikow, all of Los Angeles, for defendants Land Mortgage Co. and W. G. Lane.

Thomas F. McCue, Meserve, Mumper, Hughes & Robertson, Glenn A. Lane, and Monta W. Shirley, all of Los Angeles, for respondents.

CURTIS, Justice.

This is an appeal from an order appointing a receiver to take charge of certain real property in the city of Los Angeles, and to operate and control said real property until the further order of the court. There is located on said real property a thirteen-story building, which is principally used as a hotel or club. The real property in controversy was subject to a deed of trust given to secure the payment of $500,000, represented by 225 promissory notes or bonds (we will refer to these instruments as promissory notes) of various denominations ranging from $500 to one for $100,000. Each note bore interest at the rate of seven per cent per annum and became payable on May 1, 1935. The makers of said notes were in default in the payment of said notes. Proceedings were instituted to foreclose said deed of trust, and after proceedings duly had, said real property was sold to the various owners and holders of said notes, some seventy-five in number. The identity of a number of said owners was unknown, and for that reason no deed had been executed by the trustee under said sale at the date of making said order appointing a receiver. Thereupon the plaintiffs in this action, being the owners and holders of a large number of said notes at the date of the sale of said property to the trustee and at the date of the commencement of this suit, brought this action in partition in behalf of all the owners of said notes, and made all the other known and unknown owners of said notes, the latter sued under fictitious names, parties defendant in said action.

In plaintiffs' amended complaint they asked that the property be sold and the proceeds divided pro rata among the owners and holders of said promissory notes. Plaintiffs also asked for a receiver to take charge of said property and to manage and operate the same for the benefit of all the parties to said action. Upon the amended complaint, which was duly verified by the plaintiff Anna Baumann, and upon three affidavits of plaintiffs' attorneys, the court on December 17, 1937, made an ex parte order appointing H. F. Metcalf receiver as prayed for in said amended complaint, and further ordered that defendants appear before said court on December 23, 1937, to show cause why said appointment should not be made permanent. The appeal is from this order, and notice of appeal was served and filed on December 27, 1937.

It does not appear what, if any, action the court took an December 23, 1937, the date fixed for the hearing of the order to show cause why the order appointing the receiver should not be made permanent. If the court on the return day of the order to show cause refused to make the order of December 17, 1937, permanent, then the last-named order would in our opinion fall of its own weight, as a reading of said order would indicate that it was only temporary in character and would only continue until the permanent order was made. On the other hand, if the court on December 23, 1937, made its previous order of December 17, 1937, permanent, then this later order would be controlling, and if the appellants were dissatisfied with its requirements, they should have appealed from it rather than from the temporary order of December 17, 1937. However, neither of the parties has presented this point, and each side appears to regard the order of December 17, 1937, as decisive of their rights in the premises; and for that reason we will so consider it, and in the consideration of the issues raised by the parties, we will confine our discussion to the question of the validity of the order of December 17, 1937.

In addition to the foregoing facts, it appears that said real property was subject to a second deed of trust subsequently executed and recorded after the recordation of said first deed of trust referred to above. This second deed of trust was given to secure the payment of a promissory note for $5,000. Default having been made in the payment of said note, an action was brought to foreclose said deed of trust, and after a sale of said property under the power of sale in said second deed of trust, the purchasers thereunder brought an action in unlawful detainer against the parties in possession of said real property to recover its possession. This action was entitled "Townsend v. Perry". Two receivers were appointed in said action to take charge of said real property. That action and the present action were pending in the same court and were before the same trial judge. After the sale under the first deed of trust and upon the petition of Anna Baumann, one of the plaintiffs herein, the court in said action of "Townsend v. Perry" and on December 10, 1937, made an order directing the receivers theretofore appointed in said action of "Townsend v. Perry" to turn over and deliver said real property to the purchasers thereof at the sale under said first deed of trust. Thereafter, as before noted, the court on December 17, 1937, made said order appointing H. F. Metcalf receiver of said real property and to manage, operate and control the same. The parties to said unlawful detainer action were made defendants in this action, and they have perfected this appeal from said order of December 17, 1937. The trustee who made the sale under said deed of trust and many of the defendant purchasers of said real property have all acquiesced in the order appointing said receiver, and the only appellants are the parties in the action of "Townsend v. Perry".

It is first contended that the trial court had no jurisdiction to appoint a receiver to take possession of property from the receivers theretofore duly appointed.

[1] The order appointing the receiver in the present action was self-executing (Hibernia S. & L. Soc. v. Belcher, 4 Cal.2d 268, 48 P.2d 681) and its effect was to discharge the receivers theretofore appointed and who had been ordered to turn the property over to the plaintiffs and the other purchasers at the sale under said first deed of trust. Von Roun v. Superior Court, 58 Cal. 358. In that case the sheriff held the property involved in that action as receiver under the Insolvency Act of 1880. The court subsequently appointed a receiver of the property of the insolvent, and the sheriff was directed to turn the property over to said subsequently appointed receiver. It was contended that there could not be two receivers of the same property, and that the court was without jurisdiction to appoint a second receiver. In answer to this contention the court said at page 359 of 58 Cal.: "This does not mean that the Court can not appoint two persons as Receivers to act jointly, or that it can not take property out of the hands of one Receiver and place it in the hands of another. The order directing the Sheriff to hand over the property in his hands to the Receiver, in effect discharged the Sheriff as Receiver, regarding him as such."

Appellant relies upon the case of Fischer v. Superior Court, 110 Cal. 129, 42 P. 561, for support of its present contention. In that case a receiver had been appointed to take charge of certain mining property in the county of Tuolumne, and while said action was still pending in said county and said receiver was in the possession of said property, another action similar to the prior action was filed in the superior court of the city and county of San Francisco, and an order was made in this second action appointing a receiver of the same property. It was held in that case that one court had no power to appoint a receiver where a receiver had already been appointed by another court with equal jurisdiction, and was in possession of the property in dispute at the time of the second appointment. That case differs materially from the instant one in that in the present case both actions were before the same court, presided over by the same judge, who first made an order directing the receivers appointed in the first action to turn the property over to the lawful owners thereof, and then upon the petition of the plaintiffs herein, acting for themselves and other lawful owners, appointed a receiver to take charge of and operate said property. In our opinion there is no question that the trial court had jurisdiction to make such order. It is useless to take the time to distinguish the other authorities cited by the appellants in support of their contention that the court was without the power to appoint the present receiver, as in none of them was the second receiver appointed in the same court and by the same judge, and after the judge had ordered the first receiver to turn over the property in his possession to a receiver subsequently appointed, thus terminating the prior receivership.

[2] It is further contended that the necessary parties were not present in the present action to give the court jurisdiction to proceed in the consideration of any phase of the case, and particularly in the proceeding for the appointment of a receiver. The basis of this contention is that this is an action for partition of real property and all of the lawful owners of said real property were not made parties to the action, and therefore were not before the court when said order was made. The amended complaint shows that the names of many of said owners and their whereabouts had not been ascertained, and for that reason the deed from the trustee after making the sale under said deed of trust had not been executed. It is alleged in said amended complaint, and not denied, that all of the plaintiffs in this action were owners of notes secured by said trust deed, and that all the other known owners of said notes not joined as plaintiffs were made defendants in said action, together with unknown owners under fictitious names. We, therefore, think this was a sufficient pleading in a partition action, and even if by some chance an owner has been omitted, the appellants cannot complain of such omission. Whatever right any omitted unknown owner might have in the final determination of the action would depend upon the proceedings leading up to the rendition of the final judgment by the trial court. It is no concern of appellants. Besides this is a representative suit brought by the plaintiffs "for the purpose of ascertaining the respective rights of the plaintiffs and defendants in said property, and of the rights of unknown and unascertained persons therein as holders of said bonds". With this record before us, there can be no question in our opinion that all necessary parties were before the court at the time the order appointing the receiver was made, in order to give the court jurisdiction to make said order. Section 382 of the Code of Civil Procedure; Moore v. Bowes, 8 Cal.2d 162, 64 P.2d 423; Farmers' & Merchants' Nat. Bank v. Peterson, 5 Cal.2d 601, 55 P.2d 867. It is true that the court ordered the receivers appointed in the first action to surrender the property in their custody to the purchasers under the first deed of trust, and appellants complain that the receivers are unable to comply with this order until they know who the purchasers are. This statement is true in part, and no doubt that was one reason that prompted the court to appoint a receiver to take possession of said property and operate the same for and on behalf of all said purchasers, known and unknown.

[3] The foregoing statement answers appellants' last contention, which is that there is no allegation of fact in the amended complaint showing any ground for the appointment of a receiver. In addition to this statement, the amended complaint shows that all right, title and interest of all the parties in the action of "Townsend v. Perry", both plaintiffs and defendants, for whom the receivers appointed in that action were ordered, were wiped out by the sale of the property under the prior deed of trust. The sale was absolute without any right of redemption by appellants or any other person. There was nothing, therefore, for the receivers in this prior action to act upon. For that reason the trial court ordered them to surrender the property to the purchasers under the sale by the trustee, and because of the condition existing among these purchasers, the trial court made its further order appointing the receiver to take and hold possession of the property for said purchasers. In our opinion this order of the court was legal and proper.

The order appealed from is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.

GOES v. PERRY et al.

BAUMANN v. GOES et al.

L. A. 16873.

Supreme Court of California.

July 31, 1941

Rehearing Denied Aug. 26, 1941.

1. Replevin 🔑23

Generally, in an action where right to possession of personal property is sole issue, one not claiming right to possess such property has no right to intervene therein; however, such rule has exceptions. Code Civ. Proc. § 387.

2. Replevin 🔑23

In action to recover possession of personalty, where each party based his right of possession upon claim of ownership, one seeking to impose a trust upon property standing in name of plaintiff had such an interest in subject matter in litigation as would entitle her under statute to intervene therein, notwithstanding that intervener was not claiming right to possession of property. Code Civ.Proc. § 387.

3. Appeal and error 🔑1011(1)

In action to recover possession of personalty, wherein one seeking to impose a trust upon property standing in name of plaintiff intervened and applied for appointment of receiver, where intervener's complaint was considered by trial court as an affidavit or evidence in support of intervener's application for a receiver, as such evidence it was province of trial court to pass upon its weight and to reconcile all conflicts therein, and reviewing court would not disturb trial court's determination. Code Civ.Proc. § 387.

4. Appeal and error 🔑1008(3)

The rule that it is province of trial court to pass upon weight of evidence and to reconcile all conflicts therein, and that a reviewing court will not disturb trial court's determination, applies both to oral and documentary evidence.

5. Trusts 🔑369

In action to recover possession of personalty, wherein one seeking to impose a trust upon property standing in name of plaintiff intervened and applied for appointment of receiver, if intervener's complaint failed to state facts sufficient to constitute a cause of action in her favor, the appointment of a receiver solely upon such a pleading would be erroneous. Code Civ.Proc. § 387.

6. Pleading 🔑48

A complaint may be uncertain and ambiguous and even contain conflicting allegations and still contain a sufficient statement of facts to constitute a cause of action.

7. Trusts 🔑369, 371(2)

In action to recover possession of personalty, wherein one seeking to impose a trust upon property standing in name of plaintiff intervened and applied for appointment of receiver, where complaint in intervention alleged that personalty was purchased with money which intervener and her associates were entitled to have applied on deficiency remaining due on notes held by them after sale under deed of trust of realty in which personalty was kept, and that title to personalty was taken in name of plaintiff who paid no part of consideration therefor, complaint stated facts sufficient to constitute a cause of action, and authorized an order appointing a receiver. Code Civ. Proc. § 387.

8. Trusts 🔑86

Where title to property, either personalty or realty, is taken in name of one party and consideration for the transfer is furnished by another, a trust is presumed to result in favor of one furnishing the consideration.

9. Trusts 🔑369

In action to recover possession of personalty, wherein one seeking to impose a trust upon property standing in name of plaintiff intervened and applied for appointment of receiver, where intervener sued in a representative capacity and in behalf of all persons having a common interest with her as purchasers of realty in which personalty was kept, all necessary parties were before trial court, so as to authorize order appointing receiver. Code Civ.Proc. § 382.

10. Receivers 🔑16

Where dispute in a litigation is as to title to property involved therein and it is made satisfactorily to appear that property is of such a character or is in such a situation as that it is likely to be lost or destroyed or greatly deteriorated in value in hands of party in possession before merits of controversy can be adjudicated, and a satisfactory showing is made that plaintiff has some interest in the property, or that plaintiff's right thereto or to some portion thereof is reasonably certain, trial court may, in exercise of its discretion, appoint a receiver to take custody of the property pending the litigation.

11. Appeal and error ⟜955
Receivers ⟜8

The appointment of a receiver pending a litigation rests largely in discretion of trial court, and trial court's action in appointing a receiver will not be disturbed by an appellate court in absence of showing of abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by B. W. Goes against Will H. Perry and others to recover possession of certain personalty, wherein Anna Baumann was permitted to file a complaint in intervention against B. W. Goes and others, and wherein a receiver was appointed. From the ex parte order appointing the receiver, Will H. Perry appeals.

Affirmed.

Prior opinion, 108 P.2d 719.

C. E. Spencer and C. S. Tinsman, both of Los Angeles, for appellant.

Pacht, Pelton, Warne & Black and Charles H. Scharnikow, all of Los Angeles, for plaintiff.

Thomas F. McCue, of Los Angeles, for respondent.

CURTIS, Justice.

The appeal in this action is from an order appointing a receiver of the furniture, furnishings and fixtures contained in the thirteen-story building for which a receiver was appointed, and the order making such appointment was affirmed by this court in the case of Baumann v. Bedford, 115 P.2d 437, in an opinion this day filed.

The present action is one in claim and delivery to recover possession of said furniture, furnishings and fixtures and was brought by the plaintiff, a purchaser under a deed of trust, against the defendant Will H. Perry, who, it is alleged, unlawfully withholds possession of said property from plaintiff. The respondent, Anna Baumann, intervened in said action, claiming that the money used to purchase said property at the trustee's sale thereof was wrongfully appropriated from a trust fund belonging to the plaintiff and her co-owners of the real property upon which said building is situated and in which said personalty was used at the time of the purchase thereof by plaintiff. Intervenor therefore seeks to impose a trust upon said personal property in favor of herself and associates on the ground that the purchase price thereof was paid out of funds belonging to intervenor and her co-owners. Upon the verified complaint in intervention and the affidavit of the attorney for the plaintiff in intervention setting forth the claim of plaintiff in intervention, the location and use of said personal property, and other matters, some of which may be referred to later, the court appointed H. F. Metcalf receiver of said personal property. H. F. Metcalf was the same person appointed by the court as receiver of the real property and building in which said personal property was located and in which it was used in carrying on a club and hotel business. From this order the defendant Will H. Perry has appealed. No appeal has been taken by the plaintiff in said action.

[1] It is first contended that plaintiff had no right to intervene in said action because she had no interest in the action that would be affected by any judgment rendered therein. The position of the appellant in making this contention appears to be that the action between himself and the plaintiff is one in claim and delivery to recover the possession of personal property, and as the intervenor has not shown, nor even claimed, that she is entitled to the possession of said personal property, she has no such interest therein as will entitle her to intervene under section 387 of the Code of Civil Procedure, the sole authority under which she claims such right. While the general rule is that in an action where the right to the possession of personal property is the sole issue, one not claiming the right to possess said property has no right to intervene therein, this rule has exceptions, one of which may be illustrated by the case of Bogue v. Roeth, 98 Cal.App. 257, 276 P. 1071. That action was an action in claim and delivery, or in replevin, virtually the same proceeding under a different name. It was brought to recover possession of a herd of cattle, the plaintiff being the owner thereof, and the defendants claimed an agistor's lien upon the cattle for an unpaid pasturage bill. L. E. Walker was permitted to file a complaint in intervention, alleging that he had a contract to purchase the cattle. On appeal it was contended that he did not claim to be entitled to the possession of the cattle, but only an interest in the cattle themselves by reason

of a contract between him and the plaintiff, whereby he agreed to purchase them, and that his claim was not such an interest in the cattle as would entitle him to intervene in an action the sole question in which was the right of possession of the cattle. Answering this contention of the defendants, the court in that action on page 263 of the decision in 98 Cal.App., on page 1074 of 276 P. makes the following statement: "There is no merit in the defendants' contention that L. E. Walker, who held a valid contract for the purchase of 1,050 head of the cattle sought to be replevined in this suit, possessed no such interest in the subject of this litigation as would entitle him to intervene under section 387 of the Code of Civil Procedure, which provides in part: 'At any time before trial, any person, who has an interest in the matter of litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding.' One who holds a valid contract to purchase personal property which is involved in a suit of replevin has an interest in the matter in litigation entitling him to intervene as a party to the action. Loughborough v. McNevin, supra [74 Cal. 250, 257, 14 P. 369, 15 P. 773, 5 Am.St.Rep. 435]; Gaines v. Clark, 51 App. D.C. 71, 275 F. 1017, 1019, 20 Cal.Jur. 520, § 25. * * *"

While the present action is for the recovery of the right of possession of said personal property, it appears from plaintiff's complaint that his sole claim to the possession of said property rests upon his right of ownership thereof. He alleges that he is "the owner and entitled to the immediate possession" of said property, and that said furniture, furnishings and fixtures are the same property that was sold by the commissioner appointed by the superior court in the action of Security-First National Bank of Los Angeles v. Commercial Club. While plaintiff does not allege that he was the purchaser at said sale, the intervenor in her complaint so alleges the fact to be. There is no denial of this allegation. It is apparent, therefore, that plaintiff's right to the possession of said personal property depends solely upon his claim of ownership of said property by virtue of the conveyance to him under said foreclosure proceedings.

We have no direct information as to the claim of the appellant to the possession of said personal property. While he was made a party defendant both in plaintiff's complaint and in the complaint of the intervenor, his answer to neither of said pleadings, if any was made by him, is made a part of the record on appeal in this action. The only information we have as to the nature of appellant's claim to the possession of said property, if this can be legally considered, is contained in plaintiff's affidavit, filed pursuant to the requirement of section 510 of the Code of Civil Procedure in actions of claim and delivery. In this affidavit it is stated: "That said defendant Will H. Perry [appellant] is claiming the *title* to said personal property under an alleged agreement with one W. G. Lane, wherein said personal property and the *title* and possession thereof was transferred to the said Will H. Perry for services alleged to have been rendered by the said Will H. Perry for the said W. G. Lane." (Italics added.)

[2] From the information before us it appears that the contest between the plaintiff and defendant in this action ostensibly is for the possession of said personal property, but in reality it is an action to determine the ownership of said property, as each party bases his right of possession upon his claim of ownership. As we have stated before, the purpose of the intervenor's action is to impose a trust upon said property standing in the name of the plaintiff. If it should be determined in said action that the defendant is the owner thereof, then intervenor's claim would, of course, be denied. Under this state of facts we think that intervenor has such as interest "in the matter in litigation" as would entitle her under section 387 of the Code of Civil Procedure to intervene therein.

There is no merit to the contention of appellant that intervenor had no cause of action when the complaint was filed and therefor could not intervene therein. The cases of People's Savings Bank v. Jones, 114 Cal. 422, 46 P. 278, and Boles v. Stiles, 188 Cal. 304, 204 P. 848, relied upon by appellant in support of this contention, have no application to the time when a proceeding in intervention in a pending action may be instituted. The time in which a party may intervene in an action is governed by section 387 of the Code of Civil Procedure, which provides that "At any time before trial, any person, who has an interest in the matter in litigation * * * may intervene in the action * * *."

[3, 4] Appellant further contends that the intervenor's complaint shows positively that she has no cause of action. We

must admit that this pleading is in some respects at least uncertain and ambiguous, and contains what appears to us to be conflicting statements. Upon the application for the appointment of a receiver, however, the complaint was considered by the court not as a pleading setting forth the intervenor's cause of action, but as an affidavit or evidence in support of intervenor's application for a receiver. As such evidence it was the province of the trial court to pass upon its weight and to reconcile all conflicts therein, and a reviewing court will not disturb the determination of the trial court. This is the rule respecting oral evidence, and that in respect to documentary evidence is to the same effect. Sutcliffe v. Sutcliffe, 220 Cal. 398, 401, 31 P.2d 195; Union Supply Co. v. Morris, 220 Cal. 331, 338, 30 P.2d 394; Porter v. Miller, 201 Cal. 750, 753, 258 P. 595; 2 Cal.Jur. 932, sec. 547.

[5-8] It is true if intervenor's complaint failed to state facts sufficient to constitute a cause of action in her favor, the appointment of a receiver solely upon such a pleading would be erroneous, but a complaint may be uncertain and ambiguous and even contain conflicting allegations and still contain a sufficient statement of facts to constitute a cause of action. Semi-Tropic S. Ass'n v. Johnson, 163 Cal. 639, 642, 126 P. 488; Thomas v. Wentworth Hotel Co., 158 Cal. 275, 278, 110 P. 942, 139 Am.St.Rep. 120; Heeser v. Miller, 77 Cal. 192, 193, 19 P. 375. We think the complaint in intervention in this action meets the requirements of these authorities. It is directly alleged therein that after the sale of the real property under the deed of trust, a deficiency in excess of $500,000 remained due on the notes held by the intervenor and her associates. It further appears from said complaint in intervention that W. G. Lane and the Lane Mortgage Company collected money from "various holders of the title of the above described real estate (that is, from the original trustors and their grantees) for the use and benefit of Intervener and the other bondholders which they have failed and refused to account for or apply on the indebtedness to Intervener and the other bondholders", but, on the other hand, used said money to purchase said personal property at the trustee sale thereof, taking the title to said personal property in the name of the plaintiff, B. W. Goes, who paid no part of the consideration therefor. Where the title to property is taken in the name of one party and the consideration for the transfer is furnished by another, a trust is presumed to result in favor of the latter. This rule applies to personal property as well as to real property. Grant v. Heverin, 77 Cal. 263, 265, 18 P. 647, 19 P. 493; Kirk White & Co. v. Bieg-Hoffine Co., 6 Cal.App.2d 188, 191, 44 P.2d 439; Thompson v. Bank of California, 4 Cal. App. 660, 667, 88 P. 987.

[9] The contention that the court has no jurisdiction of the proceeding in intervention because of the want of proper parties in the complaint in intervention now made by the appellant in this action, was passed upon and decided adversely to the appellant's contention in the case of Baumann v. Bedford, 15 P.2d 437, this day decided and filed. The plaintiff in intervention, like the plaintiff in said action of Baumann v. Bedford, sued in a representative capacity and in behalf of all persons having a common interest with her, as purchasers at the sale of said real property under the deed of trust securing the various promissory notes aggregating the sum of $500,000, and we held under the authority of Moore v. Bowes, 8 Cal.2d 162, 64 P.2d 423, that an appropriate case was presented for the application of section 382 of the Code of Civil Procedure.

A number of other points are relied upon by appellant for a reversal of the order of the trial court in appointing a receiver to take charge of the personal property involved herein. They are in our opinion without merit and are not of sufficient materiality to warrant any detailed discussion, except one which we will proceed to consider.

[10] Appellant contends that the order appealed from cannot be sustained for the reason that no facts are alleged in the intervenor's verified complaint or in the affidavit of her attorney entitling her to have a receiver appointed for the furniture, furnishings and fixtures that are the subject of the litigation in this action. She sets forth in her complaint all the acts and circumstances leading up to and culminating in the purchase of the real property on which said personal property is situated. This complaint was filed on September 3, 1937. On December 17, 1937, the affidavit of her attorney in support of her application for the appointment of a

receiver to take charge and operate said real property was filed. The facts set forth in these two documents are found in more detail in the opinion in the case of Baumann v. Bedford, above referred to.

Evidently the applications for the appointment of receivers both for the real property and the personal property came on for hearing before the court at the same time. At least, the orders of appointment were dated the same day, and they were made on the same day the affidavit of the attorney for the intervenor, above referred to, was filed. In this affidavit the attorney stated: "That if the same [the application for the appointment of a receiver for the real property] be granted, such Receiver would take possession only of the real property and not of the furniture, furnishings and fixtures therein contained and forming the subject matter of this action. That furniture, furnishings and fixtures are essential to the continued use of such real property as income producing property. That the same Receiver appointed in action No. 419669 to take possession of the realty, should also be appointed herein to take possession of the personal property during the pendency of this action." It was further alleged in said affidavit: "That the property herein involved consists of the furniture, furnishings and fixtures of a thirteen story height limit building, designed for use as club or hotel. That quiet and peaceful possession, management and control of same in the hands of a single party is the best and only means of avoiding great confusion and loss of the property herein involved. That the taking of said property will not stop or seriously interfere with the business now being conducted on said property, to-wit: hotel and club rooms, but on the other hand, such taking is absolutely essential to the continued operation of said business and will provide a continuity of peace and quiet enjoyment of said property and of the premises on which the same is now located by the tenants of said property and users of said personal property."

We think the above statements are sufficient to justify the trial court to appoint the receiver in this case for the preservation of said personal property. In the case of Takeba v. Superior Court, 43 Cal. App. 469, at page 476, 185 P. 406, at page 409, it is stated as follows: "Where the dispute in a litigation is as to the title to the property involved therein, and it is made satisfactorily to appear that the property is of such a character or is in such a situation as that it is likely to be lost or destroyed or greatly deteriorated in value in the hands of the party in possession before the merits of the controversy can be adjudicated, and a satisfactory showing is made that the plaintiff has some interest in the property, or that the plaintiff's right thereto or to some portion thereof is reasonably certain, the court may, in the exercise of its discretion, appoint a receiver to take custody of the property pending the litigation and the determination of the rights of the parties. This means of course, that the court itself may take possession or custody of the property and hold or dispose of it, according as the nature of the property or the exigencies of the situation with respect to it may require."

[11] The rule is well established that the appointment of a receiver rests largely in the discretion of the trial court, and that its action in appointing a receiver will not be disturbed by an appellate court in the absence of a showing of abuse of discretion. Conklin v. Superior Court, 1 Cal.2d 601, 36 P.2d 386; Anderson v. Anderson, 124 Cal. 48, 56 P. 630, 57 P. 81, 71 Am.St.Rep. 17; Copper Hill Mining Co. v. James Spencer et al., 25 Cal. 11; Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 77 P.2d 301; Sunset Farms, Inc., v. Superior Court, 9 Cal.App.2d 389, 50 P.2d 106; Lowe v. Copeland, 125 Cal.App. 315, 13 P.2d 522; Brush v. Apartment & Hotel F. Corp., 82 Cal. App. 723, 256 P. 285; Fox v. Flood, 44 Cal.App. 786, 187 P. 68.

At the time the trial court made its order appointing the receiver of said personal property it had, as we have seen, both petitions before it. The record in this case and that in the case of Baumann v. Bedford clearly show that there had been an extended period of bitter litigation between the owners of the promissory notes secured by said $500,000 deed of trust on the one hand, and parties holding subsequent interests in both the real and personal property involved in these two actions. The holders of said notes had invested a large amount of money which evidently went into the construction of said building. They had received nothing on the principal of their investment, and default had been made in interest payments. Furthermore, it is claimed that money due them had been misappropriated and used for the purchase of the furniture, furnishings and fixtures that were in the building. To remove this furniture from the building in which it was in use would be to impair its value, as well as lessen, if not destroy, the income from the real property. Undoubtedly, the trial court with these facts before it, concluded that it would be for the best interest of all concerned to place the whole property under the management of one person until the litigation involving both the real and personal property should be terminated. In so doing, it is our opinion that the trial court did not abuse its discretion in the appointment of a receiver.

The order is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.

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18 Cal.2d 328

CLAYTON et al. v. SCHULTZ et al.

S. F. 16168.

Supreme Court of California.

July 28, 1941.

Rehearing Denied Aug. 25, 1941.

1. Appeal and error 🔑1214

Where opinion of District Court of Appeal, reversing judgment for intervener in quiet title action, clearly determined that tax deed upon which intervener relied was invalid because delinquent tax lists were published in supplements to newspaper, the issue of intervener's title was conclusively determined against intervener as a matter of law and hence in subsequent proceeding in the same action for accounting trial court did not err in striking cumulative evidence submitted by intervener on the issue. Pol. Code, § 3766.

2. Appeal and error 🔑1099(6)

Where sufficiency of defendants' pleadings in quiet title action was decided on prior appeal adversely to contention of plaintiff in intervention, there was no merit in contention on subsequent appeal that pleadings were insufficient as basis for affirmative relief.

3. Taxation 🔑814(3)

In action to quiet title between record owner of realty and holder of invalid tax title, the statute requiring allowance to tax purchaser of amounts of taxes, penalties and costs paid "in pursuit of the state's title" did not require reimbursement for amounts paid after purchaser had secured tax deed and taken possession. Pol.Code, § 3898, subd. 5.

4. Taxation 🔑814(3)

Where action to quiet title resolved itself into an accounting suit between record owners and holder of invalid tax title, principles of equity should govern allowance of cross-demands and offsets, and hence tax title claimant was entitled to offset, against total rentals for which he was held accountable to record owners, any proper expenditure which he made while in possession to preserve, protect and maintain the property, including taxes and amounts paid for maintenance and repairs.

5. Account 🔑20(3)

Generally, one charged with rentals collected on land is entitled to credit for expenditures properly made for repairs and preservation of the realty.

◆

Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge.

Action to quiet title by A. D. Clayton against William A. Schultz, Jr., and others, wherein Phineas D. Clayton intervened, claiming ownership of the property by virtue of a delinquent tax sale and subsequent acquisition of the interests of A. D. Clayton, the purchaser thereunder. An accounting was ordered. From a judgment directing intervener to pay $1,633.58 to defendants, intervener appeals.

Modified, and as modified affirmed.

J. H. Sapiro, Abraham Setzer, and J. E. White, all of San Francisco, for appellant.

Thomas T. Califro, of San Francisco, for respondents.

PER CURIAM.

This appeal is from a judgment rendered against Phineas D. Clayton which, among other things, directed him to pay to the defendants the sum of $1,633.58 as a result of accounting proceedings had in connection with a quiet title action brought by A. D. Clayton in 1932, in which Phineas D. Clayton (hereinafter referred to as plaintiff) had intervened, claiming ownership of the real property involved by virtue of a delinquent tax sale and the subsequent acquisition of the interests of A. D. Clayton, the purchaser thereunder. The rights of the latter are not involved herein.

In the complaint in intervention it was alleged that the defendants in the action claimed some interest in or title to the said real property but that such claim or interest was subordinate to the title of the intervener. The defendants answered, setting up their own title, and judgment was rendered in their favor. On appeal from such judgment (Clayton v. Schultz, 4 Cal.2d 425, 50 P.2d 446, 450), it was held that the record was insufficient to properly determine the rights of the parties under the tax sale proceedings, and therefore the judgment was reversed. In its opinion rendered therein this court stated that if upon a retrial the tax proceedings should be held to have been defective the purchaser thereunder would be entitled to reimbursement for "all taxes, costs, penalties, and expenses" incurred in his attempt to secure title from the state, and that the said purchaser should be held to account for rentals collected by him from the property during the period of his possession under the tax deed. Thereafter, a retrial was had which resulted in a judgment for plaintiff, and on appeal therefrom the judgment was reversed. Clayton v. Schultz, 22 Cal.App.2d 72, 70 P.2d 512, 513. The court there ruled that the proceedings leading up to the tax sale were irregular in that publication of the delinquent tax lists was had in a supplement to a newspaper, contrary to the provisions of section 3766, Political Code, and that because of such irregularity the tax deed was void and the plaintiff had secured no rights thereunder. In that decision it was also said that since the cause might again be retried the purchaser must be reimbursed for "all taxes, costs, penalties, and expenses incurred in his attempt to secure title from the state", the said purchaser to account for rentals collected from the property during the period of his possession under the tax deed.

Thereafter, and on November 29, 1937, pursuant to a motion filed in the superior court "to give effect to the decision of the appellate court", a referee was appointed and the court directed that an accounting be had of the expenses incurred by the purchaser in pursuit of title, and of the rentals collected from the property during plaintiff's possession thereof. Also, as a part of those proceedings had in the superior court, and over the objection of the defendants that the issue as to ownership of the property was res judicata, the trial court received evidence on that issue, which evidence, however, was later stricken from the record. Subsequently, on receipt of the report of the referee on the accounting proceedings, the trial court rendered its findings and decree by which the defendants were declared to be the legal owners of the real property involved, and plaintiff was ordered to pay to the defendants the said sum of $1,633.58, which was found to be the amount remaining after the expenses incurred in pursuit of title to the real property had been deducted from the total amount of rentals collected by plaintiff while in possession of the property. This appeal is from that judgment.

Plaintiff's principal contention is that the trial court erred in granting the defendants' motion to strike from the record the testimony adduced by plaintiff with respect to the publication of the delinquent tax lists—which motion was predicated on the claim that the issue as to ownership of the property had been conclusively determined by the District Court of Appeal in favor of the defendants. Plaintiff contends that the issue was not res judicata for the reason that the District Court of Appeal merely reversed the judgment and gave no directions as to the entering of a decree in favor of the defendants, and that such unqualified reversal set the case at large again for a trial de novo. Atchison etc., Ry. Co. v. Superior Court, 12 Cal. 2d 549, 555, 86 P.2d 85; Erlin v. National Union Fire Ins. Co., 7 Cal.2d 547, 549, 61 P.2d 756; Central Sav. Bank of Oakland v. Lake, 201 Cal. 438, 443, 257 P. 521; Monson v. Fischer, 219 Cal. 290, 26 P.2d 6; Heinfelt v. Arth, 4 Cal.App.2d 381, 383, 41 P.2d 191. Plaintiff further contends that on such new trial the law of the case on the question of title was not applicable because the evidence so stricken was different from that offered at the former trial. Rasmussen v. Fresno Traction Co., 15 Cal.App.2d 356, 359, 59 P.2d 617; Sichterman v. R. M. Hollingshead Co., 117 Cal.App. 504, 506, 4 P.2d 181; Aurenz v. Los Angeles Ry. Corp., 35 Cal. App.2d 615, 618, 96 P.2d 397; Sheets v. Southern Pac. Co., 1 Cal.2d 408, 411, 35 P. 2d 121.

[1] An examination of the decision of the District Court of Appeal shows that the question of the regularity of the tax proceedings leading up to the sale of the property, as well as the issue as to plaintiff's title, was squarely presented and determined by that court. It was there said: "The sole and only question here presented is: 'Were the proceedings leading up to the sale of the real property herein involved for nonpayment of taxes regular and legal and sufficient to support the tax deed, which is the basis of plaintiff's title?'" Attention was also directed to the fact that two exhibits which were offered in evidence showed that publication of the delinquent tax lists here involved (in the years 1927 and 1932) was made respectively in "supplements" to certain newspapers, and that the parties conceded they were so made "and in no manner other than set out in said exhibits". In its decision the court further ruled that by an amendment in 1921 to section 3766, Political Code, the legislature had intended to eliminate the practice of publication of delinquent tax lists in supplements to a newspaper; that the tax deed which formed the basis of plaintiff's claim to title was entirely dependent upon the validity of such publications; that the giving of notice of tax delinquency in the manner and form prescribed by the statute was an essential jurisdictional fact; and, finally, that "the tax deed was void, and the plaintiff secured no rights thereunder".

From the foregoing it is clear that in the decision rendered by the District Court of Appeal the issue as to title claimed by virtue of the tax sale was conclusively determined against plaintiff as a matter of law. See, also, Clayton v. Schultz, 12 Cal. 2d 703, 707, 87 P.2d 355. Moreover, with respect to the evidence adduced by plaintiff in the present case on that issue, and which the trial court struck from the record, it may here be said that such evidence did not militate against the conclusion of the District Court of Appeal that the publications were made in a supplement to a newspaper. The evidence so stricken was not materially different from and was but cumulative of that submitted by plaintiff at the preceding trial, and on which the District Court of Appeal based its ruling. Estate of Baird, 193 Cal. 225, 245, 223 P. 974; Swarzwald v. Cooley, 39 Cal.App. 2d 306, 320, 103 P.2d 580; United Iron Works v. Standard B. C. Co., 98 Cal.App. 517, 519, 277 P. 183. The trial court, therefore, did not err to plaintiff's prejudice when it ordered such evidence stricken from the record.

[2] There is no merit in plaintiff's contention that the pleadings of the defendants were insufficient on which to predicate affirmative relief in their favor. That question was before this court on the first appeal and was there decided adversely to plaintiff's contention. Clayton v. Schultz, 4 Cal.2d 425, 432, 50 P.2d 446.

The parties are not in agreement as to the propriety of the allowance and rejection of certain items of expense which were assertedly incurred by plaintiff otherwise than "in pursuit of title" and after he had taken possession of the property under the tax deed. The trial court allowed the sum of $119.08 which plaintiff had expended on April 16, 1936, in payment of taxes for the year 1935–1936, and disallowed the sum of $845.51, which he had expended for repairs, maintenance, management and insurance in connection with the property during the period he was in possession.

[3-5] At the time the property was purchased at the tax sale, section 3898, subdivision 5, of the Political Code provided that whenever it had been determined that such a sale was void and that the purchaser from the state should not be awarded the property so purchased, no decree of the court should be made declaring a forfeiture of the property except on condition that the former owner repay to the purchaser the full amount of all taxes, penalties and costs paid out and expended by him, to be determined by the court, in pursuit of the state's title to the property so sold. It is obvious that since the item of $119.08 for 1935–1936 taxes was expended after plaintiff had secured the tax deed and had entered into possession of the property, reimbursement for this item should not be allowed under section 3898 of the Political Code. See Butterfield v. Union Hollywood W. Co., 39 Cal.App. 605, 179 P. 524; O'Reilly v. All Persons, etc., 29 Cal.App. 49, 154 P. 474. And it is likewise true that reimbursement of the sum of $845.51 expended by the plaintiff after he obtained the tax deed is not contemplated by that section. However, because of the demands of the defendants to recover rentals collected by the plaintiff, the litigation finally resolved itself into an accounting suit between the parties wherein the principles of equity should govern the

question of allowable cross-demands and offsets. Therefore, if the plaintiff is to be held accountable to the defendant for gross rentals, in accordance with the trial court's ruling, he should be entitled to have as an offset against the total amount of such rentals any proper expenditure which he had made while in possession, in preserving, protecting and maintaining the property in such manner as to permit the yielding of rentals. The general rule is that where one is charged with rentals collected he ordinarily is entitled to a credit for expenditures properly made for repairs and preservation of the realty. The situation here presented is analogous to an action for an accounting brought against a mortgagee in possession of mortgaged property. See Raynor v. Drew, 72 Cal. 307, 312, 13 P. 866; Murdock v. Clarke, 59 Cal. 683; 17 Cal.Jur. pp. 1039, 1040; Pom. Eq.Juris., 4th Ed., vol. 3, p. 2914; Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93. In Raynor v. Drew, supra [72 Cal. 307, 13 P. 868], the court ruled that a mortgagee in possession might make such repairs as were reasonably necessary for the preservation of the property, but not permanent improvements "or things which conduced merely to his comfort or convenience". No claim is here made that the expenditures for repairs, etc., were for anything other than for items which were reasonably necessary for the preservation of the property, and the evidence shows they were not improper expenditures within the rule referred to. No distinction of sufficient importance appears between a mortgagee in possession who has collected rentals and made expenditures reasonably necessary to preserve the property, and the situation here existing, to warrant the application of a different rule in this equitable action—and under the particular facts of this case, culminating as it did in an action in equity for an accounting, we will not disturb the holding of the trial court allowing the plaintiff the benefit of the item of $119.08, paid for taxes for the year 1935–1936.

Because of the error of the trial court in its refusal to allow the item of $845.51, a modification of the court's findings and conclusions of law with regard to the accounting will be necessary, and no further consideration need be given to plaintiff's contention that the trial court erred in awarding him a smaller sum as interest on the principal amount allowed him as reimbursement than he would have been entitled to had the interest been properly computed.

The trial court found plaintiff was entitled to the principal sum of $1,121.14, as representing proper items of reimbursement, together with interest thereon (for the period from July 1, 1932, to February 5, 1938) in the sum of $119.08—comprising a total sum of $1,240.22. It was found that plaintiff had collected the sum of $2,873.80 for rentals during the period of his possession under the tax deed and, therefore, that the defendants should have judgment in the sum of $1,633.58—the difference between the expenditures for which allowance had been made to plaintiff and the rentals received by him.

The principal sum of $1,121.14 embraced the following separate items of expenditure: $133, paid on July 1, 1932 (for the purchase price of the property at the tax sale); $869.06, expended on July 26, 1932 (for delinquent taxes, penalties and assessments against the property); and the sum of $119.08 for 1935–1936 taxes. Plaintiff is entitled to an allowance of the two items expended in July, 1932, in pursuit of title, which amount to the sum of $1,002.06, and $119.08 (for 1935–1936 taxes—together with interest at seven per cent on each of such items from the respective dates of payment to February 5, 1938, aggregating the sum of $403.38, and the additional sum of $845.51 for maintenance, repairs, etc.—making a total allowance to plaintiff in the sum of $2,370.03. The defendants are entitled to the difference between that sum and the amount of the rentals collected, which amounts to the sum of $503.77.

Accordingly, the findings of fact and conclusions of law are amended in the respects indicated, and the decree is modified to show that the defendants are entitled to a money judgment in the sum of $503.77.

As so modified, the decree is affirmed, neither party to recover costs on appeal.

18 Cal.2d 256

KINNISON v. GUARANTY LIQUIDATING CORPORATION et al.

L. A. 17849.

Supreme Court of California.

July 23, 1941.

Rehearing Denied Aug. 22, 1941.

1. Attachment 🔑63

Generally, an attaching creditor, seeking to subject the property of a debtor to payment of his debt, obtains a lien only on title or interest which debtor has in the particular property at the time of levy, and therefore if all title and interest of the debtor has been assigned to a third person, the attaching creditor gets nothing by virtue of his levy.

2. Mortgages 🔑187

The common-law doctrine which entitled a mortgagee to possession of mortgaged property has no application in states where mortgagee has merely a lien as security for his debt.

3. Mortgages 🔑187

A mortgagor is entitled to possession of the mortgaged property and to the rents accruing therefrom. Civ.Code, § 2927; Code Civ.Proc. § 744.

4. Mortgages 🔑187

The possessory rights of trustors under deeds of trust are the same as those of mortgagors.

5. Mortgages 🔑188

The possessory rights of mortgagor or trustor during period of mortgage or deed of trust may be subject of a special agreement between mortgagor and mortgagee or between the trustor and trustee.

6. Mortgages 🔑199(2)

Generally, where mortgage or deed of trust contains clause which merely includes rents as portion of property pledged, the mortgagee acquires only a security interest and has no more right to the rents than he has to the real property, and must actually acquire possession of the mortgaged property by consent or lawful procedure or must secure appointment of a receiver in order to perfect his claim to the rents.

7. Mortgages 🔑199(2)

The parties to a mortgage or deed of trust may contract respecting the right to rentals and such agreements will be enforced in accordance with expressed intention of the parties, regardless of whether the agreement is incorporated in mortgage or deed of trust or is in form of a separate instrument, the decisive question being whether the parties contemplated an assignment of the rentals or merely a pledge for security purposes.

8. Mortgages 🔑199(2)

A recorded instrument granting and assigning income from property covered by deed of trust to the secured creditor together with right to collect or enforce payment thereof did not constitute a transfer of a mere security interest but constituted a complete transfer of debtor's interest in rentals.

9. Attachment 🔑178

A creditor who seeks by judicial process to attach property of his debtor to satisfy the debt acquires only the interest which debtor actually possesses.

10. Attachment 🔑175, 178

A creditor who seeks by judicial process to attach property of his debtor to satisfy the debt is in position of a purchaser with notice and his lien is subject to any infirmities which exist in title of his debtor.

11. Attachment 🔑63, 180

The claim of an attaching creditor may be defeated by proof of even an equitable assignment of the debtor's interest, or by a prior unrecorded conveyance of the real property of the debtor.

12. Attachment 🔑53

A recorded assignment by debtor to secured creditor of rentals from property covered by the deed of trust prevented any seizure of the rents by another creditor under subsequent levy of execution.

13. Mortgages 🔑199(2)

An assignment by debtor to creditor of rentals from property covered by deed of trust, by agreement authorizing debtor to collect the rentals as agent and to pay them to creditor at stated intervals precluded another creditor from levying on the rentals while they were on deposit in name of debtor.

14. Banks and banking 🔑130(3)

The fact that an agent deposits funds of his principal in a bank account which stands in the agent's name does not give agent any interest which can be subjected to payment of his debts, and proof that the money in fact belongs to another will defeat an attempt by creditors of the agent to seize the deposit.

15. Estoppel 🔑70(1)

A secured creditor who had received an assignment of rentals from property covered by deed of trust was not "estopped" on equitable principles from asserting title to the rentals because it had permitted debtor to collect and deposit the funds in its own name, as against another creditor which had not extended credit in reliance on debtor's apparent financial position.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

16. Judgment 🔑898(2)

Where a satisfaction of judgment has been erroneously entered, the satisfaction may be cancelled either on motion made in the original action or by means of an independent action in equity between the parties.

17. Judgment 🔑898(4)

Where judgment creditor's levy of execution on bank account was subject to cancellation at instance of another creditor who had prior right thereto, but judgment debtor was not a party to the action, the judgment of judgment creditor would not be reinstated, since the judgment debtor must be a party to any action which affects its rights by reinstatement of original judgment against it.

◆

In Banc.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Ray H. Kinnison against the Guaranty Liquidating Corporation and others to recover proceeds of a bank deposit levied on and turned over to the named defendant. Judgment for plaintiff, and the named defendant appeals.

Affirmed in part and reversed in part.

For prior opinion, see 108 P.2d 466.

Geo. W. Fenimore and Donald P. Mayhew, both of Los Angeles, and Alvin W. Wendt, of Hollywood, for appellant.

Bettin & Wait, Bettin, Painter & Wait, Vernon Bettin, and D. Howard Painter, all of Los Angeles, for respondent.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiae for respondent.

GIBSON, Chief Justice.

The Guaranty Liquidating Corporation (hereafter called defendant) brings this appeal from a judgment in favor of the plaintiff. Defendant, the owner of a judgment in excess of $26,000 against the Bartlett Syndicate Building Corporation (hereafter called Bartlett Corporation), levied a writ of execution upon the bank accounts, moneys and credits of the judgment debtor, Bartlett Corporation, which were in the possession of the Farmers & Merchants National Bank of Los Angeles. That bank made a return stating that it was indebted to Bartlett Corporation in the amount of $4,041.09. This sum was thereafter remitted to the marshal of the municipal court of the city of Los Angeles, who paid the money, less his charges, to defendant. The plaintiff, as assignee of the Pacific Mutual Life Insurance Company (hereafter called Pacific Mutual), brought this action against defendant to recover the sum of $3,997.09, asserting that Pacific Mutual had a prior right to the funds of the debtor, Bartlett Corporation, to that extent.

Plaintiff's claim of a prior right is based upon certain transactions which took place between Bartlett Corporation and Pacific Mutual. In December, 1928, Pacific Mutual made a loan of $835,000 to Bartlett Corporation for the purpose of erecting a building, and a deed of trust was executed upon the property as security for the loan. This deed of trust was released and a new one was executed on February 17, 1932, while Bartlett Corporation was in default under the terms of the original deed of trust. Contemporaneously with the execution of each deed of trust Bartlett Corporation executed an assignment of the rents from the theater which was built on the property, as additional security for the performance of its obligations. On December 28, 1933, while Bartlett Corporation was again in default under the terms of the deed of trust, an instrument was executed upon which plaintiff bases his claim of a prior right to the funds of Bartlett Corporation which were on deposit with the bank. This instrument assigned to Pacific Mutual all the rents, issues and profits accruing from all the real property covered by the deed of trust, including office and store rents as well as the theater rent which had previously been assigned as further security when the deed of trust was executed. This last assignment of rentals was recorded on

January 12, 1934, and at the same time a separate agreement was entered into providing that Bartlett Corporation should thereafter collect all of the rental income assigned, but specifying that such income was deemed to have been collected for the account and benefit of Pacific Mutual. After February, 1934, Bartlett Corporation collected the rentals under the terms of this special agreement and deposited the money in its general account with the Farmers & Merchants National Bank. Monthly disbursements were made to Pacific Mutual in accordance with the agreement but the account was in the name of Bartlett Corporation, and it was this account upon which defendant levied execution on February 16, 1937. The trial court found that Bartlett Corporation had collected the rentals and had deposited them on behalf of Pacific Mutual, and that, at the date of defendant's levy of execution, the sum of $3,997.09 constituted rental money belonging to Pacific Mutual under the terms of its assignment. The court also found that, prior to its levy of execution, defendant had actual and constructive knowledge of the assignment of rents from Bartlett Corporation to Pacific Mutual, of the fact that Bartlett Corporation was collecting the rentals on behalf of Pacific Mutual and under authority from it, and of the fact that the sum of $3,997.09 actually belonged to Pacific Mutual although the account stood in the name of Bartlett Corporation. On the basis of these findings the court gave judgment for the plaintiff in the sum of $3,997.09, and from that judgment the defendant brings this appeal.

[1] It is the general rule that an attaching creditor, seeking to subject the property of a debtor to the payment of his debt, obtains a lien only upon the title or interest which the debtor has in the particular property at the time of the levy. Thus, if all the title and interest of the debtor has been assigned to a third person, the attaching creditor gets nothing by virtue of his levy. National Bank of Pacific v. Western Pac. Ry. Co., 157 Cal. 573, 576, 108 P. 676, 27 L.R.A.,N.S., 987, 21 Ann.Cas. 1391; Spear v. Farwell, 5 Cal.App.2d 111, 42 P.2d 391; see O'Rourke v. O'Connor, 39 Cal. 442; 11 Cal.Jur. 70, et seq.; Ward v. Waterman, 85 Cal. 488, 507, 24 P. 930. It is contended, in support of the judgment below, that the assignment of December 28, 1933, operated in the present case to transfer the entire interest of Bartlett Corporation in the rentals to Pacific Mutual. Therefore, it is said, Bartlett Corporation had no interest which was subject to a levy of execution by defendant, the judgment creditor.

[2-5] The common law doctrine which entitled a mortgagee to possession of the mortgaged property has no application in states where the mortgagee has merely a lien as security for his debt. Dutton v. Warschauer, 21 Cal. 609, 82 Am.Dec. 765. It is established in this state, therefore, that the mortgagor is entitled to possession of the mortgaged property (Code of Civ.Proc., § 744; Civ.Code, § 2927; 17 Cal.Jur. 1010; see 1 Jones, Mortgages, 8th ed., 1928, § 22) and to the rents accruing from such property. Freeman v. Campbell, 109 Cal. 360, 42 P. 35; Belcher v. Aaron, 8 Cal.2d 180, 182, 64 P.2d 402; Casey v. Doherty, 116 Cal.App. 42, 2 P.2d 495. No distinction is to be made in this regard between mortgages and deeds of trust; the possessory rights of trustors have been held to be the same as those of mortgagors. Snyder v. Western Loan & Bldg. Co., 1 Cal.2d 697, 37 P.2d 86; Meadows v. Snyder, 209 Cal. 270, 236 P. 1012; 25 Cal.Jur. 41, 42. It has been recognized, however, that the possessory rights of the mortgagor or trustor during the period of the mortgage or deed of trust may be the subject of a special agreement between the mortgagor and mortgagee or between the trustor and trustee. Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 627, 81 P.2d 944; Snyder v. Western Loan & Bldg. Co., supra; Mines v. Superior Court, 216 Cal. 776, 16 P.2d 732; Sacramento & Placerville R. R. Co. v. Superior Court, 55 Cal. 453; Freeman v. Campbell, supra. Provisions granting to the mortgagee the right to collect the rents in the event of default are often incorporated in the terms of the mortgage or deed of trust, and they are sometimes the subject of an independent contract between the parties. Snyder v. Western Loan & Bldg. Co., supra; Pomona Mutual, etc., Ass'n v. Smith, 18 Cal.App.2d 509, 64 P.2d 444; Fisher v. Norman Apts., Inc., 101 Colo. 173, 72 P.2d 1092; Harris v. Taylor, 35 App.Div. 462, 54 N.Y.S. 864; Farmers' Trust Co. v. Prudden, 84 Minn. 126, 86 N.W. 887.

[6, 7] Where the mortgage or deed of trust contains a clause which merely includes the rents as a portion of the property pledged to secure the debt, courts have generally held that the mortgagee acquires only a security interest and has no more right to

the rents than he has to the real property. In such circumstances it is well settled that the mortgagee must actually acquire possession of the mortgaged property by consent or lawful procedure or must secure the appointment of a receiver in order to perfect his claim to the rents. Freeman v. Campbell, supra; Simpson v. Ferguson, 112 Cal. 180, 185, 40 P. 104, 44 P. 484, 53 Am.St. Rep. 201; Bank of America v. Bank of Amador County, 135 Cal.App. 714, 721, 28 P.2d 86; Freedman's Savings & Trust Co. v. Shepherd, 127 U.S. 494, 8 S.Ct. 1250, 32 L.Ed. 163; Long v. Devereux Co., 87 Mont. 198, 286 P. 402; Myers v. Brown, 92 N.J. Eq. 348, 112 A. 844; Sullivan v. Rosson, 223 N.Y. 217, 119 N.E. 405, 4 A.L.R. 1400; 2 Jones, Mortgages, 8th Ed. 1928, § 827; Beindorf v. Thorpe, 126 Okl. 157, 259 P. 242, 55 A.L.R. 1020; State ex rel Gardner J. Gwinn, Inc. v. Superior Court, 170 Wash. 463, 16 P.2d 831, 19 P.2d 1119, 87 A. L.R. 625, 628; Watts v. Smith, 250 Ky. 617, 63 S.W.2d 796, 91 A.L.R. 1217, 1221. The agreement between the parties, however, either by a clause inserted in the deed of trust or mortgage or by a separate instrument, may provide that in the event of default the rents are assigned absolutely to the mortgagee. It has been held that such a provision, rather than pledging the rents as additional security, operates to transfer to the mortgagee the mortgagor's right to the rentals upon the happening of the specified condition. Paramount Bldg. & Loan Ass'n v. Sacks, 107 N.J.Eq. 328, 152 A. 457; Graniss-Blair Audit Co. v. Maddux, 167 Tenn. 297, 69 S.W.2d 238; see Franzen v. G. R. Kinney Co., 218 Wis. 53, 56, 259 N.W. 850, 105 A.L.R. 740; Harris v. Taylor, supra. In some jurisdictions, however, courts have refused in certain cases to give effect to clauses of assignment either upon the theory that the mortgagee can acquire the rights flowing from possession only in the manner provided by statute (Rives v. Mincks Hotel Co., 167 Okl. 500, 30 P.2d 911; Western Loan & Bldg. Co. v. Mifflin, 162 Wash. 33, 297 P. 743) or upon the theory that the courts are reluctant to find that a complete transfer of the mortgagor's possessory rights was intended despite the use of language of assignment rather than hypothecation. Fisher v. Norman Apts., Inc., supra; Sullivan v. Rosson, supra; Prudential Ins. Co. v. Liberdar Holding Corp., 2 Cir., 74 F.2d 50, 52; One Hundred & Forty-Eighth Street Realty Co. v. Conrad, 125 Misc. 142, 210 N.Y.S. 400; 1938, Yale L.J. 1000, 1001; 2 Jones, Mortgages, 8th Ed. 1928, § 976. Our decisions have indicated, however, in accord with the better view, that the parties to a mortgage or deed of trust may contract respecting the right to rentals and that such agreements will be enforced in accordance with the expressed intention of the parties. Title Guarantee & Trust Co. v. Monson, supra; Snyder v. Western Loan & Bldg. Co., supra; Silverstein v. Oakland Title Ins. etc., Co., 122 Cal.App. 73, 9 P.2d 846; Pomona Mut., etc., Ass'n v. Smith, supra; cf. Long Island Bond, etc., Co. v. Brown, 171 Misc. 15, 11 N.Y.S.2d 793, 797; see Abelow, "Historical Analysis of Assignments of Rent", 1936, 6 Brooklyn L.Rev. 25, 41; 1938, 47 Yale L.J. 1000; 1937, 50 Harv.L.Rev. 1322. Whether the agreement between the parties is incorporated in the mortgage or deed of trust or whether it is in the form of a separate instrument is not controlling; the decisive question is whether the parties contemplated an assignment of the rentals or merely a pledge of the rentals for security purposes. See Paramount Bldg. & Loan Ass'n v. Sacks, supra; 1938, 47 Yale L.J. 1000.

[8] In the present case we do not see how it can be said that the parties contemplated merely the transfer of a security interest in the rentals. The instrument by which Bartlett Corporation transferred its right to Pacific Mutual provides:

"Whereas, Bartlett Syndicate Building Corporation, Ltd., a California corporation * * * is the owner of that certain real property * * * described as follows: * * *; and

"Whereas, all leases * * * are hereinafter referred to as the 'Hollywood leases'; and

"Whereas, all rentals * * * due * * * to Bartlett * * * under all or any of said Hollywood leases * * * (excepting only any rental * * * which is paid after all of the indebtedness and obligations secured by said trust deed have been fully paid and performed) are hereinafter referred to as the 'property income';

"Now, therefore * * * Bartlett hereby (1) grants, transfers, assigns and sets over to the Pacific Mutual Life Insurance Company of California * * * said property income, together with the right to collect and/or compromise the same in whole or in part and/or to enforce the payment of all or any part thereof * * * as the insurance company may deem proper. * * *"

This instrument was recorded and the trial court found that Pacific Mutual had notified the tenants under the leases that the rents had been assigned to it by Bartlett Corporation. Such an assignment cannot be said to have contemplated the transfer of a mere security interest. The instrument is phrased as a complete transfer of Bartlett Corporation's interest in the rentals. Thus, there is no provision for a continued enjoyment of the rents by the debtor so long as no default exists in the obligation secured. Nor is there any indication that, by meeting the obligations then due, Bartlett Corporation could have regained its right to receive the rents. Rather, the rents were relinquished completely, to be applied by Pacific Mutual in satisfaction of the total outstanding indebtedness. This was not an assignment as further security for the performance of Bartlett Corporation's obligations, but was an attempt to liquidate the debt upon which Bartlett Corporation had been in default for at least eight months at the time the assignment was executed. Unlike the rental assignments accompanying the deeds of trust executed in 1928 and 1932, this assignment contemplated an immediate application of the rentals as a means of satisfying the total outstanding debt. It follows that the cases relied upon by defendant in seeking a reversal are not controlling. They deal with the requirements of possession necessary to constitute the mortgagee a "mortgagee in possession" where he holds only a security interest in the rentals. In the present case, on the other hand, the plaintiff's assignor Pacific Mutual, held not merely a security interest in the rentals but an absolute assignment of Bartlett Corporation's interest therein.

[9-12] It is well settled that where a creditor seeks by judicial process to attach the property of his debtor to satisfy the debt, he acquires only the interest which the debtor actually possesses. Such an attaching creditor is in the position of a purchaser with notice, and it has been held that his lien is subject to any infirmities which exist in the title of his debtor. McGee v. Allen, 7 Cal.2d 468, 473, 60 P.2d 1026; O'Rourke v. O'Connor, 39 Cal. 442; Ward v. Waterman, supra; National Bank of Pacific v. Western Pac. Ry., supra; 1 Freeman, Executions, 3d Ed., 857, § 170; 28 C.J. 104, et seq.; 15 Cal.Jur. 1002; 11 Cal. Jur. 71. Thus, the claim of an attaching creditor may be defeated by proof of even an equitable assignment of the debtor's interest (McIntyre v. Hauser, 131 Cal. 11, 63 P. 69; Cannon v. Chapman, 24 Cal.App.2d 448, 75 P.2d 522; Van Orden v. Anderson, 122 Cal.App. 132, 142, 9 P.2d 572), or by a prior unrecorded conveyance of the real property of the debtor. Ward v. Waterman, supra, 85 Cal. page 507, 24 P. 930; Plant v. Smythe, 45 Cal. 161. In the case before us, therefore, the assignment of rentals from Bartlett Corporation to Pacific Mutual clearly prevents any seizure of the rents by the defendant under its subsequent levy of execution.

[13, 14] Under the foregoing cases it is apparent that defendant could not have garnished the rents in the hands of the tenants themselves since those rents had already been assigned to Pacific Mutual. Nor is a different result to be reached because defendant attempted to levy upon the rentals while they were on deposit in the name of Bartlett Corporation. The agreement which accompanied the assignment of rentals clearly authorized Bartlett Corporation to collect the rentals as an agent and to pay them to Pacific Mutual at stated intervals. The fact that an agent deposits the funds of his principal in a bank account which stands in the agent's name does not give the agent any interest which can be subjected to the payment of his debts. Proof that the money in fact belongs to another will defeat an attempt by the creditors of the agent to seize the deposit. Nathan v. O'Donnell, 52 Cal.App. 390, 198 P. 1028; Home Land & Loan Co. v. Routh, 123 Ark. 360, 185 S.W. 467, Ann.Cas.1917C, 1142; Packer v. Crary, 121 Iowa 388, 96 N.W. 870; Marx v. Parker, 9 Wash. 473, 37 P. 675, 43 Am.St.Rep. 849; Farmers', etc., Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215; Morrill v. Raymond, 28 Kan. 415, 42 Am.Rep. 167; Brown v. Maguire's, etc., Agency, 343 Mo. 336, 121 S.W.2d 754; 4 Am.Jur. 719; 15 Cal.Jur. 1002.

[15] Defendant also urges that plaintiff should be estopped upon equitable principles from asserting title to the funds because Pacific Mutual, by permitting Bartlett Corporation to deposit the funds in its own name, created a situation which tended to deceive Bartlett Corporation's creditors as to its true financial position. Defendant, however, did not extend credit in reliance

upon Bartlett Corporation's apparent financial position and no sufficient ground is presented for the intervention of equity in these circumstances. Compare Marx v. Parker, supra, 9 Wash. page 475, 37 P. 675, 43 Am.St.Rep. 849; Morrill v. Raymond, supra, 28 Kan. page 419, 42 Am.Rep. 167; Ann.Cas.1917C, 1145. In accord with the general rule, therefore, it must be held that Bartlett Corporation had no interest in the money on deposit with the Farmers & Merchants National Bank which could be applied in satisfaction on defendant's judgment. That portion of the judgment which is in favor of plaintiff and against defendant is therefore affirmed.

[16, 17] In its judgment the trial court sought to place the defendant, Guaranty Liquidating Corporation, in the position it occupied prior to its levy of execution. To that end the court ordered that the sum previously credited on account of defendant's judgment against Bartlett Corporation because of the levy of execution be cancelled so that the judgment might be reinstated at its former amount. It is settled that where a satisfaction of judgment has been erroneously entered, it may be cancelled either upon motion made in the original action or by means of an independent action in equity between the parties. Merguire v. O'Donnell, 139 Cal. 6, 72 P. 337, 96 Am.St.Rep. 91; Haggin v. Clark, 61 Cal. 1; Clark v. Johnston, 49 Cal.App. 315, 193 P. 864; Argue v. Wilson, 3 Cal. App.2d 645, 40 P.2d 297; 15 Cal.Jur. 273; 2 Freeman, Judgments, 5th Ed., p. 2410 et seq.; Knaak v. Brown, 115 Neb. 260, 212 N.W. 431, 51 A.L.R. 243. Such an order cannot appropriately be made in the present case, however, because Bartlett Corporation is not a party to the action, and it is clear that the judgment debtor must be a party to any action which affects its rights by reinstating the original judgment against it. See Freeman, supra, p. 2415. It follows that that portion of the judgment herein purporting to reinstate defendant's judgment against Bartlett Corporation at its original figure must be reversed.

The judgment is affirmed in part and reversed in part in accord with the foregoing conclusions, costs upon this appeal to be borne by defendant, appellant herein.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.

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18 Cal.2d 341

ACKER v. BALDWIN et al.

L. A. 16619.

Supreme Court of California.

July 30, 1941.

As Modified on Denial of Rehearing Aug. 25, 1941.

1. Counties 🔑21½

A zoning measure will be deemed within purview of county police power unless it is clearly oppressive, though the court may differ from determination of the legislative body.

2. Municipal corporations 🔑601

If there is a reasonable basis for belief that establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, a zoning ordinance to accomplish that purpose will be upheld.

3. Municipal corporations 🔑601

Zoning may properly take into consideration those factors which, though they may not be exactly defined as relating to public health, safety or morals, come under the broad term of general welfare.

4. Municipal corporations 🔑120

A zoning plan must be viewed as a whole and the court will not search out individual cases of discrimination or hardship in order to override legislative determination.

5. Municipal corporations 🔑601

A zoning plan which restricts the use of certain areas to residential purposes need not be sustained by showing that public welfare demands the exclusion of business uses for each individual lot in the area zoned.

6. Counties 🔑21½

The intention motivating founders of town did not affect validity of county zoning ordinance which restricted use of area to residential purposes, since the police power is not subject to mental state of realtors who lay out a subdivision nor may the police power be limited by private contract.

7. Municipal corporations 🔑601

The existence of nonconforming uses does not invalidate a zoning ordinance.

8. Municipal corporations 🔑601

A finding that property owner had long used his property for a commercial purpose would not warrant holding invalid a previously enacted zoning ordinance which restricted use to residential purposes, since no vested right to violate an ordinance may be acquired by continued violations.

9. Counties ⚿21½

A finding that use of property by property owners had not reasonably or otherwise impaired or injuriously affected public health, safety, morals or general welfare would not warrant holding invalid a county ordinance restricting use to residential purposes, since it is only necessary that zoning plan as a whole promote the objectives of the police power.

10. Municipal corporations ⚿601

Zoning regulations look to the future, not to the past, and cannot be made retroactive.

11. Counties ⚿21½

The alleged fact that area included within terms of county zoning ordinance was much less subject to zoning in connection with reasonable desires to preserve health and welfare than communities of more pretentious character would not warrant court in holding the ordinance invalid.

12. Counties ⚿21½

A county zoning ordinance which restricted to residential purposes a sparsely settled area near rapidly growing city of Los Angeles was not invalid as applied to dwelling owner who used his property in connection with his business as plumber, notwithstanding that various home industries including chicken raising had been theretofore pursued by property owners in that area.

13. Appeal and error ⚿781(4)

Where area covered by zoning ordinance was reduced after rendition of judgment declaring ordinance void and after appeal therefrom, but amendment did not change classification of plaintiff's property, his motion to dismiss appeal on ground that appeal presented only a "moot question" was properly denied.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

SHENK and CARTER, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

On rehearing.

Judgment reversed.

Prior opinions, 101 P.2d 505; 108 P.2d 899.

Everett W. Mattoon, County Counsel, Beach Vasey, Deputy County Counsel, and J. H. O'Connor, County Counsel, all of Los Angeles, for appellants.

Aubrey N. Irwin, City Atty., A. L. Lawson, Asst. City Atty., and Ray T. Hall, Deputy City Atty., all of Glendale, amici curiæ for appellants.

Sparling & Teel and Courtney A. Teel, all of Los Angeles, for respondent.

EDMONDS, Justice.

In an action for declaratory relief brought by the respondent, the trial court determined that a zoning ordinance enacted by the county of Los Angeles was unconstitutional. As a part of the decree, the court enjoined the appellants, who are all officers of the county, from enforcing it.

The ordinance (No. 1813 N.S.), adopted in 1930, zoned an unincorporated area, which included the town of Temple City, for specified uses. The respondent is the owner of a house and lot situated within the territory described in the ordinance as Zone R-1. Within this zone, the ordinance provides, "No building, structure, improvement or premises shall be used, and no building, structure or improvement shall be erected, constructed, established, altered or enlarged * * * which is designated, arranged or intended to be occupied or used for any purpose other than a single family residence, together with the outbuildings necessary to use such located on the same lot or parcel of land, including a private garage with a capacity not to exceed three cars."

The findings of fact recite that at the time the decree was made the respondent was a contracting and jobbing plumber conducting his business from his residence in Temple City; that this property was acquired by him after the ordinance was enacted and it is located within Zone R-1; "that Temple City, which notwithstanding its name is an unincorporated territory, was founded with the intention that its inhabitants would use their residence properties for some light commercial purposes which would enable them to make a living; that chicken raising on a commercial scale has been and is the most extensive of these light, commercial home industries but throughout the residence district in Temple City there have been and are scattered real estate offices, stone masons' headquarters, cement contractors' offices, and the like; that this was the state of affairs when the zoning ordinance was passed; the court finds that this zoning ordinance is unreasonable because it attempts to make a strictly residential district out of a district where home industries have always been conducted; that said ordinance purports to prevent the living upon and use of said property for any purpose other than a single family residence and to prevent the living upon and the conduct of any business from and upon said premises; that said premises are in a sparsely built-up community without the corporate limits of any municipality and in the unincorporated section of Los Angeles county; that said section is in the center of a poultry, truck gardening and fruit growing community wherein and whereat all residents, without substantial exception, are poor people who at least must of necessity and do get their living or a large portion thereof from the use of the said property otherwise than in a strictly residential capacity; that much of the property in said restricted and zoned district has, for a long time, and prior to the enactment of said ordinance been and now is, used for residential and business purposes; that said property is closely surrounded by numerous properties so used for residential and business purposes and is near and in close proximity to railroads and railroad yards and other business areas; that plaintiff has long used his property as hereinbefore alleged; that the use of said property by plaintiff, or by numerous others using their properties for residential and business purposes, has, in no wise, reasonably or otherwise impaired or injuriously affected the public health, safety, morals or general welfare of the community of Temple City, or any other community or section of Los Angeles county; that the said Zoning Ordinance is not reasonably or at all necessary to said public health, safety, morals and general welfare, and that the enforcement of said Ordinance, as valid, will jeopardize and deprive the plaintiff of his rights to the free use and enjoyment of his said property as guaranteed by the Federal and State Constitution."

The principal contention of the appellants is that the evidence does not support these findings and that, in pursuance of a general zoning plan, a legislative body may restrict the use of certain areas for residential purposes. The respondent asserts that the use which he has made of his property is among those intended by the founders of the zoned area, taking the district as a whole, and that the zoning regulations, if enforceable, will result in the taking of his property in violation of the constitutional guarantees.

[1, 2] It is now settled beyond question that although a court may differ from the determination of the legislative body, unless a zoning measure is clearly oppressive, it will be deemed to be within the purview of the police power. There will always be difference of opinion as to the means of accomplishing a particular end, but if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, a zoning ordinance to accomplish that purpose will be upheld. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388.

[3] In earlier times, zoning regulations were, in the main, enacted to restrict the use of property in districts already partially, or somewhat completely built up. With the growth of the large cities as the result of motor transportation, governmental authorities have endeavored to set aside areas for residential purposes in advance of their use, Certainly, it is more in the interest of the general welfare that certain districts be set aside to residential uses before there has been any large investment for improvements than to apply restrictions after business has become established. This is wise city planning in the public interest. It has been made possible by general judicial approval of the doctrine that zoning may properly take into consideration those factors which, although they may not be exactly defined as relating to public health, safety or morals, come under the broad term of general welfare.

[4, 5] Also, a zoning plan must be viewed as a whole and the court will not search out individual cases of discrimination or hardship. Moreover, it is not necessary, in order to sustain such legislation, to show that the public welfare demands the exclusion of business uses

for each individual lot in the area zoned. Rehfeld v. City and County of San Francisco, 218 Cal. 83, 21 P.2d 419; Jones v. City of Los Angeles, 211 Cal. 304, at page 309, 295 P. 14.

[6] Considering the findings, it is not made clear by them what the intention of the "founders" of Temple City was or how it may now be ascertained. Moreover, such intention is immaterial, for the police power is not subject to the mental state of realtors who lay out a subdivision. Nor may the police power be limited by private contract. Thus it has been held that a city and county may not be estopped by its conduct from requiring the removal of a cemetery, estoppel being no stronger than a contract entered into by the sovereign. Laurel Hill Cemetery Association v. City & County of San Francisco, 152 Cal. 464, 93 P. 70, 27 L.R.A.,N.S., 260, 14 Ann.Cas. 1080.

[7] Concerning the next finding, chicken raising and "commercial home industries" are probably carried on in most large areas adjacent to cities. There are usually "scattered" real estate offices in such districts but there is no finding that these uses surround the respondent's property or are even near it. But the existence of non-conforming uses does not invalidate a zoning ordinance.

The finding "that much of the property in said restricted and zoned district has, for a long time, and prior to the enactment of said ordinance been and now is, used for residential and business purposes" is so ambiguous and general as to be utterly meaningless. What is meant by "much"? The court did not state the number, nature or extent of the industrial or commercial uses in the district, nor their proximity to the respondent's property. A large part of the land in any district which is zoned is ordinarily used for residential and business purposes. That situation does not forbid zoning.

These findings were made upon evidence which shows, without conflict, that the total area zoned is 2496 acres, approximately 4 square miles. In general, the community consists of a commercial district running along a main street immediately surrounded by property chiefly given over to residential uses in the next few blocks, with agricultural pursuits surrounding that area. Like practically every other community, these uses sometimes merge near the boundaries, but the lines of demarcation in Temple City are more sharply drawn than in many other districts where zoning legislation has been upheld. There is a single track passenger line of the Pacific Electric Railway on the main street, Las Tunas boulevard, and a branch line of the Southern Pacific Railroad over a mile away from the respondent's property. No other land within the district zoned is used for railroad purposes. Under the zoning ordinance adopted by the board of supervisors, 67% of the area was devoted to single family residences, 26% to multiple family dwellings, and the remainder 7% to commercial uses.

[8, 9] The finding that the respondent has long used his property for a commercial purpose is immaterial because that use commenced subsequent to the enactment of the zoning ordinance. No vested right to violate an ordinance may be acquired by continued violations. Also, the court's finding that the use of property by the respondent and others for business purposes, has, in no wise, reasonably or otherwise impaired or injuriously affected the public health, safety, morals or general welfare will not sustain the judgment. Courts do not require that the proscribed use of each individual lot in an area zoned will have this effect if the zoning plan, as a whole, promotes these objectives of the police power. Rehfeld v. City and County of San Francisco, supra.

[10] Unquestionably, in enacting the ordinance zoning Temple City, the purpose of the board of supervisors was to restrict a sparsely settled area near the rapidly growing city of Los Angeles for residential purposes. Zoning regulations look to the future, not to the past, and cannot be made retroactive. Jones v. City of Los Angeles, supra; Biscay v. City of Burlingame, 127 Cal.App. 213, 15 P.2d 784. There was no attempt to interfere with any existing use. But, in effect, the legislative body declared that in the interests of the future development of the metropolitan area surrounding the city of Los Angeles, reasonable city planning required that this section be set aside for residential purposes. Of course, there would not be unanimous agreement among all citizens concerning the desirability of zoning that particular area. But government cannot wait for unanimous ap-

proval of its purposes, nor do its enactments depend upon such approval for validity.

[11, 12] Also, the contention of the respondent that the area included within the terms of the ordinance is much less subject to zoning in connection with reasonable desires to preserve the health and welfare than communities of more pretentious character is one which has no place in a judicial proceeding. Considerations of private interest will usually be sufficient to convince one that regulation is much more desirable when applied to property belonging to another than to him. Moreover, as has been pointed out before, the respondent bought the property upon which he lives and maintains his business after the ordinance was adopted; he is not in the position of one who finds that a present use of his land does not conform to the requirements of new legislation.

[13] When this case was before the District Court of Appeal the respondent moved to dismiss it upon the ground that the appeal presents only a moot question because of an amendment to the ordinance. According to an affidavit presented in support of the motion, the area of Zone R-1 as fixed by the amended ordinance is much less than that originally prescribed for it. However, the amendment did not change the classification of the respondent's property and, for that reason, the motion was properly denied.

The judgment is reversed.

We concur: GIBSON, C. J.; CURTIS, J.; TRAYNOR, J.; MOORE, J. pro tem.

SHENK, Justice (dissenting).

In my opinion, the decision of this court on the former hearing (108 P.2d 899) correctly disposed of the appeal. The many cases there cited wherein zoning ordinances were held to be not in conformity with constitutional and statutory requirements would seem to bring this case within the rule that the action of the local regulating body is not necessarily beyond judicial scrutiny and direction.

In the majority opinion great stress is laid upon the fact that the plaintiff acquired his property after the enactment of the zoning ordinance and therefore that he is not in position to resist its enforcement. But that fact is not controlling. The leading cases upholding the constitutionality of zoning ordinances in this state (Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, and Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388) were decided on February 27, 1925. Also on that day the case of In re White, 195 Cal. 516, 234 P. 396, was decided. Mr. Justice Lennon was the author of the three opinions. In the White case the petitioner was discharged from custody in a proceeding in habeas corpus wherein it appeared that the building constructed by him in defiance of the zoning ordinance was constructed after the enactment of the ordinance. Notwithstanding that fact, this court, having in mind the salutary effect of zoning regulations and upholding them when properly enacted, as in the two immediately prior cases, nevertheless set aside the ordinance of the city of Atherton in a proceeding where the ordinance was declared to be unreasonable and void on its face. In the present case we have the findings of the trial court after an extensive trial and view of the premises by the trial judge. The facts recited in the majority opinion are to my mind sufficient to support the findings and the conclusion that the ordinance under attack had no reasonable relation to the public health, safety, morals or general welfare.

I concur: CARTER, J.

18 Cal.2d 247

CULLINAN v. GREY et al.

L. A. 16553.

Supreme Court of California.

July 23, 1941.

Rehearing Denied Aug. 22, 1941.

1. Municipal corporations ⚿519(6)

In absence of any statutory enactment establishing rule of priority for special assessment and bond liens, such liens are ranked in the inverse order of their creation, the last in point of time being superior in rank, or first in priority.

2. Municipal corporations ⚿519(6)

"Prior," within provision of the Street Opening Bond Act of 1911 that liens created under such act shall be superior to all other liens, charges and incumbrances except liens of prior assessments, means first in time of creation, and not merely superior in right. St.1911, p. 1196, § 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Prior".

3. Municipal corporations ⚿519(6)

The provision of the Street Opening Bond Act of 1911 that liens created under such act shall be superior to all other liens, charges and incumbrances except liens of prior assessments does not merely place liens created under such act and liens prior in time on a parity, but makes liens prior in time superior. St.1911, p. 1196, § 6.

4. Municipal corporations ⚿519(6)

The operation of the provision of the Street Opening Bond Act of 1911 that liens created under such act shall be superior to all other liens, charges and incumbrances, except "liens of prior assessments," is not limited to prior assessment liens arising under the Street Opening Act of 1903, the Street Improvement Act of 1909, and the Park Act of 1909, notwithstanding another provision of the 1911 act that "assessment" or "assessment roll," as used in such act, shall mean a special assessment made under the 1903 and 1909 acts. St.1903, p. 376; St. 1909, pp. 1042, 1066; St.1911, pp. 1192, 1196, §§ 1, 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Assessment", "Assessment Roll" and "Lien of Prior Assessment".

5. Municipal corporations ⚿405, 519(1)

An "assessment" is a charge made for improvement of a certain piece of property, and an "assessment lien" is security for payment of such charge.

See Words and Phrases, Permanent Edition, for all other definitions of "Assessment Lien".

6. Municipal corporations ⚿454, 519(5)

An "assessment" is ordinarily prepared by street superintendent when entire cost of improvement is ascertained, but "assessment liens" are not created until assessment roll is recorded in the superintendent's office.

7. Municipal corporations ⚿519(6)

Under the provision of the Street Opening Bond Act of 1911 that liens created under such act shall be superior to all other liens, charges and incumbrances except liens of prior assessments, bonds and liens created in 1926 and 1928 under such act were superior to bonds and liens created in 1929 under such act. St.1911, p. 1196, § 6.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by D. Cullinan against John Robert Grey and others to foreclose liens of certain bonds for street improvements, wherein Gertrude Ham filed a cross-complaint. From a judgment affirming an adverse judgment of the superior court, the defendant City of Glendale appeals.

Affirmed.

Prior opinion, 107 P.2d 481.

Rehearing denied; HOUSER, J., did not participate.

Aubrey N. Irwin, City Atty., A. L. Lawson, Asst. City Atty., and Ray T. Hall, Deputy City Atty., all of Glendale, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, amici curiae for appellant.

John F. Bender and Robert E. Rosskopf, both of Los Angeles, for respondent.

CURTIS, Justice.

Plaintiff is the owner of three bonds representing special assessment liens issued in 1926 under the Improvement Act of 1911. Stats.1911, p. 730. Cross-complainant owns one bond representing a special assessment lien issued in 1928 under the said Improvement Act of 1911. Defendant City of Glendale is the owner of three bonds representing special assessment liens issued in 1929 under the Improvement Act of 1911.

Stats.1911, p. 1192. (This act is frequently referred to as the Street Opening Bond Act of 1911, and we will refer to it under that title.) The bonds of defendant were issued under said act to represent special assessment liens to meet the expense of a street improvement under proceedings taken under the Street Opening Act of 1903, St. 1903, p. 376. The bonds of the plaintiff and those of the defendant represent special assessment liens against the same three lots, and the bond of cross-complainant represents a special assessment lien against one of said lots. All proceedings under which the bonds and assessment liens were created were for the improvement of the same street.

As the trial court found and adjudged that the lien of each of the plaintiff's bonds was superior to the lien of the bond of the cross-complainant, Gertrude Ham, and there is no appeal from the judgment by the said Gertrude Ham, there is no issue before us as to the priority of the respective liens of the bonds of the plaintiff and the cross-complainant. The court further found and adjudged that the lien of plaintiff's bonds and the lien of cross-complainant's bond were superior to the lien of the bond of defendant, the City of Glendale, as to the lots affected by the lien of defendant. Therefore, the sole task before us is to determine the priority of the liens of the respective bonds of the plaintiff and cross-complainant on the one hand and of the appellant, the City of Glendale, on the other hand.

[1] It is well established in this state by the decisions of this court that in the absence of any statutory enactment establishing a rule of priority for special assessment and bond liens, that such liens are ranked in the inverse order of their creation, that is to say, that the last in point of time is superior in rank, or is first in priority. Thompson v. Clark, 6 Cal.2d 285, 57 P.2d 490; Conley v. Hawley, 2 Cal.2d 23, 38 P.2d 408; Balaam v. Pacific States Savings & Loan Company, 219 Cal. 612, 28 P. 2d 1053; Woodill & Hulse Electric Company v. Young, 180 Cal. 667, 182 P. 422, 5 A.L.R. 1296.

In the case of Balaam v. Pacific States Savings & Loan Company, supra, plaintiff's and defendant's bonds were issued under the Improvement Act of 1911 (Stats. 1911, p. 730), the plaintiff's bond in 1925 and the defendant's bond in 1926, and it was held that defendant's bond had priority over the bond of the plaintiff. The controversy in the Balaam case was thus between the holders of bonds issued in different years, under the different improvement projects against the same property and under the same statute. We held that the priority of the bond liens against said property was controlled by section 66 of said act, and that under said section the priority of the liens of the respective bonds was in the inverse order of their creation, that is, that the lien of the bond issued last in time took priority over that of previous issue. At the date of the issuance of the bonds in that case section 23 of said act provided that the amount of the assessment should be a lien upon the lots assessed for a period of two years from the date of its recording unless sooner discharged.

In 1927, which was after the issuance of the bonds involved in the Balaam case, section 23 of the Improvement Act of 1911 was amended, but section 66 of said act remained unchanged. That portion of section 23 of said act as amended respecting the question of priority of assessment and bond liens is as follows: "Said warrant, diagram and assessment, shall be recorded in the office of said superintendent of streets. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portion of lots assessed, respectively, and such lien shall so continue until it be discharged of record. Such lien shall be subordinate to all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property." Stats. 1927, p. 1406.

The terms of the Improvement Act of 1911 were thus in force at the time the bonds of the plaintiff in the case of Thompson v. Clark, supra, were issued, and it was held in that case by reason of the 1927 amendment to section 23 of said act, that the lien of the assessments for which plaintiff's bonds were issued in 1930 was subordinate to the prior assessment liens of defendants' bonds issued in 1926 under the Bond Act of 1915, St.1915, p. 1441. This result was arrived at by holding that by reason of said 1927 amendment of section 23 of the Improvement Act of 1911, the priority of bonds issued under said act was fixed by the terms of said amended section, in order of their issuance, that is the bonds issued were subject to those of a prior issue, but they were prior to those subsequently issued. The effect of that decision was to change the rule of priority approved in the Balaam case as to assessment liens represented by bonds issued under the Improvement Act of 1911 and to give priority to the lien first created. In other words, under the Improvement Act of 1911 as then in force, it was held that the bonds representing special assessment liens were subsequent to all bonds previously issued, but superior to those subsequently created under said act. It will be noted that the bonds of the defendants in the case of Thompson v. Clark, supra, were issued under the Bond Act of 1915. The difference in the terms of the acts under which the respective bonds of the parties in that action were issued is discussed by the court, and the provisions thereof fixing the priority of bonds issued under each were held to be substantially the same.

Coming now to the facts in the instant case, we find that the bonds of both the plaintiff and cross-complainant were issued under the Improvement Act of 1911, and prior to the issuance of the bonds of the defendant, the City of Glendale, but that the latter's bonds were issued under the Street Opening Bond Act of 1911. At the time the defendant's bonds were issued (in 1929) under the provisions of the Street Opening Bond Act of 1911, the provisions of the Improvement Act of 1911 were the same as they were in 1930, when the bonds of the defendants in the case of Thompson v. Clark, supra, were issued. Therefore, insofar as the terms of the last-named act govern the priority of bonds issued thereunder, the lien of the bonds of the plaintiff and cross-complainant are made superior to those issued to the defendant at a later date. But as defendant's bonds were issued under the terms of the Street Opening Bond Act of 1911, it will be necessary to ascertain whether a different rule should be applied in this case than that which was held to govern the case of Thompson v. Clark, supra, in determining the priority of the respective bond issues involved in that case.

As stated before, the bonds of defendant City of Glendale were issued under the terms and provisions of the Street Opening Bond Act of 1911 to represent assessments levied under the provisions of the Street Opening Act of 1903 (Stats.1903, p. 376). This latter act, like part I of the Improvement Act of 1911, St.1911, p. 732, provided for an assessment against the property of the owners to meet the expenses of opening or other improvement of the street involved in the proceeding. By section 20 of the Street Opening Act of 1903 it was provided that the street superintendent should record the assessment and diagram in his office and that "Immediately upon such recording, the several assessments contained in such assessment roll shall become due and payable, and each of such assessments shall be a lien upon the property against which it is made". Stats.1903, p. 381. If the assessment is not paid, the act provided for a procedure for the sale of the property subject to said lien, by the street superintendent, and upon such sale having been made, the street superintendent shall give to the purchaser a certificate of sale and file a copy thereof in his office, and that "On the filing of the copy of such certificate in the office of the street superintendent, the lien of the assessment shall vest in the purchaser, and is only divested by a redemption of the property, as in this act provided". Sec. 26, Stats.1903, p. 383. If no redemption of the property is made within a year, the purchaser is entitled to a deed, which deed "shall be prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee". Sec. 29, Stats. 1903, pp. 384, 385. These are the original provisions of said act providing for liens to secure assessments created in proceedings instituted thereunder. We have set forth these provisions of the Street Opening Act of 1903 simply to show that the act contained no provisions which purported to fix the priority of any lien created thereunder over any other lien against the same property. As we have stated above, the bonds to pay for such improvements which might be made under said act were issued under the subsequently enacted Street Opening Bond Act of 1911. The only provision to be found in said last-named act which purports to fix the priority of assessment liens created under said act is section 6 thereof, which provided as follows: "The amount due upon any such bond shall be a lien upon the lot described in such bond superior to all other liens, charges, and incumbrances *except the liens of prior assessments* and of municipal, state and county taxes." (Italics added.) Stats.1911, p. 1196. What effect is to be given to this section of the act in determining the priority of bonds issued to represent assessment liens created thereunder?

[2, 3] Defendant argues that the exception of "prior assessment liens", indicated by the italicized portion of said section above quoted, does not make such liens superior to those arising under the Street Opening Bond Act of 1911, but merely equal to or on a parity with them, and that because they are equal to the prior assessment liens, the inverse order rule applies and thus defendant's liens should prevail. It is first insisted that the word "prior" as used in section 6 does not mean first in time of creation, but superior in right only. We cannot believe that the legislature intended that any such interpretation should be given the word "prior", for if that were true, then section 6 would read: "The amount due * * * shall be a lien * * * superior to all other liens * * * except those *superior* thereto." So interpreted the section would have no meaning. The word "prior" can only be interpreted as meaning first in time. If it is so interpreted, then the exception either places the liens on a parity or makes the liens prior in time, prior in right. If the equality interpretation is accepted and the inverse order rule applied, then the exception becomes mere surplusage and is rendered meaningless because the inverse order rule would be applicable if section 6 merely read "superior to all other liens" without the addition of the exception. On the other hand, if the exception is interpreted to mean that "prior assessment liens" prevailed over those created by the Street Opening Bond Act of 1911, then said exception would be given force and effect in that it would be a "statutory declaration" contrary to the inverse order rule.

In support of its contention that its liens are not inferior to but are on an equality with prior assessment liens, defendant cites the case of La Mesa Lemon Grove and Spring Valley Irrigation District v. Hornbeck, 216 Cal. 730, 17 P.2d 143. In that case the irrigation district, as holder of a special assessment lien, petitioned this court for a writ of mandate to compel certain county authorities to make orders of cancellation of certain tax sales and tax deeds on the ground that the lien held by it was made superior to the general tax lien under section 3787 of the Political Code. In 1927 that section read, in part, as follows: "Such deed * * * is * * * conclusive evidence of the regularity of all other proceedings, from the assessment of the assessor, inclusive, up to the execution of the deed. Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances, *except any lien of taxes levied for municipal, or for irrigation * * * district purposes, * * *.*" (Italics added.) In denying the writ of mandate this court held that the legislative intent was to place all taxes, including taxes in the form of assessments in favor of special agencies of the state, upon an equality before the law. Because the wording of section 6 of the Street Opening Bond Act of 1911 is similar to that of section 3787 of the Political Code, defendant argues that the exception in section 6 should be interpreted to mean that its liens are on a parity with prior assessment liens. However, we do not consider the La Mesa case to be controlling here. In that case a general tax lien was opposed to or balanced against a special assessment lien. Because every presumption is against the legislative intent to prefer the lien of special assessments to those of general taxes. (La Mesa case, supra, 216 Cal. page 736, 17 P.2d 143), we could not conclude that the special assessment liens of the irrigation district had priority over the general tax liens, and we were thus compelled to accept the alternative interpretation of equality. In the instant case no general tax lien is involved. Here we have only assessment liens of the same general character, and there is no presumption against making one inferior to another. On the other hand, as previously noted, there is good reason for interpreting the exception in section 6 as being a legislative declaration contrary to the inverse order rule.

[4-6] Defendant further contends that the only "prior assessment liens" included within the "exception" of section 6 of the Street Opening Bond Act of 1911 are those arising under the Street Opening Act of 1903 (Stats.1903, p. 376), the Street Improvement Act of 1909 (Stats.1909, p. 1042), and the Park Act of 1909 (Stats. 1909, p. 1066). Section 1 of the Street Opening Bond Act of 1911 enumerates the above-mentioned acts and then provides: "The terms 'assessment' or 'assessment roll' as herein used shall mean a special assessment made under the provisions of any of the acts herein in this section specified." Stats.1911, p. 1192. In using this latter provision as a basis for its argument that only the assessment liens arising under the acts enumerated in section 1 come within

the exception of section 6, defendant fails to take into consideration the distinction between an "assessment" or "assessment roll" and an "assessment lien". An assessment is a charge made for the improvement of a certain piece of property, and an assessment lien is the security for the payment of such charge. The assessment is ordinarily prepared by the street superintendent when the entire cost of the improvement is ascertained, but assessment liens are not created until the assessment roll is recorded in the office of said official. The time of the creation of the lien is dependent on the particular statute involved. To illustrate the distinction reference may be made directly to the provisions of the Street Opening Bond Act of 1911 now being considered. In section 2 thereof it is provided that the city council may at or before the time of confirmation of any assessment or assessment roll in proceedings taken under any one of the three acts enumerated in section 1, determine that improvement bonds may issue to represent such assessments. In the following sections provision is made for the issuance of such bonds at the election of the property owners. Section 6 then provides that the amount due on the bonds shall be a lien superior to all other liens except prior assessment liens. That the "assessment" is made prior to and is distinct from any "assessment lien" created by the issuance of bonds under the act seems clear from a review of the provisions of the act itself. It will be noted that the provision in section 1, on which defendant relies, uses only the words "'assessment' or 'assessment roll'" and makes no reference to assessment liens. The Street Opening Bond Act of 1911 was passed to provide an alternative method of financing improvements made under the acts enumerated therein. It would naturally follow, therefore, that the term "assessment" as used in the Street Opening Bond Act of 1911, should be confined to assessments made under one of those acts. However, the term "liens of prior assessments" as used in the exception in section 6 has an entirely different meaning than the term "assessment" as used in section 1, and there is no reason why the former should be controlled by the latter. The fact that work done under the enumerated acts might involve the exercise of the power of eminent domain, whereas work done under the improvement acts might not, is not a distinction sufficient to restrict the meaning of the term "liens of prior assessments". If it were, then assessment liens arising under all street opening acts should be included, and not just those under the enumerated acts.

[7] The bonds of both plaintiff and cross-complainant and the assessment liens arising as security therefor were issued prior to those of defendant. Therefore, the exception in section 6 of the Street Opening Bond Act of 1911, under which defendant's assessment liens arose, is a statutory declaration contrary to the inverse order rule announced as applicable in previous decisions of this court, cited above, and renders the defendant's bonds subject to the prior assessment liens represented by the bonds of plaintiff and cross-complainant.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; TRAYNOR, J.; CARTER, J.

18 Cal.2d 321

RUSSILL v. STATE BAR OF CALIFORNIA.

L. A. 17773.

Supreme Court of California.

July 28, 1941.

Attorney and client 🔑53(2)

Evidence was insufficient to show an intent on part of attorney to misappropriate money collected for his client or an actual misappropriation thereof and did not sustain charges of violation of the business and professional code amounting to a breach of his duties as an attorney at law, and hence did not sustain recommendation that attorney be suspended from the practice of law for six months. St.1939, p. 357, §§ 6103, 6106.

In Bank.

Proceeding by Louis P. Russill to review the record in disciplinary proceedings initiated by the State Bar of California.

Proceedings dismissed.

Samuel S. Adler, of Los Angeles, for petitioner.

Norman A. Bailie, of Los Angeles, and Claude Minard and Jonathan H. Rowell, both of San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review the record in disciplinary proceedings initiated by the respondent State Bar, pursuant to service on petitioner, an attorney at law, of a notice to show cause why he should not be disciplined for asserted professional misconduct. The notice to show cause charged a violation of sections 6103 and 6106 of the Business and Professions Code, St. 1939, p. 357, amounting to a breach of his duties as an attorney at law in having misappropriated funds belonging to his client, Mrs. Mary C. Stubbs. Petitioner answered, denying the charges, and at the close of the initial hearings before a local administrative committee two members found the charges to be supported and recommended that petitioner be given a private reprimand, the third member recommending that the charges be dismissed. At the hearing before the Board of Bar Governors additional evidence was received, whereupon the board adopted the findings of the local administrative committee and, three members dissenting therefrom, recommended that petitioner be suspended from the practice of the law for a period of six months.

The local committee found that petitioner had been employed by Mrs. Stubbs to secure the return to her of certain moneys which she had previously delivered in trust to one Mrs. Beha; that petitioner had secured a settlement of the claim and received a cashier's check in the sum of $273, payable to Mrs. Stubbs; that he had induced Mrs. Stubbs to endorse the check and she had thereupon delivered it to him with instructions to cash it and after deducting the sum of $30 (as the remainder of his fee) to deliver the balance to her; and that petitioner had misappropriated the full amount of the cashier's check and converted the same to his own use. The committee also found that while it was agreeable to Mrs. Stubbs that the money be deposited with one Augustus Alvarez, the money was not so deposited, petitioner having admitted that he deposited the money in his personal account and checked out against it for his own use, pursuant to an arrangement with Alvarez.

It may here be said that the evidence elicited before the local committee was conflicting in material respects. The two members who found the charges to be sustained conceded that the evidence was "somewhat unsatisfactory", while the dissenting member expressed the view that the evidence was conflicting and far from convincing, and "certainly not established by a preponderance." Mrs. Stubbs, the prosecuting witness, gave evidence before the local committee in support of the charges; but at the hearing before the Board of Bar Governors there was admitted in evidence an affidavit sworn to by Mrs. Stubbs, the averments of which constituted a complete reversal of the evidence she had given before the local committee.

The record shows that long prior to the time petitioner became involved in the matters here concerned he had been a personal friend of and acted as attorney for August Alvarez, a Los Angeles mortician. A working agreement existed between the two, whereby petitioner handled accounts and made collections for Alvarez. Records of amounts due between Alvarez and petitioner were kept as an open book account, balances being settled between them about once a month. Petitioner also possessed a power of attorney from Alvarez and was authorized to draw checks against Alvarez' bank account when the latter was absent from the city.

The evidence also showed that, for many years prior to the time of the incidents here set forth, Alvarez had been a close friend and adviser of Mrs. Stubbs, a woman of advanced age; that she had arranged with Alvarez to have charge of her interment, and, in 1935 or 1936, to defray her funeral expenses, she had placed in his keeping a fund for that purpose. However, some time later, Mrs. Stubbs transferred the money from Alvarez to Mrs. Beha. Thereafter, she attempted to recover the money from Mrs. Beha but was unable to do so. In May or June, 1939, Mrs. Stubbs visited Alvarez, who was then ill and who shortly intended to leave on a trip to Australia. There was evidence to show that at the conversation which took place on that occasion Mrs. Stubbs expressed the desire that the fund be recovered and again placed in the keeping of Alvarez. The latter testified that he had been taking care of Mrs. Stubbs and her troubles for years, that "she wanted me to get hold of it [the moneys]"; that on the occasion of her visit it was agreed that when the moneys in question were recovered they were to be again entrusted to Alvarez' care, with the understanding that they were to be used for her funeral expenses, or, in event she needed money for other purposes, she was to be given a certain amount each month; that Mrs. Stubbs asked Alvarez' advice about employing petitioner to secure the money from Mrs. Beha, to which plan he assented, stating, "That's what he is for", and "You know he is my attorney and he has power of attorney here to act, to do everything." Thereafter, petitioner was employed by Mrs. Stubbs to recover the moneys. Some time in July, 1939, after he had settled the claim and received a cashier's check for the said sum of $273, payable to Mrs. Stubbs and himself as her attorney, he took the check to her home. At that time, and in the presence of her nurse, Miss Hayes, petitioner had a conversation with Mrs. Stubbs concerning the settlement and the receipt of the check. The evidence which was given at the hearing before the local examining committee is sharply conflicting as to what was said by the parties on that occasion.

Petitioner testified that when Mrs. Stubbs endorsed the check she told him to deduct the balance of his fee and, after making a statement to the effect that she did not wish to carry an account in the bank, she said to him, "You turn that over to Alvarez * * * of course I am perfectly satisfied if Mr. Alvarez has that money and if I need a little money I can always get it from Gus"; that immediately thereafter he went to Alvarez' place of business and, as Alvarez was then away, he explained to Charles Byrne, Alvarez' business manager, the directions which Mrs. Stubbs had given him, and tendered the check to Byrne; that Byrne told him that, since the matter was a personal one, he would prefer that petitioner retain the money until Alvarez returned from abroad. Byrne testified to having had the conversation with petitioner as related by the latter, and of his request that petitioner keep the money until Alvarez' return. Petitioner then placed the money in his personal bank account and debited the Alvarez account with that amount. The evidence showed that the said sum was treated as an offset against an obligation of Alvarez to petitioner.

Mrs. Stubbs testified that when petitioner came to her home she endorsed the check, instructed him to have it cashed and, after deducting $30 which was due him as the remainder of his fee, to return to her the balance of $243. Miss Hayes corroborated that testimony, but on cross-examination she stated that during the conversation referred to Mrs. Stubbs had said that she would like to give the money to Alvarez for her funeral expenses; that "she did not directly tell" petitioner "to give it to Mr. Alvarez, but she did say that she would like Mr. Alvarez to have it * * *", and that Mrs. Stubbs also said "in case she needed it for doctors or anything like that, she knew she could always call on Mr. Alvarez."

Mrs. Stubbs further testified that thereafter petitioner failed to return with the money and after a lapse of some time she notified him in writing on two occasions that she was dissatisfied with the way he had handled the transaction and requested that he clear up the matter. On his failure to communicate with her thereafter, she lodged a complaint with the Bar Association.

It also appeared that Alvarez had returned to Los Angeles about the 7th of September, 1939, but due to severe illness he was immediately placed in a hospital, where he remained for over two months. During such period of time business matters were not taken up with him and he did not learn of the trouble between Mrs. Stubbs and petitioner until the latter part of November, when Mrs. Stubbs and Miss Hayes called on him a few days after his release from the hospital and asked him if he had the money formerly held by Mrs. Beha, and informed him of the fact that they had lodged a complaint against petitioner with the Bar Association. Alvarez testified that on learning of that situation he said, "That's all folly" and "we have every confidence" in petitioner; that he told Mrs. Stubbs if she had not yet received her money she would get it; that there was plenty of money "right there in the safe" to repay her now; that petitioner had power of attorney to act for him (Alvarez) and that it would have been all right for him to have written a check from Alvarez' funds, pursuant to such power of attorney, and to have returned the money to Mrs. Stubbs; that she thereupon stated that she did not want the entire sum at that time; and that shortly thereafter an agreement and promissory note for the sum of $243, payable in monthly installments, were drawn up and executed by Mrs. Stubbs and Alvarez. The agreement recited that the moneys collected by petitioner on behalf of Mrs. Stubbs were to be held in trust by Alvarez for the benefit of Mrs. Stubbs, and were to be paid to her by Alvarez in accordance with the terms of the promissory note. The evidence was uncontradicted that petitioner knew nothing of the foregoing conversation or of the execution of the note and agreement until later. When questioned about the making of the note and agreement, Alvarez testified that both documents were executed in accordance with the conversation and understanding he had had with Mrs. Stubbs when she had visited him before he went away. Also, in answer to a query as to the truth of such statement Mrs. Stubbs agreed that it was correct, as did also Miss Hayes, who, it appeared, had been present on both occasions.

Petitioner admitted that he had been informed of Mrs. Stubbs' dissatisfaction, but stated that shortly thereafter he had received a communication from the Bar Association to the effect that she had made a complaint against him and that in view of such fact he had refrained from negotiating with her or from placing himself in the position of having possibly attempted to influence her in testifying before that body; that he therefore decided "to wait until Gus got back and straighten it out," but that when Alvarez returned he did not take the matter up with him because of his serious illness. In view of the fact that a period of less than two months elapsed between the time petitioner collected the money and the date of Alvarez' return, that explanation does not appear to be unreasonable. Petitioner also admitted that after placing the money in his personal bank account he checked out against it for his own use, but he contended that he had been instructed to deliver the money to Alvarez, who was not then available, and since he possessed a power of attorney by which he was authorized to act for and on behalf of Alvarez he had authority to handle the matter as he did, and there was no misappropriation of Mrs. Stubbs' money. He further testified that while Alvarez was away he handled several business matters for Alvarez, for which the latter became indebted to him in a sum greatly exceeding the amount of Mrs. Stubbs' money. Alvarez also testified that at the time of the Beha transaction, as a result of their business relationship, he owed petitioner some money, although he did not know the amount. In response to a query whether petitioner had tendered him any money on his return, Alvarez testified that petitioner had not done so, but that "he telephoned all the time but I was indisposed * * * in the hospital".

As heretofore indicated, the evidence shows conclusively that Alvarez had been taking care of Mrs. Stubbs' affairs for several years before he went to Australia, and that at that time it was understood between them that the moneys, if recovered from Mrs. Beha, were to be again placed in Alvarez' keeping—a fact which lends substantial support to petitioner's contention that he was instructed to deliver the money to Alvarez. The record further shows that Alvarez had complete confidence in petitioner and on learning that the latter had succeeded in recovering the Beha moneys he immediately recognized the obligation to Mrs. Stubbs as his own, and voiced no objection to the fact that after collecting the money and attempting to deliver it to Byrne on his behalf petitioner had offset the amount thereof against a claim which petitioner had or might have against Alvarez. He testified that he was surprised to hear that when petitioner learned of Mrs. Stubbs' dissatisfaction he had not exercised his power of attorney and drawn a check in her favor against Alvarez' funds for the amount involved, and characterized the entire situation as being "all a mistake". Miss Hayes also testified that Mrs. Stubbs had "agreed that there was some misunderstanding some way or other" and that "we never at any time distrusted [petitioner] * * * and never made any statement to that effect".

Moreover, as has been hereinbefore mentioned, at the hearing before the Board of Bar Governors there was introduced in evidence an affidavit of Mrs. Stubbs to the effect that the arrangement which had been followed with respect to the collection and disposition of the moneys in question was "in accord with her original wishes and understanding as to how the money was to be handled and in accordance with her instructions to her attorney," petitioner herein.

Aside from other facts and circumstances which support petitioner's contention that he was not instructed to return the money to Mrs. Stubbs but was in fact directed to turn it over to Alvarez, a direct conflict was raised in Mrs. Stubbs' own testimony by her sworn statement that, in handling the matter as he did, petitioner had followed her instructions. This conflict, together with the statement of Miss Hayes that Mrs. Stubbs had agreed there had been some misunderstanding somewhere, renders of slight value other evidence adduced in support of the charges based on petitioner's failure to carry out his client's instructions, and leaves little else which can be said to seriously challenge the truth of petitioner's statement that he was in fact directed to turn the money over to Alvarez.

On a consideration of all the facts and circumstances hereinbefore set forth, it is our conclusion that the evidence was insufficient to show an intent to misappropriate, or an actual misappropriation of the moneys so collected—and that petitioner's dereliction, if any, lay not in a violation of his client's instructions but in the method by which they were carried out.

It is true that the Stubbs money was not an outstanding claim of Alvarez which under the working agreement that existed between Alvarez and petitioner would ordinarily have been entitled to be offset against a claim the latter might have had against Alvarez. However, in the light of the uncontradicted evidence to the effect that at the time petitioner collected the Stubbs money Alvarez was indebted to him, together with the fact that petitioner possessed full power of attorney to act for and on behalf of Alvarez, even to the extent of withdrawing funds from his personal bank account during his absence, we are of the view that in offsetting the Stubbs money against Alvarez' indebtedness to him, petitioner's conduct—while not meriting approval as good business practice—did not amount to an act involving moral turpitude, or a violation of the rules of professional conduct of the State Bar of California.

After a review of the entire record, we are of the opinion that the evidence is insufficient to sustain the charges against petitioner, and the proceeding against him is therefore dismissed.

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18 Cal.2d 336

HOUSING AUTHORITY OF CITY OF OAKLAND v. SUPERIOR COURT OF ALAMEDA COUNTY et al.

S. F. 16572.

Supreme Court of California.

July 30, 1941.

1. Eminent domain 🔑187

A provision in Code of Civil Procedure that court in which eminent domain proceeding was tried "may", on notice of not less than 10 days, authorize condemnor to take possession of and use the property until the final conclusion of the proceeding, was intended to vest discretion in superior court to grant or deny the application for possession in proper cases. Code Civ.Proc. § 1254.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

2. Eminent domain 🔑187

The refusal of superior court to deny municipal housing authority's application for immediate possession of property pending landowners' appeal from judgment of condemnation, was not an abuse of discretion, where landowners in apparent good faith raised the question of right of authority to take the property for the contemplated housing project, and alleged facts indicating that the necessity for such taking was questionable. St.1938, Ex.Sess., p. 17, § 12; Code Civ. Proc. § 307 et seq., and §§ 1251, 1254, 1257.

3. Eminent domain 🔑262(1)

Where landowners against whom municipal housing authority instituted eminent domain proceeding, raised the question on their appeal from judgment of condemnation, of right of authority to take their property, and alleged facts indicating that the necessity for such taking was questionable, the court to which authority's application for possession pending appeal was addressed, must be deemed to be in the best position to judge in the first instance whether the landowners would be adequately protected by the authority's deposit in court, if question of authority's right to take property should be decided favorably to landowners on the appeal, and the best judge of whether the project would be retarded by the fact that the authority did not have possession of the property pending the appeal. St.1938, Ex. Sess., p. 17, § 12; Code Civ.Proc. § 307 et seq., and §§ 1251, 1254, 1257.

In Bank.

Proceeding by the Housing Authority of the City of Oakland against the Superior Court of Alameda County and others for writ of mandamus directing the Superior Court to issue an order for a writ of possession of property sought to be taken in eminent domain proceedings under the Housing Authorities Law, St.1938, Ex. Sess., p. 9, as amended.

Writ denied.

Bernard J. Abrott, of Oakland, for petitioner.

Alfred Nelson, of Oakland, for respondents.

SHENK, Justice.

Housing Authority of the City of Oakland seeks the writ of mandamus directing the respondent Superior Court to issue an order for a writ of possession of property sought to be taken in eminent domain proceedings under the Housing Authorities Law. (Stats. Ex. Sess. 1938, p. 9, as amended.)

The petition shows that a proceeding in condemnation to acquire the land and improvements owned by Nick and Mary Simin located in the city of Oakland is pending in the respondent court. On September 13, 1940, a jury fixed the value of the property at $3,950 and judgment of condemnation was entered requiring the payment thereof by the condemnor. The petitioner deposited in court the amount of the award and costs. Nick and Mary Simin took an appeal from the final judgment of condemnation. Thereupon, on December 2, 1940, the petitioner applied to the respondent court for an order to be let into possession of the premises pending the appeal. The court, after hearing, denied the application, and this proceeding followed.

The petitioner alleges that contracts for the construction of the public housing project have been entered into and involved an expenditure of more than a million dollars; that construction commenced on December 2, 1940; that the real property owned by Nick and Mary Simin is located on the proposed site of the improvement, and that unless the petitioner is placed in immediate possession of the property work on the improvement will be retarded.

The respondent filed an answer alleging that the property sought to be taken consists of a lot 37½ by 120 feet, improved by a residence measuring 28 by 58 feet, which is and has been for many years occupied by the Simins and their daughter; that the house consists of five rooms, porch and basement, is unusually well constructed, recently painted and in excellent repair, and that the balance of the lot is covered with well kept gardens, lawn and cement sidewalks; that the purpose of the defendants' appeal in the condemnation proceeding is not to contest the amount of the jury's award, but that the principal issue on the appeal is the question of the necessity for the use of said property in the contemplated project and the petitioner's right to condemn the property; that one of the grounds of the appeal is that there was no evidence that any part of the property, which lies on the outskirts of the contemplated project and would represent less than 1 per cent of the area of the project, was needed as a part thereof; that the condemnees greatly desire to retain their property as a permanent dwelling.

It is also shown that at the time the answer was filed less than one tenth of the entire area was occupied by buildings in the course of the construction of the project, and that a much smaller proportion was so occupied at the time the order was made denying the application of the Authority to be put into possession; and that no building in said area has been completed.

It is further alleged in the answer that no part of the money deposited in court by the petitioner has been taken or received by the appellants.

No question is raised with reference to the petitioner's right to exercise the power of eminent domain under the Housing Authorities Law, the constitutionality of which was upheld in The Housing Authority of Los Angeles County v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794. Section 12 of the act provides that an authority may exercise the power pursuant to the provisions of the Code of Civil Procedure.

The petitioner contends that the respondent court is required by the provisions of section 1257 of the Code of Civil Procedure to grant the application for possession of the property condemned where the condemnor has complied with all of its provisions and of the provisions of section 1254 of the same code.

Section 1257 of the Code of Civil Procedure is included in title VII on the subject of eminent domain. It provides that the provisions of part two of the Code of Civil Procedure, § 307 et seq; relating to new trials and appeals shall apply where not inconsistent, provided that upon the execution of a bond to build the fences and cattle guards, as provided in section 1251 "the plaintiff shall be entitled to enter into, improve, and hold possession of the property * * * as provided in section twelve hundred and fifty-four * * *; and no motion for new trial or appeal shall, after such payment and filing of such bond as aforesaid, in any manner retard the contemplated improvement".

Section 1254 of the Code of Civil Procedure reads in part: "At any time after trial and judgment entered or pending an appeal from the judgment to the supreme court, whenever the plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use, the superior court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof." The section also provides that the defendant may apply for and receive the money deposited in court, and that payment to the defendant shall constitute a waiver and abandonment by him of all the defenses except his claim for greater compensation.

It is the theory of the petitioner that, although the language of section 1254 appears to be permissive and to vest discretion in the court, the language of section 1257 is mandatory and requires the court to place the petitioner in immediate possession of the Simin property upon a showing by the plaintiff of compliance with the statutory provisions.

[1] There is no necessity here for holding, as contended by the respondent, that since section 1251 makes special reference to highway and railroad improvements, section 1257 applies only to such improvements. It is sufficient to note, in disposing of the contentions of the petitioner, that by the provisions of section 1257 the condemnor is entitled to enter and hold possession of the property "as provided in section twelve hundred and fifty-four", and that the latter section vests a discretionary power in the court, after notice and hearing, to grant possession pending final adjudication. It may be assumed that it would be an abuse of discretion to deny application for immediate possession in certain cases, such as in the case of a highway or railroad improvement where there has been compliance with the conditions of sections 1251 and 1257. But it is clear that by reason of the language of said section 1254—the use of the permissive "may" and the requirement for notice and hearing—the legislature intended to vest discretion in the court to grant or deny the application in proper cases. Templeton v. District Court, 47 Cal. 70; Spring Valley Water Works v. Drinkhouse, 95 Cal. 220, 30 P. 218; People ex rel. v. District Court, 11 Colo. 147, 17 P. 298, citing Templeton v. District Court, supra. The section has been held to be constitutional. Heilbron v. Superior Court, 151 Cal. 271, 90 P. 706.

[2, 3] It may also be assumed that it would be an abuse of discretion for the court to deny the plaintiff's application for immediate possession pending appeal by the defendants, if the only question on the appeal were the amount of the damages to be received by the defendants. But in a case such as is here presented, where the defendants in apparent good faith have raised the question of the right of the plaintiff to take the particular property, we cannot conclude that the court has abused its discretion in denying the application for immediate possession. The petitioner does not allege that the only question on the appeal is that of the amount of damages. On the other hand the respondent affirma-

tively avers that the appeal by the defendants in the condemnation proceeding raises the question of the right of the plaintiff in any event to take the defendants' property for the contemplated housing project, and alleges facts indicating that the necessity for such use or taking is questionable. Under such circumstances the court to which the application for possession is addressed must be deemed to be in the best position to judge in the first instance whether the defendants would be adequately protected by the deposit in court, if the question of the plaintiff's right to take the property should be decided favorably to the defendants on the appeal. The trial court should also be considered the best judge of whether the project will be retarded by the fact that the Authority does not have possession of the property pending the appeal. It does not appear that any persons other than the defendants have contested the necessity for the taking of their property, nor has the petitioner alleged any facts from which a conclusion may be drawn that progress on the project will be retarded by the defendants' appeal if immediate possession of the defendants' property is not granted to it. In fact, the petitioner does not contend that if the statute confers discretion upon the trial court, the circumstances here presented would show any abuse thereof.

The peremptory writ is denied and the alternative writ is discharged.

We concur: GIBSON, C. J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.; SPENCE, J. pro tem.

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18 Cal.2d 290

JENSEN v. HUGH EVANS & CO. et al.

L. A. 16969, 16970.

Supreme Court of California.

July 24, 1941.

Rehearing Denied Aug. 22, 1941.

1. Execution 🔑200

Motions for new trial in third party proceedings were properly stricken, since a new trial is not authorized in such proceedings. Code Civ.Proc. § 689.

2. Joint-stock companies and business trusts 🔑19

In proceedings by third party claimants to determine rights to funds held by trustees of Massachusetts trusts on which judgment creditor had levied execution, if ownership of funds, which represented proceeds of judgment recovered by trustees against bonding company, was in trust estates, third party claimants could not prevail, but if funds belonged to individual certificate holders, their representatives properly chose third party claim proceeding as means of protecting their right of ownership. Code Civ.Proc. § 689.

3. Joint-stock companies and business trusts 🔑19

In actions on bonds of former trustees of Massachusetts trusts running to subscribers, amended allegations setting forth appointment of plaintiffs as substituted trustees and their added capacity as representatives of trust estates as well as of subscribers did not change cause of action, but at most plaintiffs undertook prosecution of suits against bonding company in dual instead of single representative capacity, as respects third party proceeding to determine right to proceeds of judgments on bonds levied on by judgment creditor of trusts. Code Civ.Proc. § 689.

4. Joint-stock companies and business trusts 🔑19

Adverse interests did not preclude substituted trustees of Massachusetts trusts from representing both subscribers and trust estates in suit on bonds of former trustees running to subscribers, in view of terms of permit from corporation commission authorizing issuance of shares, terms of bonds and of declarations of trust and since trust estates had no claim under bonds, as respects third party proceedings to determine right to proceeds of judgments on bonds levied on by creditors of trust. Code Civ.Proc. § 689.

5. Joint-stock companies and business trusts 🔑19

Where judgment creditors of Massachusetts trusts, who levied on proceeds of judgments on bonds of former trustees running to shareholders, could not have recovered directly from bonding company on cause of action on which their judgment against trusts was based, it would be manifestly unjust for creditor to prevail over individual shareholders in claiming entire fund recovered on behalf of latter class on bonds executed solely for their benefit and protection. Code Civ.Proc. § 689.

6. Joint-stock companies and business trusts 🔑19

As respects third party proceedings to determine right to proceeds of judgment on bonds of former trustees of Massachusetts trusts running to shareholders, which were levied on by judgment creditors of trust, facts that each amended pleading in actions against bonding company charged damage and loss to "trust estate", that stipulation for recovery against bonding company provided for entry of judgments "in favor of plaintiffs" that moneys paid by company were paid, not in discharge of bonds, but in satisfaction of judgments, that checks given in settlement were made payable to trustees, and that funds were deposited by them in special account to credit of trusts did not show that funds belonged to and were held by trustees for trust estates and not for shareholders, where trustees were representing both estates and shareholders. Code Civ.Proc. § 689.

7. Joint-stock companies and business trusts 🔑19

In third party proceedings to determine right to funds held by trustees of Massachusetts trusts representing proceeds of judgments on bonds of former trustees running to shareholders, which were levied on by judgment creditors of trusts, trustees acting on behalf of shareholders were true third party claimants, and not merely parties defendant to actions. Code Civ.Proc. § 689.

8. Joint-stock companies and business trusts 🔑19

In third party proceedings to determine right to funds held by trustees of Massachusetts trusts, representing proceeds of judgments on bonds of former trustees running to shareholders in actions by trustees representing both trust estates and individual shareholders, which were levied on by judgment creditors of trust estates, title should have been adjudged to be in trustees, third party claimants, as trustees of the trusts holding for use and benefit of shareholders. Code Civ.Proc. § 689.

9. Joint-stock companies and business trusts 🔑19

Judgment creditors of Massachusetts trust could acquire no greater right in property levied on than their judgment debtors, trust estates, possessed at time of levy, and where trust estates at such time possessed no right whatsoever in property, judgment creditors acquired none. Code Civ.Proc. § 689.

10. Joint-stock companies and business trusts 🔑19

Judgment creditors, levying on funds held by trustees of Massachusetts trusts representing proceeds of judgments on bonds of former trustees running to shareholders, were not entitled to funds as against trustees holding for use and benefit of shareholders, on theory that actions against bonding company were of same class as actions brought by stockholders of corporation to redress wrongs done to corporation and that in such cases injury is to shareholders collectively and not individually and suit is one for benefit of corporation. Code Civ.Proc. § 689.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by A. P. Jensen against Hugh Evans & Co. and others. The plaintiff recovered judgment and caused execution to be levied against a fund held by trustees of Massachusetts trusts. L. H. Booker and others filed third party claims. From judgments of the Superior Court of Los Angeles County, Myron Westover, Judge, in favor of plaintiff, and from orders striking motions for a new trial and other orders, third party claimants appeal.

Appeals from orders striking motions for new trial and from all other orders dismissed; judgments reversed.

Prior opinion, 108 P.2d 93.

Rehearing denied; GIBSON, C. J., did not participate.

Olson & Olson; Allen Miller, Robert Clifton, and Olson & Ahlport, all of Los Angeles, for appellants.

Max Lewis, A. Arnold Klein, Laurence M. Weinberg, and Loeb & Loeb, all of Los Angeles, for respondent.

SHENK, Justice.

These actions have been consolidated for hearing on appeal. In each there are two appeals by separate groups of third party claimants from a single judgment determining that title to the funds in controversy rests in the plaintiffs and not in the appellants. In action number 16970 there is also an appeal from an order striking motions for new trial.

Diversified Real Estate Investments and Diversified Real Estate Investments Trust No. 2 are unincorporated business or Massachusetts trusts. They were organized in

1928 and 1929, respectively, by the recordation of like trust agreements designating Hugh Evans, William A. Avey, and Gordon Whitnall, as trustees. The general purpose of the trusts was to engage in the real estate business, with capital procured by the sale to the public of shares of beneficial interests. Permits were obtained from the corporation commission authorizing the issuance and sale of these shares under certain conditions, one of which was that the trustees be bonded. The provision of the permits setting forth this requirement reads as follows: "That this permit shall not become effective for any purpose unless and until the trustees herein named shall give bonds for the honest and faithful application of all funds derived from the sale of the shares herein authorized, said bonds to be first approved by the commissioner of corporations * * *."

Pursuant to this requirement each trustee furnished surety bond in the penal sum of $50,000, executed by the trustee as principal, and the Fidelity & Deposit Company of Maryland, a corporation, as surety. Each bond provided that the named trustee, as principal, and the Fidelity & Deposit Company "as surety, are held and firmly bound unto all such persons, firms or corporations as shall hereafter become subscribers to shares of beneficial interests * * *" in the named trust. Each bond was conditioned as follows: "* * * if the said principal * * * as such trustee, shall honestly and faithfully apply all funds derived from the sale of shares of beneficial interests in said trust, in accordance with the provisions of said declaration of trust above referred to, then this obligation shall be void, otherwise to remain in full force and effect * * *."

Subsequently many shares in the trusts were issued and sold, and with the capital so procured, the trusts, through the trustees, carried on the business of purchasing and selling real estate in and about Los Angeles county. The business, however, was mismanaged by the trustees and through their misapplication of funds, the trust assets were wiped out and the entire investment of the shareholders was lost.

On March 3, 1932, L. H. Booker, Lillian C. Prentiss-Baker, and W. G. Hargis, as individual shareholders in Diversified Real Estate Investments, commenced an action against the trustees and managing agent of that trust for an accounting, removal of trustees, appointment of a receiver, and for a monetary judgment for dissipation of the trust estate. On the same date L. H. Booker, as an individual and as a shareholder in Diversified Real Estate Investments Trust No. 2, filed a similar action seeking relief against the same defendants as representative of the latter trust.

When it appeared doubtful that any recovery could be effected in either action, it was decided to join the surety on the bonds of the trustees as a party defendant. Meanwhile, and on March 16, 1932, two of the original trustees, and a third trustee who had been appointed on the prior resignation of the other original trustee, all resigned, and were replaced by other appointees. One of these later appointees resigned in June, 1932, and the other two in February, 1934. In March, 1934, for the alleged purpose of more conveniently prosecuting the above-mentioned actions against the bonding company, the three plaintiffs, Booker, Prentiss-Baker, and Hargis, were appointed as trustees of the two trust estates. By order of court they were substituted as party plaintiffs in their added capacity and were permitted to file a fourth amended complaint in each action, joining the bonding company as a party defendant. In other words, with respect to the capacity of the plaintiffs, the fourth amended complaints alleged as follows:

"Plaintiffs herein, L. H. Booker, Lillian C. Prentiss-Baker and W. G. Hargis, are the owners and holders of beneficial interest in said trust. On the first day of March, 1934, said plaintiffs were duly appointed by this court as trustees of said trust, and in that capacity, having accepted said trust, plaintiffs file this their fourth amended complaint herein, on behalf of said trust estate and of all purchasers or owners of beneficial interest therein."

In determining a question of proper parties raised by demurrer, the trial court expressed the view that it was permissible for the trustees to bring the actions on the bonds rather than to require that a separate action be prosecuted by each individual beneficiary of the trust. Authority for the trustees to so act was found in a provision of the trust indenture (sec. 10, sub. e), empowering them to "Represent the beneficiaries in all suits or legal or other proceedings affecting the trust estate, or any right or duty of trustees, or any beneficiary hereunder in any court of law or equity or elsewhere * * *."

The fourth amended complaints charged that during the periods the bonds were in full force and effect the original trustees failed to faithfully perform the duties of their office in accordance with the provision of the declaration of trust, that they misappropriated funds derived from the sale of shares, thereby defrauding the trust estates and the beneficiaries, and that by concealment and false and fraudulent representations they prevented discovery of their wrongful acts until after March 1, 1932. Issue was joined by the filing of an answer by the bonding company to each of the complaints.

Thereafter, as between plaintiffs and the defendant bonding company, the actions were compromised for the sum of $50,000. On February 26, 1938, pursuant to stipulation, there was entered in each action a judgment in the sum of $25,000 in favor of the plaintiffs and against the company, and on the same day the judgments were satisfied. After deduction of costs and legal fees the balance of the recovery obtained by plaintiffs through the settlement, $25,000 each, was deposited by them in two separate bank accounts of $12,500 each, with the Citizens National Trust & Savings Bank of Los Angeles, one account being designated as "Diversified Real Estate Investments, Special Account No. 93996", and the other as "Diversified Real Estate Investments Trust No. 2, Special Account No. 93997."

These two funds of $12,500 each are the subject of the present third party claim proceedings in the action of Jensen v. Hugh Evans & Co. et al. The third party claims represent an effort of the shareholder-trustees, Booker, Prentiss-Baker, and Hargis, and of other shareholders, acting on behalf of all of that class, to retain the funds for their benefit as against seizure under a writ of execution procured by A. P. and Lillie P. Jensen as judgment creditors of the trusts.

The Jensens had subscribed for and become registered owners of shares in Diversified Real Estate Investments Trust No. 2, and had also subscribed for shares in Diversified Real Estate Investments, but had never received certificates of beneficial interest in the latter trust. On March 22, 1932, which was about two weeks after commencement of the Booker actions, they filed suit against the three original trustees, the managing agent, the two trusts, and the bonding company, seeking the rescission of agreements to subscribe for shares in the trust on the ground said shares were void and worthless, and also damages for deceit and for violation of the Corporate Securities Act, St.1917, p. 673, in the sale and exchange of stock. Recovery was had on the latter ground, and on September 11, 1935, judgment was entered against the two trusts for the sums of $12,292.77 and $17,057.23, respectively, and against all of the other defendants except the bonding company. As against that company the cause was dismissed. The judgments were not paid because the trust estates were insolvent and all assets had been dissipated.

Three years later, however, on May 20, 1938, after the two funds of $12,500 recovered in the Booker actions had been deposited to the credit of the trusts in special bank accounts, the Jensens sought to satisfy their judgment from those funds. Under their direction, pursuant to an alias writ of execution, the sheriff of Los Angeles county levied upon the funds, and on May 27, 1938, secured them from the bank and deposited them with the county treasurer. The latter officer, as custodian for the sheriff, has been in possession of the sums ever since that date.

On May 26, 1938, Booker, Prentiss-Baker, and Hargis, in their capacity as trustees of the two trusts "holding for the use and benefit of the subscribers to shares of beneficial interests" therein, filed verified third party claims with the sheriff claiming the two funds on behalf of the subscribers. This they did on the theory that in suing and recovering the judgments against the bonding company they acted as trustees for the individual certificate holders of beneficial interests, and therefore the sums recovered were held for the benefit of the individual certificate holders and not for the trust estates. The Jensens petitioned the court, under section 689 of the Code of Civil Procedure, for a hearing to determine title to the funds.

After a hearing the trial court adjudged that the Jensens were entitled to the sums in possession of the sheriff, and a judgment was entered in their favor. On the same day a warrant was drawn on the treasurer by the county auditor for $24,859, being the balance of the amount in litigation after deduction of expenses. Later in the day a stay of execution was ordered by the court and served upon the sheriff and treasurer, by reason of which the latter officer refused to pay the warrant. The third party claimants, Booker et al., as trustees, appealed from the judgment and also from an order subsequently made striking their motions for new trial.

Meanwhile, on July 6, 1938, while prior motions and proceedings were still pending, two new third party claims were filed with the sheriff by an agent representing groups of subscribers to shares in each trust. This second set of claims was filed upon the theory that the trial court's ruling on the first set might have been based upon a misconception as to the capacity of the claimants Booker et al., in acting as trustees of the trusts on behalf of the individual certificate holders. The Jensens again petitioned for a hearing to determine title and the court again adjudged that they were entitled to the funds. The third party claimants appealed from this judgment.

The appeals consolidated for hearing are as follows: In case No. 16970, two appeals by the third party claimants Booker et al., from the judgment in favor of the Jensens, one by said claimants in their capacity as trustees of Diversified Real Estate Investments, holding for the use and benefit of subscribers to shares of beneficial interests in said trust, and the other in their like capacity as trustees of Diversified Real Estate Investments Trust No. 2; and an appeal by said claimants from the order striking their motions for new trial; in case No. 16969, two appeals by the second set of third party claimants from the judgment in favor of the Jensens, one on behalf of all subscribers of beneficial interests in Diversified Real Estate Investments, and the other in behalf of all the subscribers for shares of beneficial interests in Diversified Real Estate Investments Trust No. 2. The claimants also gave notice of appeal from an order requiring them to post a bond, but that appeal has not been prosecuted.

[1] The appeal from the order striking appellants' motions for new trial may be disposed of by the statement that as a new trial is not authorized in proceedings under section 689 of the Code of Civil Procedure, the motions were properly stricken. Wilson v. Dunbar, 36 Cal.App.2d 144, 97 P.2d 262. The appeals from the judgments in favor of the Jensens present questions which are more complex.

[2] The vital issue is whether the proceeds of the judgments recovered by the trustees against the bonding company belong to the trust estates or to the individual certificate holders. If ownership is in the trust estates, against which the Jensen judgments run, then the third party claimants cannot prevail; if, on the other hand, the funds belong to the individual certificate holders, their representatives have properly chosen a third party claim proceeding as a means of protecting their right of ownership.

It is at once apparent that the proceeds of the bonds should inure to those who were specifically indemnified by the terms thereof. This may be accomplished, not only by the application of the plain and unambiguous terms of the bonding agreements, but also by a proper consideration of the form, purpose and effect of the action brought for recovery thereon. The obligation of the bonds ran, not to the trust estates, but to all who should "hereafter become subscribers to shares of beneficial interests" in the trusts. It was on behalf of such subscribers, and as members of that class, that Booker, Prentiss-Baker, and Hargis, acting in their representative capacity, originally undertook the prosecution of the actions against the bonding company. The only liability of the bonding company was that predicated upon a breach of the condition of the bonds, i. e., a misapplication by the original trustees of funds derived from the sale of shares, and that liability was to the subscribers, and not to the trust estates.

If Booker, Prentiss-Baker, and Hargis, acting in the capacity of agents or trustees for the subscribers only, had pressed the litigation against the bonding company to final termination, the proceeds of the judgments recovered against the company would have been immune to seizure by judgment creditors of the trust estates. What then was the effect of the status of the funds and the rights of the litigants, of the appointment by order of court of Booker, Prentiss-Baker, and Hargis as trustees of the trust estates, and of the new allegations included in the fourth amended complaint setting forth the added capacity of said trustees as representatives of the trust estates as well as of the subscribers?

[3, 4] It is clear that the effect of the amended allegations was not to change the cause of action, a cause of action based on the bonds, brought on behalf of the obligees thereunder. The most that can be said is that under the new allegations Booker, Prentiss-Baker, and Hargis undertook the prosecution of the suits against the bonding company in a dual instead of

a single representative capacity. As trustees of the trusts they sued to secure whatever recovery they could on the bonds, both on behalf of the trust estates and of the subscribers. While it is argued that adverse interests precluded them, as trustees of the trusts, from representing both the subscribers and the trust estates, the contention is answered by the terms of the permit authorizing the issuance of shares, the terms of the bonds, and of the declaration of trust. The permit required that the trustees be bonded against the misapplication of funds derived from the sale of shares, the obligation of the bonds was to the shareholders, and the declaration of trust specifically empowered the trustees to represent the beneficiaries (shareholders) "in all suits or legal or other proceedings affecting the trust estate, or any right or duty of trustees, or any beneficiary * * *". It was thus the duty of the trustees to represent the shareholders in the enforcement of their rights, as well as the trust estates.

This representation of the shareholders by the trustees was not adverse to the interest of the trust estates because the estates had no claim under the bonds. Had the trust estates alone, through the trustees, sued on the bonds, they could have asserted no cause of action and sustained no recovery against the bonding company. The main thing accomplished by including them, represented by the trustees, as parties plaintiff, was the protection of the bonding company against any future claim upon the bonds which might be urged by others purporting to act on behalf of the trust estates. There was in reality no conflict of interests, rights, or duties of the trustees in their dual representation of the estates and the shareholders. The character of the action on the bonds was entirely different from that of the ordinary suit brought in the course of business to realize upon an obligation in favor of the trusts. In the latter type of action, under usual circumstances, an effort of the trustees to seek recovery for the subscribers would be adverse to the interest of the trust estates. The action on the bonds, however, was a derivative one and the damages sought were peculiar to the shareholders, that is, damages for misapplication of such part of the trust funds as had been "derived from the sale of shares".

It is evident from the facts that the terms of the bonds expressed the true intent of the corporation commissioner and of the parties that the obligation of the instruments should run to the benefit of the shareholders to protect them against misappropriation of the sums which they had invested. If the bonds had been intended to run in favor of the trust estates, and had so provided, the defaulting trustees, who were the principals thereunder, would have been the very persons authorized by the declaration of trust to bring an action on the bonds against themselves as principals, and the bonding company as surety, to recover on behalf of the trusts for their own defalcations. The requirement for the bonding of the trustees was intended to guard against and not to encourage the creation of any such anomalous situation. The bonds were intended to and did provide for an obligation which flowed directly to those whose interests were sought to be protected, rather than indirectly to such obligees through trustees, the trust estates, or some other intermediate channel.

[5] Respondents, the Jensens, were not entitled to the benefit of the bonds. They could not have recovered directly from the bonding company upon the cause of action upon which their judgment against the trusts was based. That judgment was not predicated upon a misapplication by the trustees of funds derived from the sale of shares, but was a money judgment in lieu of the return of property in an action for rescission, based upon the illegality of respondents' contract for the purchase of shares arising from the failure of the sales agent to display a permit at the time of purchase. In fact, in their fourth amended complaint, respondents joined the bonding company as a party defendant, but later dismissed the action against it. It is significant that the bonds were conditioned upon the honest application by the trustees of only those funds of the trust estates derived from the sale of shares. Such funds would not normally comprise all of the assets of the estates, which could include surplus profits, income, interest, or other items. Under the circumstances it would be manifestly unjust for respondents, as judgment creditors of the insolvent business, to prevail over the individual shareholders in claiming the entire fund recovered on behalf of the latter class upon bonds executed solely for their benefit and protection.

[6] Respondents rely upon the following factors to support their contention that

the funds belong to and are held by the trustees for the trust estates and not the shareholders: Each amended pleading in the actions against the bonding company charged damage and loss to the "trust estate"; the stipulation for recovery against the bonding company provided for entry of judgments "in favor of the plaintiffs"; the moneys paid by the company were paid, not in discharge of the bonds, but in satisfaction of the judgments; the checks given in settlement were made payable to the trustees; and the funds were deposited by them in special accounts to the credit of the trusts.

Many of the arguments advanced by respondents have already been answered by the foregoing discussion. Booker, Prentiss-Baker, and Hargis, as trustees of the trust estates, were representing both the estates and the shareholders. It is immaterial that in the wording of the pleadings, stipulation, judgment, and other documents in the action no distinction was noted between the two capacities. Damage or loss to the trust estates by misapplication of funds was a condition precedent to recovery by the shareholders. When that recovery was effected and judgments were entered for the plaintiffs, those were judgments in their favor in their dual capacity, and the defendants were unconcerned in the ultimate division or disposition made of the proceeds. In the same dual capacity the plaintiff trustees received the proceeds of the judgments and deposited them in special accounts in the bank. The title given to the special accounts did not determine the question of ownership of the funds; it was significant only as it might have given rise to a disputable presumption, had the facts remained undisclosed.

[7] When, prior to distribution of the funds, respondents, as judgment creditors of the trust estates, levied upon and attempted to seize the moneys as assets of the estates, the trustees of the trusts were required for the first time to assert upon whose behalf they held the funds. They immediately claimed the funds for the benefit of the shareholders. In the execution proceedings, their position as third party claimants, trustees of the trusts acting on behalf of the shareholders, was antagonistic to their position as judgment debtors, trustees of the trust acting on behalf of the trust estates. Acting in the first capacity, they were true third party claimants and not, as contended by respondents, merely the parties defendant to the actions; that is, they were third parties in principal and fact, representing interests and rights in such capacity different and separate from those which they represented on behalf of the trust estates, or judgment debtors.

[8, 9] The decision of the trustees that the funds belonged to and were held by them for the benefit of the shareholders was a correct one. While the recovery was effected by them acting in their full capacity, and nominally legal title stood in their name in such capacity, the trust estates actually had no interest in or right to the funds. The equitable title and ownership rested wholly in the shareholders, and had the trustees not acted to protect the interest of those beneficiaries, they would have been entitled to follow the funds and assert their right by the filing of claims in their own behalf or by maintaining an independent action in equity.

Respondents, as judgment creditors, could acquire no greater right in the property levied upon than their judgment debtors, the trust estates, possessed at the time of the levy. As the trust estates at that time possessed no right whatsoever in the property, respondents acquired none. The trial court erred in ruling to the contrary. Title to the property should have been adjudged to be in the third party claimants, Booker et al., as trustees of the trusts holding for the use and benefit of the shareholders.

[10] Respondents contend that the actions brought against the bonding company were of the same class as actions brought by stockholders of a corporation to redress wrongs done to the corporation, and they rely upon authorities holding that in such cases the injury is to the shareholders collectively and not individually, and the suit is one for the benefit of the corporation. Whitten v. Dabney, 171 Cal. 621, 154 P. 312; Anderson v. Derrick, 220 Cal. 770, 32 P.2d 1078; Nighbert v. First National Bank of Bakersfield, 26 Cal.App.2d 624, 79 P.2d 1105. The situation presented by the present case is not analogous to those of the cited cases. There the actions were brought on behalf of a corporation to redress injuries done it. Here the trustees, acting for the shareholders of a Massachusetts business trust, brought suit on bonds given for the express protection of funds invested by the shareholders, and not for the protection of the trustees, or the trust estates, or their creditors.

The appeals from the orders relating to the motions for a new trial and from all other orders are dismissed.

The judgments are reversed.

We concur: CURTIS, J.; CARTER, J.; TRAYNOR, J.; PULLEN, J. pro tem.

GIBSON, C. J. did not participate herein.

18 Cal.2d 302

WATSON v. POORE et al.

LEFFLER et al. v. WATSON et al.

POORE et al. v. PROW & LEFFLER et al. (KALLMEYER et al., Interveners).

L. A. 16787–16789.

Supreme Court of California.

July 28, 1941.

1. Judgment 🔑590(1)

A judgment in divorce action by plaintiff's wife was not a bar to plaintiff's claim to interest in property, although in such action defendants sought to quiet title by cross-complaint against plaintiff and wife, plaintiff failed to answer cross-complaint and default was entered by clerk, where court did not render default judgment against him and made no finding thereon other than that defendants had purchased property and that plaintiff's wife had no interest therein, and there was no decree that plaintiff had no interest in property or that defendants were exclusive owners.

2. Judgment 🔑590(1)

A judgment in prior action against plaintiff was not a bar to plaintiff's claim to interest in property under resulting trust where judgment specifically provided that it was making no determination of interests in property as between plaintiff and defendant.

3. Judgment 🔑707

A judgment in a prior action was not a bar to plaintiff's claim to interest in property under resulting trust where plaintiff was not a party to prior action and therefore was not bound by judgment.

4. Trusts 🔑110

Evidence as to agreement or arrangement whereby defendant purchased land with plaintiff's money for plaintiff, supported judgments establishing "resulting trust", notwithstanding impeachment of plaintiff's testimony.

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trust".

5. Appeal and error 🔑994(3), 1012(1)

It is within exclusive province of trial court to pass upon credibility of witnesses and weight of evidence.

6. Equity 🔑65(2)

Generally, equitable relief in nature of establishment of resulting trust will not be granted where proponent had resulting trustees take title in latter's name in order to defraud proponent's creditors, doctrine of "unclean hands" being the obstacle to proponent's recovery.

See Words and Phrases, Permanent Edition, for all other definitions of "Unclean Hands".

7. Appeal and error 🔑173(2)

In action to establish resulting trust, defense of unclean hands was not available on appeal where it was not pleaded or called to trial court's attention.

8. Equity 🔑65(2)

Plaintiff was not precluded from establishing resulting trust on ground of unclean hands in that plaintiff fraudulently caused his wife to convey other property to defendant as security for loan to improperly deprive her of it, and that having defendant purchase land in his name was done with intent to defraud plaintiff's creditors, under circumstances showing that defendant and plaintiff were not equally at fault.

9. Fraudulent conveyances 🔑172(3)

One cannot lay trap for another, secure his confidence, induce him to make conveyance of his property in expectation that it will be returned and thereafter retain fruits of his perfidy on ground that donor too readily yielded to temptation to save himself at possible expense of his creditors.

10. Equity 🔑65(2)

Plaintiff was not precluded from establishing resulting trust on ground of unclean hands, in that purchase of land in defendant's name was made to defraud purchasers of part of tract from plaintiff, where according to plaintiff's testimony he was not endeavoring to defraud such purchasers, but maintained that defendant should settle with them and see that they receive land which they had agreed to purchase.

11. Equity 🔑65(2)

Plaintiff was not precluded from establishing resulting trust on ground of unclean hands as respects claim plaintiff fraudulently caused his wife to convey other land to defendant as security for loan to improperly deprive her of it.

12. Equity 🔑65(3)

Ordinarily improper conduct not necessarily connected with transaction particularly involved is not a reason for denying equitable relief on the ground of "unclean hands".

13. Deeds 🔑206
Release 🔑57(2)

Evidence supported finding, on which judgment setting aside deeds and release was based, that there was no delivery thereof and that they were executed on fraudulent representation of defendant to plaintiff that their execution was necessary for plaintiff to clear up his wife's end of divorce action, in which defendant was joined, and that plaintiff had no intention to convey property to defendant.

14. Cancellation of Instruments 🔑24(1, 2)

Plaintiff was not precluded from setting aside deeds and release on ground that there was no restoration or offer to restore to defendant consideration given for their execution, where as result of defendant's conduct plaintiff was induced to sign documents which were entirely contrary to what they were represented to be, and for execution of which he received nothing.

15. Pleading 🔑166

Plaintiff was not required to plead fraud to set aside deeds and release where documents were pleaded as defenses in action to establish resulting trust, there being no pleading such as a replication in California.

16. Pleading 🔑67, 166

Where facts constituting fraud are relied on in avoidance of defense set up in answer, they need not be pleaded in complaint, but may be proved in rebuttal of defense without replication.

17. Cancellation of Instruments 🔑34(1)

Where deeds and release were claimed to have been executed on September 11, 1936, and action in which instruments were attacked by plaintiff was commenced on February 17, 1937, period of time was not sufficient to constitute "laches".

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

18. Trusts 🔑79

A resulting trust may be established to fractional interest in property where one urging trust pays only a portion of purchase price.

19. Trusts 🔑110

In action to establish resulting trust in land where plaintiff made down payment for purchase in defendant's name, evidence authorized conclusion that all moneys to be paid on note given vendor were to be paid by defendant either as credit against sums he owed to plaintiff, from income from property or from funds which were to be loaned from defendant to plaintiff, and therefore court properly found that entire tract was impressed with resulting trust.

20. Trusts 🔑63½

The fact that purchase price paid for property consists of money borrowed from one in whom title is taken, or is derived from income from property and is in fact paid by grantee does not prevent establishment of a resulting trust, and grantee may advance beneficiary credit rather than a loan, although beneficiary is prevented by statute of frauds from asserting arrangement whereby he is to repay grantee for sums advanced after purchase is made.

21. Trusts 🔑79

Where plaintiff furnished down payment and purchase was made in defendants' name, establishment of resulting trust in entire tract was not precluded by fact that note and trust deed given for balance of purchase price were executed by defendant alone, since property was primary security for loan.

22. Trusts 🔑80

Where purchase price is loaned by grantee to beneficiary to make purchase from which resulting trust arises, beneficiary is obligated to repay grantee and grantee holds legal title as security for loan.

23. Trusts 🔑305

Where plaintiff was successful in establishing resulting trust in land purchase price of which was loaned to plaintiff by defendant, and evidence respecting state of accounts

between plaintiff and defendant was vague and conflicting, defendants were entitled to have accounting although they did not raise such issue in their pleading.

24. Appeal and error ⚷880(3)

A judgment declaring plaintiff's contract with one defendant to purchase two acres of tract in full force and effect was not subject to reversal on appeal by second defendant on ground that no privity of contract existed between plaintiff and second defendant, where judgment in consolidated case established resulting trust in tract in favor of first defendant, so that second defendant held property only as security for moneys expended on behalf of first defendant, and first defendant was not complaining.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Three consolidated actions by John T. Watson against Alvin H. Poore and others to establish a resulting trust, by S. P. Leffler and wife against Jack Watson and wife, Alvin H. Poore and wife and others to recover for an alleged conspiracy to deprive plaintiffs of land, wherein named defendants filed cross-complaints, and by Alvin H. Poore and wife against Prow & Leffler and others to eject S. P. Leffler and wife from a tract of land, wherein Cornelius Kallmeyer intervened, making Alvin H. Poore and wife and others defendants in intervention. From judgments adverse to Alvin H. Poore and wife in each of the three actions, they appeal.

Affirmed in part and reversed in part with directions.

Prior opinion, 106 P.2d 235.

Hector P. Baida, of Santa Monica (Tanner, Odell & Taft, of Los Angeles, of counsel), for appellants.

B. W. Burkhead, Claude A. Shutt, and Arthur E. Briggs, all of Los Angeles, for respondents.

CARTER, Justice.

These three cases were consolidated in the court below and on this appeal. They all involve the interests of the respective parties in a certain ten-acre tract of real property situated in Los Angeles county. From the voluminous pleadings it appears that the nature of the actions is essentially as follows:

In the first action, respondent Watson sought to have established a resulting trust in his favor in the real property against appellants, Alvin H. Poore and Beulah Poore, husband and wife. Involved in that action, by reason of Poores' defenses, also were a release and deeds to the property from Watson to the Poores; those instruments were set aside by the trial court for fraud and lack of delivery. In the second action appellants sought to eject respondents S. P. Leffler and Nellie E. Leffler, husband and wife, from two acres of the property. In the third action, respondents Lefflers sought to establish that appellants and respondent Watson conspired to deprive them of two acres of the property. A demurrer was sustained to the Lefflers' complaint in that action and no amendment was offered, but the Poores having filed a cross-complaint therein, claiming that the Lefflers had no interest in the property, the trial proceeded on the issues raised by the cross-complaint. After trial before the court without a jury, separate findings and judgments were entered in each action. They established the resulting trust and determined that Watson was the owner of the property subject to a $5,500 note secured by a trust deed in which Poore and wife were the makers and trustors and the Warren estate the beneficiary, declared to be in full force and effect a contract of sale of two acres of the real property in which Watson is the vendor and the Lefflers the vendees, and set aside a release of Poores by Watson and deeds from the latter to the former of the ten acres in question and other property. This appeal is taken from those judgments.

In 1927, Cornelius Kallmeyer owned the ten-acre tract involved, subject to an indebtedness of $5,000 represented by his promissory note payable to a certain Mr. Hunt on April 1, 1931, and secured by a deed of trust encumbering the land. Hunt transferred that note and trust deed to the Warren estate. On June 3, 1927, Kallmeyer agreed to sell five acres of the property to respondent Watson for $10,000, half of which was paid in cash and respondent assumed and agreed to pay the Hunt note. On February 4, 1928, respondent Watson contracted to sell two acres of the five-acre tract to respondents Lefflers for $6,500. The latter took possession under the contract and still are in possession, paid $1,500 cash, and agreed to pay the balance of $5,-

000 on February 3, 1931; they expended considerable sums improving the property. Watson being unable to furnish a merchantable title to the two acres, because of a defect therein affecting the entire property consisting of a trust not here involved, Lefflers refused to pay the $5,000 when it became due. In March, 1933, Watson and Kallmeyer having failed to pay the Hunt note, the Warren estate gave notice of election to sell the ten acres on August 12, 1933, under the trust deed securing the Hunt note. The property was sold on that date and purchased by the Warren estate, the beneficiary. Watson and Kallmeyer carried on negotiations to purchase the ten acres from the Warren estate. In 1933, Watson borrowed $1,200 from appellant Poore to finance that transaction, for which he gave a note to Poore and a mortgage securing the same covering certain real property in El Monte, not directly involved here. In November, 1933, the endeavor of Kallmeyer and Watson to purchase the property having been unavailing, Kallmeyer sued Watson for $25,000 damages claimed to have been suffered by reason of Watson's failure to perform his contract with Kallmeyer to purchase the five acres of the property. It is claimed by Watson that thereafter Poore agreed to purchase the property from the Warren estate for $6,500, paying $1,000 cash and giving a note and trust deed for the balance; and that the purchase was made by Poore for Watson; and that the money which Poore loaned to Watson was used for the initial payment; that Poore was to convey two acres included in the Leffler contract to the Lefflers for $3,000; and that Watson and his wife conveyed certain property in El Monte (hereinafter referred to as El Monte City property) to Poore as security for the loan of the money used in the purchase. Thereafter, in December of 1933 and January of 1934, Poore purchased the ten-acre tract from the Warren estate at a probate sale for $6,500, paying $1,000 cash; the balance was represented by a note and trust deed executed by Poore covering the ten-acre tract. Poore took title in his name. The note was payable in installments of $100 per month. In January, 1934, Watson settled the damage action brought against him by Kallmeyer. Poore being in possession of eight of the ten acres received the income therefrom.

In August of 1935, Inez Watson sued Watson for a divorce, including therein Poore and his wife as defendants and endeavoring to establish that Poore held the ten acres as a resulting trustee for her and to recover the El Monte City property. In that action Poore filed a cross-complaint to quiet title to the ten acres as against Watson and Inez Watson. Judgment was entered in 1936, awarding all of the El Monte City property to Inez Watson as her separate property except certain lots which were awarded to Watson, and a money judgment for some $2,500 against Poore for income received from the El Monte City property. An interlocutory decree of divorce was rendered and Watson was ordered to make certain payments to his wife. It was decreed that Inez Watson had no interest in the property here involved, but no determination was made in respect to the title as between Poore and Watson. The Poores appealed from that judgment. They dismissed their appeal and paid $2,000 to Inez Watson in settlement of her $2,500 judgment. Watson executed deeds to the ten acres and property in El Monte in Poore's favor and a release of all claims against Poore. The divorce decree, deeds and release were pleaded as a defense by appellants to Watson's action. The trial court found that the deeds and release were executed upon the false and fraudulent representation of Poore to Watson, that the former had to have those instruments to make a settlement with Inez Watson, and that said instruments were a settlement of the claims between Watson and his wife, and further found that there was no delivery of the deeds, and that the divorce decree was not res judicata.

Appellants also claimed two other judgments as being res adjudicata on the issue of the ownership of the ten acres by them. In one action, entitled Kallmeyer v. Kallmeyer and John T. Watson et al., the judgment was entered November 13, 1934, the other was Poore v. Kallmeyer, in which the judgment was entered on October 18, 1935. In both of those actions the title of the property in question was involved.

Poores, the appellants, urge several grounds for the reversal of the judgments in these cases, most of which are aimed at the conclusion of the trial court that they held the property as resulting trustees for Watson. They contend that the evidence is insufficient to support that determination, that even if there is such a trust, Watson is not entitled to relief because he was in pari delicto with Poore in that the property was taken in Poores' name at Watson's behest to defraud Watson's wife and other creditors and that therefore Watson not having clean hands is not entitled to equitable relief, that at most Watson would be entitled to only a pro tanto interest in the property, that is, to the extent of the $1,000 down payment, that there was no proper restoration and rescission of the settlement in which Watson gave Poore a release and deeds to the property, and that the above-mentioned judgments conclusively established that Poores and not Watson were the owners of the property.

[1] The trial court's conclusion that the judgments, pleaded as being res judicata, were not a bar to Watson's claim to an interest in the property must be sustained. In the Watson divorce action, while it is true that appellants sought to quiet title by cross-complaint against Watson and wife, and Watson failed to answer the same and default was entered by the clerk, the court did not render a default judgment against him and it made no finding thereon other than that appellants had purchased the property and that Inez Watson had no interest therein. There was no decree that Watson had no interest in the property or that appellants were the exclusive owners.

[2] In the action of Kallmeyer v. Kallmeyer and Watson, the court in its judgment specifically provided that it was making no determination of the interests in the property as between Watson and Poores. As found by the court in the case at bar that judgment contained the following paragraph:

"That this Decree shall not be binding or conclusive between F. A. Leonard, as Executor, aforesaid, and the Warren heirs, on the one hand, Prow and Leffler on the other hand, and Alvin H. Poore and Beulah Poore, on the third hand, and John T. and Inez Watson on the fourth hand, as to the rights of said parties, between themselves, but shall be binding as between them, or any of them, and any and all other parties to this action."

[3] In the last above-mentioned action (Poore v. Kallmeyer) Watson was not a party thereto, and therefore is not bound by the judgment.

[4] The evidence concerning the resulting trust, although highly conflicting, is sufficient to support the judgments. According to Watson's testimony, he and Poore had been acquainted for about fifteen years. After Kallmeyer and Watson were unable to raise sufficient funds to purchase the property from the Warren estate, Watson called on Poore, who agreed to loan to him $1,200 to consummate the transaction. Poore advised Watson, however, that it would not be wise to let Kallmeyer handle the money or make the arrangement in his name. The endeavors of Kallmeyer and Watson to purchase the property bore no fruit. On August 10, 1933, Watson received the $1,200 and gave Poore a note and mortgage on the El Monte City property, not here directly involved. Watson does not know what happened to that note and mortgage; Poore claims he never accepted them. Watson being worried about a threatened suit against him by the Lefflers on their contract to purchase two acres, asked Poore for advice. Poore suggested that Watson have Poore buy the property from the Warren estate for him. Watson and wife transferred the El Monte City property to Poore as security for the $1,200 loan. The $1,200 and portion thereof were transferred back and forth between Watson and Poore several times. Finally Poore told Watson that he should give him $1,000 and that Poore would purchase the property for Watson, making a $1,000 down payment and arrange for the balance to be paid in monthly installments of $100 per month. Poore agreed that if Watson was unable to make the payments, Poore would pay them out of the moneys he owed to Watson for labor or from the income from the property; that Poore would perform Watson's agreement with the Lefflers to let them have the two acres for $3,000 without removing the defect from the title. Pursuant to that arrangement Watson gave Poore $750, and Poore stated that Watson still had $200 payable to him on the $1,200 loan which could be used for the balance. In December of 1933, and January of 1934, Poore purchased the property at probate sale from the Warren estate for $6,500, paying $1,000 down and executing a note payable $100 per month, secured by a deed of trust for the balance. The property was deeded to the Poores; they made no settlement with the Lefflers and

thereafter denied that Watson had any interest in the property.

[5] It is true that the evidence shows that Watson made prior inconsistent statements under oath and his testimony on direct examination was impeached in several particulars on cross-examination; and that Poore maintained throughout in his pleadings and at the trial that there was never any agreement or arrangement whereby he was purchasing the property with Watson's money for Watson. However, it is within the exclusive province of the trial court to pass upon the credibility of the witnesses and the weight of the evidence. It cannot be said that Watson's credibility was so wholly impeached that as a matter of law this court may disregard his testimony.

[6-8] Appellants assert that Watson was not entitled to the equitable relief given, that is, the establishment of a resulting trust, because he did not have clean hands. Their theory is that the El Monte property, which was transferred to Poore as security for the $1,200 loan, belonged to Watson's wife, and that in the action of Watson v. Watson, it was found that Watson fraudulently caused his wife to convey that property to improperly deprive her of it; and that having Poore purchase the ten acres in his name was done with the intent to defraud Kallmeyer and Lefflers, Watson's creditors. Appellants did not plead the defense of unclean hands and the trial court made no finding thereon, unless it may be said that the finding of the existence of a resulting trust carried with it a finding against that defense by implication.

It is the general rule that equitable relief in the nature of the establishment of a resulting trust will not be granted where the proponent had the resulting trustee take title in the latter's name in order to defraud the proponent's creditors; the doctrine of unclean hands is the obstacle to the proponent's recovery. Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296. However, when we consider that the trial court had no opportunity in the instant case to pass on that defense as it was not pleaded or called to its attention, we must conclude that it is not now available to appellants. There are other circumstances also to be considered which force us to the conclusion that appellants should not prevail on this appeal. Commencing with the first contact between Poore and Watson it appears that the latter placed complete confidence and faith in Poore's honesty and advice. Watson placed the entire matter of his troubles in Poore's hands. Indeed, it might be well said that Watson made Poore his agent to conduct his affairs in relation to his difficulties and that their relationship was fiduciary in character. It was Poore who first suggested that Watson give a mortgage on the property in order that Kallmeyer and Lefflers could not reach it, and that he should not deal with Kallmeyer because the latter was not to be trusted. In this connection Watson testified that Poore told him: "I wouldn't trust Kallmeyer with my money. Jack, what about my buying it for you in my name? I will use you right. When the deal is over, pay me the $1,200 plus a commission for putting the deal through, and I will give you back your property." Poore initiated the scheme whereby the El Monte property of Watson's wife was transferred to him. Although that transfer was only as security for the $1,200 loan, Poore maintained it was an outright purchase. After the purchase was made by Poore, Watson was sued for divorce and at Poore's instigation he left the state to avoid being compelled to appear in court in the action; Poore was to contest the action and protect both his own and Watson's interests. Thereafter, Poore fraudulently induced Watson to execute deeds conveying the ten acres to him. Although these latter transactions were after the transaction in which Poore purchased the property in his name, it may well be said they were a part of the entire transaction which Poore conducted for Watson and in which he directed Watson's actions. Although Watson's conduct was far from exemplary, we do not believe that under these circumstances it can be said that Poore and Watson were equally at fault. In the case of Birney v. Birney, 217 Cal. 353, 359, 18 P.2d 672, 674, this court said:

[9] "As was said in Chamberlain v. Chamberlain, 7 Cal.App. 634, 95 P. 659, one cannot lay a trap for another, secure his confidence, induce him to make a conveyance of his property in expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that the donor too readily yielded to temptation to save himself at the possible expense of

his creditors. The greater offense of the tempter overshadows and renders innocuous the weakness of the one of whom advantage is taken. Though a deed made for an improper purpose is unfairly procured through the undue influence of the grantee, in violation of a fiduciary relationship, abuse of confidence, oppression, or fraud, a court of equity will still grant relief to one in fault. Such relief will not be denied to a party least in fault against one who has led him into the act by a violation of confidence. They are not in equal wrong. Anderson v. Nelson, 83 Cal.App. 1, 256 P. 294. Under the circumstances plaintiff should not be denied the relief he seeks."

[10-12] Also as opposed to appellants' contention of unclean hands, particularly with relation to Watson's conduct toward his wife and the Lefflers, it may be pointed out that according to Watson's testimony he was not endeavoring to defraud the Lefflers but rather maintained in his discussions with Poore that the latter should settle with the Lefflers and see that they received the two acres they had agreed to purchase under contract with Watson. In respect to the claim that Watson was endeavoring to defraud his wife, the finding in the action of Watson v. Watson was that he and Poore had defrauded her of the El Monte City property, by having her convey it to Poore rather than the ten acres involved in these actions. It will be remembered that the El Monte City property was conveyed to Poore as security for the $1,200 loan, to be used by Watson and Kallmeyer to purchase the property from the Warren estate. Ordinarily improper conduct not necessarily connected with the transaction particularly involved (having Poore take the ten acres in his name) is not a reason for denying equitable relief on the ground of unclean hands.

[13] With respect to the deeds from Watson to Poore of the ten acres and the release which were executed after the entry of the judgment in the divorce action of Watson v. Watson, the court found that there was no delivery thereof and that they were executed upon the fraudulent representation of Poore to Watson that their execution was necessary for Watson to clear up his wife's end of the divorce action, and that Watson had no intention to convey the property to Poore. The documents were signed at the office of Watson's attorney in the divorce action, where Poore took Watson, advising the latter that he must sign some papers to settle the divorce action in so far as Watson and his wife were concerned; the relation between Watson and his attorney were at that time unfriendly. In that connection Watson testified:

"A. He (Poore) came into the shack, (that was just prior to the trip to the attorney's office to sign the instruments) he says,—'Jack, the attorneys have been looking for you for three days'; I said, 'He knows where I live here, I have no reason to run around to see him any more, because I have to work for a living', and he says, 'He has some papers for you to sign'; I says, 'I don't have to sign any papers, the clerk of the court signed all the papers necessary while I was away'; he says, 'This is in connection with the final settling up of the Watson v. Watson case and your attorney says you will have to sign those papers because the appealing the case costing too much money, and I have decided to settle with Mr.'—my wife's lawyer at that time—'Dadmun,' he says, 'My attorney, Mr. Coblentz, has got a $2,000 check but he will not turn it over until you sign certain papers which cleans the thing up on your end of the line'. * * *

"Q. Was there anything said in that conversation with relation to the El Monte City property? A. Yes, I said, 'What about my city property? You promised you would give that back to me', and he says, 'I would, but my wife has it now, it is a clean sale, you lost it, and there is nothing to do about it'. I said, 'what about the settlement of the lion farm property (the ten acre tract)?' * * *

"The Witness: He looked at me in a kind of a funny way, and he said, 'Jack you can't prove nothing in court. That land is mine, and I am going to keep it.'

"Q. At the time the deeds just shown you, Exhibits V, X and Y, and the release W were executed and signed by you, you had a conversation with Mr. Poore in which he stated to you that he would not pay $2,000 in settlement of the Watson v. Watson divorce action, pay $2,000 to Mrs. Watson, unless you signed these instruments; is that correct? A. No, made no such statement.

"Q. Did he at the time that you executed the instrument which is referred to by myself, say anything to you about payment of $2,000? A. He said that he decided that he wouldn't appeal the case, because it cost too much money and he did decide and he had handed to his attorney a $2,000 check, and that his attorney wouldn't pass it to my wife's attorney until certain papers had been signed by me to close up my wife's end of the deal. He said nothing about anything else. * * *

"A. He did not. He said my wife wanted certain papers to clean up her end of the Watson v. Watson trial, and they had to be signed that night in order for him to pass the money (the $2,000 settlement) to Dadmun the next day. * * *

"Q. And Mr. Haughton presented these three deeds and the release to you for signature; is that correct? A. He passed to me a bunch of papers. * * *

"Q. Were they the same papers? A. I don't know those were the same papers I signed that you showed me here. They were in it, but I didn't know it.

"Q. Why didn't you know it? A. Because he says, 'Will you look over them, Jack'; 'I haven't got my glasses', and I says, 'What are they, Mr. Haughton?' 'Why,' he says, 'the cleaning up of the Watson v. Watson trial'. I says, 'I am supposed to not sign no papers, only the court supposed to sign all the papers against me, and I am just supposed to be coming home after everything is cleaned up'; 'You have to sign those papers for your wife's end of it'; I says, 'You are my attorney, and I don't know a thing about those papers. What is in them, I haven't got my glasses, I trust in your honesty, shall I sign those papers or shall I not?' 'You have to sign them and clean up your wife's end of the deal'; I said, 'All right, where shall I sign?' He stood up, turned them over, and I signed them; he turned them over, kept turning them over until they were all signed and I didn't know two words that was in those papers, never saw them, depended wholly on his advice and honesty as my attorney."

Obviously, the instruments were not cleaning up Mrs. Watson's "end" of the case. They were not affecting any of Watson's rights or obligations in respect to the divorce action. We believe there was sufficient evidence to support the finding on which the judgment setting aside the deeds and release was based.

[14] Appellants, however, advance several other objections to the action of the court in setting aside these instruments. They claim that there was no restoration or offer to restore to Poore of the consideration given for the execution of the same. Watson testified positively that no consideration was given for their execution. Appellants claim that part of the consideration consisted of the $2,000 paid to Mrs. Watson in settlement of the part of the judgment awarding some $2,500 to her against Poore, and the dismissal of the appeal Poore had taken from the judgment. Watson received nothing from Poore, therefore, there was nothing for him to restore. The payment of the $2,000 was in discharge of Poore's judgment obligation to Mrs. Watson with which Watson had nothing to do and which was of no benefit to him. He still remained obligated under the judgment for attorney's fees, alimony and the other awards made against him. Nor can it be said that he received anything by the dismissal of the appeal. That dismissal in no way benefited him. On the contrary, it may well have been to his advantage to have the appeal prosecuted. In any event, according to Watson's testimony, Poore said he was dropping the appeal because it was too expensive. It appears to be quite obvious that as the result of Poore's conduct Watson was induced to sign documents which were entirely contrary to what they were represented to be and for the execution thereof he received nothing. Under such circumstances no restoration was necessary. The mere fact that the papers were signed in the presence of Watson's attorney in the divorce action does not alter the case.

[15, 16] Appellants further urge that Watson failed to plead fraud with respect to the execution of the instruments, and that he was guilty of laches in rescinding. It must be remembered that those documents were pleaded as defenses by appellants in answer to Watson's action to establish a resulting trust. Under such circumstances, there being no pleading such as a replication in this state, it was not necessary for Watson to plead the fraud. Where facts constituting fraud are relied upon in avoidance of a defense set up in the answer, they need not be pleaded in the complaint but may be proved in rebuttal of the defense without replication. Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074. Watson did file an affidavit denying the due execution of the papers as required by section 448 of the Code of Civil Procedure.

[17] The deeds and release were claimed to have been executed on September 11, 1936, and Watson's action to establish the resulting trust was commenced on February 17, 1937. That period of time cannot be said to be sufficient to constitute laches on Watson's part in attacking those instruments.

[18] Appellants contend that in any event it cannot be held that Watson, by reason of the resulting trust, is the sole owner of the ten-acre tract, but has no more than a pro tanto interest in the property; that is, an interest based on the amount of money which he contributed toward the purchase price of the property, and that inasmuch as the note and trust deed for the $5,500 balance after the down payment was made were executed and have been partly paid by them, Watson has no interest in the property except to the extent of the sum of $1,200 paid by him on the purchase price. It cannot be doubted that a resulting trust may be established to a fractional interest in property where the one urging the trust pays only a portion of the purchase price. 25 Cal.Jur. 189.

[19, 20] However, the question here would appear to be whether that rule is applicable. Appellants assert that according to Watson's testimony it was agreed that by the purchase of the ten acres by Poore, Watson was to receive three acres of the property; Poore was to settle with the Lefflers for the two acres they had contracted for and Poore was to have the remaining five acres. They rely for that contention in part upon the original arrangement in which Poore was to loan the $1,200 to Watson to join with Kallmeyer in the purchase of the property in a manner that Watson would obtain five acres and Kallmeyer five acres. However, as heretofore shown, that transaction was never consummated. After negotiations therefor had ceased, the arrangement was that Poore was to purchase the ten acres for Watson. Appellants further point out, however, that Watson also testified that he asked Poore, after Poore had purchased the property, if the latter was going to carry out the "gentlemen's agreement" and settle with Lefflers for $3,000, and that Poore said Watson could have the three acres, to which Watson replied, "Oh, boy, if I can have it, I am perfectly satisfied". On the other hand, Watson also testified: "Q. You were to get all of the 10-acre tract, is that right, or were you to get 3 acres of the 5 acres? A. I gave him the money to go and buy the whole darned cheese and we were to settle afterwards, but he didn't settle". Under these circumstances we are not inclined to disturb the finding of the trial court that the resulting trust embraced the entire property. The difficult question is, whether the part of the money payable under the note and trust deed given by Poore to the Warren estate, which has been paid, was in fact paid by Poore from money belonging to Watson either by reason of an arrangement that the note would be paid out of the income from the property, the wages Watson claimed Poore owed him, or moneys advanced and loaned by Poore to Watson. In that respect Watson testified, in relating the conversation between him and Poore just prior to the purchase, that Poore said: "* * * but I want to make the bid high enough so the Lefflers can't raise it, going to make the monthly payments (on the unpaid balance) $100 per month and if you haven't money enough to make those monthly payments I will have to take it out of the labor I owe you, and you will have to keep on working. I (Watson) says that is O. K. with me. * * *"

Watson further testified regarding the same conversation: "A. Make the first down payment, he (Poore) says, 'Dig up money enough to make the first down payment, because I am pretty near broke, give me money to make the first down payment, and then,' he says, 'after I sell the property I can use the rents off the property to make the monthly payments, if I fail on that there is more interest on the lion farm property now you are working for me, so it is O. K., Jack, I can make the payments, fine and dandy, and if I need any more I will take it out of the labor that I owe you'."

It is not unreasonable to conclude from the evidence that all moneys to be paid on the note given the Warren estate were to be paid by Poore either as a credit against sums he owed to Watson, or from the income from the property, or from funds which were to be a loan from Poore to Watson, and that therefore the court properly found that the entire ten acres was impressed with a resulting trust in Watson's favor. The fact that the purchase price paid for property in cases involving resulting trusts consists of money borrowed from the one in whom title is taken, or is derived from the income from the property and is in fact paid by the grantee, does not prevent the establishment of a resulting trust. Further, the grantee may advance him credit rather than a loan. O'Rourke v. Skellenger, 169 Cal. 270, 146 P. 633; Brown v. Spencer, 163 Cal. 589, 126 P. 493; White v. Costigan, 138 Cal. 564, 72 P. 178; Webb v. Vercoe, 201 Cal. 754, 258 P. 1099, 54 A.L.R. 1200; American Law Institute, Restatement of the Law of Trusts, sec. 456. Of course, the plaintiff is prevented by the statute of frauds from asserting an arrangement whereby he is to repay the grantee for the sums advanced after the purchase is made. Lincoln v. Chamberlain, 61 Cal. App. 399, 214 P. 1013.

[21-23] The fact that the note and trust deed given to the Warren estate for the balance of the purchase price were executed by the Poores alone, does not alter the situation. The property was the primary security for the loan. However, where the purchase price is loaned by the grantee to the plaintiff to make the purchase from which a resulting trust arises, the plaintiff is, of course, obligated to repay the grantee, and the latter holds the legal title as security for the loan. In the instant case the court found that Poore had paid out on behalf of Watson a total of $7,047, consisting of the $1,200 loan and interest thereon, expenditures on the property and payments on the note held by the Warren estate; that Poore received as income the total sum of $17,432, consisting of $12,000 from the sale of the El Monte City property, and $3,632 income therefrom, and $1,800 income from the ten-acre tract. It is claimed by appellants and not denied by respondents that some of those figures find no support in the evidence, and in this connection appellants assert that they are entitled to have an accounting in order to arrive at the true status of the claims by Poore and Watson against each other. Although it is true as asserted by respondents that appellants did not raise the issue of an accounting in their pleadings, having maintained in their pleadings and throughout the trial that no resulting trust existed and that the release heretofore mentioned settled the affairs between the parties, we believe that an accounting should be had in order that the lower court may determine whether there are any sums still owing from Watson to Poore, for which Poore would hold the legal title to the property as security. The evidence with respect to the state of the accounts between Watson and Poore is both vague and conflicting, and this court is neither inclined nor able to make a determination in respect thereto.

[24] Finally, in respect to the respondents Lefflers, appellants contend that there being no privity of contract between them, the judgment in the action of Lefflers v. Poore, declaring Lefflers' contract with Watson to purchase two acres of the property in full force and effect cannot stand. They must concede, however, that if the judgment establishing the resulting trust stands, and we have determined that it should, then they have no more than a bare legal title, and that they hold the property only as security for moneys expended on behalf of Watson which have not been paid. Watson, the owner of the entire beneficial interest in the property, has not appealed and is not complaining of the requirement that he be required to perform his contract with the Lefflers. It is therefore immaterial whether there exists any privity of contract between Poore and Lefflers or that a contract obligation rests on the former to convey to the latter.

In view of the conclusion which we have reached that under the rules of law applicable to the facts of the case as disclosed by the record and found by the trial court in the case of Watson v. Poore et al., L. A. No. 16787, the portion of the judgment in that case determining that the ten acre tract of land is held in trust by appellants for respondent Watson must be affirmed, and it is so ordered. It likewise follows that the judgments in the actions entitled Leffler et al. v. Watson et al., L. A. No. 16788, and Poore et al. v. Prow & Leffler et al., L. A. No. 16789, declaring the contract of the Lefflers to purchase two acres of said tract to be in full force and effect, are affirmed. But the portion of the judgment in the case of Watson v. Poore et al., L. A. No. 16787, purporting to determine the amount of the indebtedness against said ten acre tract which respondent Watson is required to assume and pay is reversed, and the trial court is directed to take such further proceedings as may be necessary to determine the amount of any indebtedness which may exist between appellants and respondent Watson and enter judgment accordingly. In the event the trial court determines that respondent Watson is indebted to appellants in any sum whatever arising out of the transaction for the purchase of said ten acre tract, such indebtedness shall be a lien upon said tract. In all other respects the judgments are and each of them is affirmed. Respondents Lefflers to recover their costs of appeal. Neither appellants nor respondent Watson shall recover costs against the other on this appeal.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; TRAYNOR, J.

18 Cal.2d 349

PEOPLE v. SKINNER.

Sac. 5360.

Supreme Court of California.

July 30, 1941.

Rehearing Denied Aug. 25, 1941.

1. Licenses ⇨30

Where notices of additional assessments under Retail Sales Tax Act were mailed to retailer at his place of business, statutory requirements respecting notices were sufficiently complied with by State Board of Equalization, though no summons or notice of any kind was ever served personally on retailer. St.1935, pp. 1259, 1261, 1262, §§ 17, 21, 26.

2. Licenses ⇨32(2)

Under provisions of Retail Sales Tax Act empowering State Board of Equalization to appoint assistants to enforce its powers and perform its duties, the fact that certificate of amount of tax filed by board in county clerk's office with request for judgment against retailer was signed by tax counsel appointed by board rather than by board itself, did not render certificate invalid. St. 1935, pp. 1262, 1264, §§ 26, 27.

3. Taxation ⇨572

A more summary method may be provided for the collection of taxes due to the sovereign than is provided for the recovery of judgment for debts between private citizens.

4. Constitutional law ⇨284(2)

"Due process of law" is satisfied if notice and an opportunity to question the validity or amount of the tax is provided for at some stage of the proceedings, the notice does not have to be personally served, notice of every step in the proceeding is not required, and it is sufficient if the finality of the assessment is determined by the taxing authorities. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

5. Taxation ⇨1

A "tax" is an exaction by the sovereign, and the sovereign has an enforceable claim against every one within the taxable class for the amount lawfully due from him.

See Words and Phrases, Permanent Edition, for all other definitions of "Tax".

6. Constitutional law ⇨280, 283, 289.

In judging what is "due process of law", respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law", but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

7. Constitutional law ⇨284(2)

The sufficiency of a notice, as constituting "due process of law", must be determined in each case on the particular circumstances, and in matters of assessment and taxation the same character of notice is not required as in ordinary actions in a court of justice. U.S.C.A.Const. Amend. 14; Const. Cal. art. 1, § 13.

8. Constitutional law ⇨283

The Fourteenth Amendment of the Federal Constitution places a limit on all the powers of the state, including, among others, that of taxation. U.S.C.A.Const. Amend. 14, § 1.

9. Constitutional law ⇨287
Licenses ⇨7(1)

The Retail Sales Tax Act provision that State Board of Equalization must file a certificate specifying amount of delinquent tax, interest and penalties, with the name and last known address of retailer liable, and requesting that judgment be entered against retailer in amount set forth and that county clerk shall immediately enter judgment against the retailer, is not violative of the "due process" clauses of the Federal or State Constitutions. St.1935, pp. 1259, 1260, 1261, 1262, 1265, §§ 17, 18, 20, 21, 26, 33; U.S.C.A. Const. Amend. 14; Const.Cal. art. 1, § 13.

10. Licenses ⚿32(2)

The use of the word "judgment" in section of Retail Sales Tax Act providing that "judgment" shall be entered against retailer in amount of delinquent taxes set forth in certificate issued by State Board of Equalization and filed with county clerk does not of itself require all the antecedent steps in a judicial tribunal usually applicable when private debts are the subject of collection. St.1935, p. 1262, § 26.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

11. Constitutional law ⚿284(2)

The sovereign may adopt any appropriate procedure known to the law to collect taxes, and it is not required to provide for hearing in a judicial tribunal before it may use the processes which follow upon the entry of a judgment in such a tribunal in order not to violate requirements of "due process of law" of State and Federal Constitutions. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

12. Licenses ⚿32(2)

Under provision of Retail Sales Tax Act requiring that judgment be entered against retailer in amount of delinquent taxes set forth in certificate of State Board of Equalization filed with county clerk with request that judgment be entered against retailer in amount thereof, a hearing in a judicial tribunal was not intended nor required for the entry of the judgment. St.1935, p. 1262, § 26.

13. Licenses ⚿32(2)

Under provision of Retail Sales Tax Act that county clerk shall enter a "judgment" against retailer for delinquent taxes on filing of certificate stating amount of such taxes and requesting entry of judgment, the "judgment" referred to, not being one ordered by a judicial tribunal, is not governed by provisions of Code of Civil Procedure in like matters, such as requirement for notice of entry of judgment with right to resort to an appellate tribunal. St.1935, p. 1262, § 26.

14. Licenses ⚿7(1)
Statutes ⚿95(3)

The provisions of Retail Sales Tax Act that State Board of Equalization may file in county clerk's office a certificate specifying amount of delinquent tax, and requesting that judgment be entered against retailer in amount set forth in certificate, and that county clerk shall immediately enter a judgment against retailer, do not vest in board arbitrary or unreasonable powers nor constitute "special legislation", law being "general law" applicable to all retailers of tangible property. St.1935, p. 1262, § 26; Const. art. 4, § 25.

See Words and Phrases, Permanent Edition, for all other definitions of "General Law" and "Special Legislation".

EDMONDS and CURTIS, JJ., dissenting.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

On rehearing.

Prior opinion, 110 P.2d 41.

Rehearing denied; CURTIS, EDMONDS, and HOUSER, JJ., dissenting.

Earl Warren, Atty. Gen., and H. H. Linney, James J. Arditto, and Adrian A. Kragen, Deputies Atty. Gen., for appellant.

Norman Elkington, of San Francisco, for respondent.

Eugene H. O'Donnell, of San Francisco, George Acret, of Los Angeles, Howard B. Crittenden, Jr., of Tracy, and H. R. Whiting and Morgan V. Spicer, both of San Francisco, amici curiae for respondent.

SHENK, Justice.

On rehearing, we approve and adopt the opinion rendered herein on the former hearing, as follows:

"The defendant moved to set aside as void a so-called 'judgment' entered in accordance with the provisions of section 26 of the Retail Sales Act of 1933, St.1933, p. 2607, as amended, Stats.1935, p. 1262. The plaintiff appealed from the judgment entered on the trial court's order granting the motion.

"The appeal presents the question of the correctness of the trial court's conclusion that the provisions of said section 26 are unconstitutional.

"The defendant conducted as 'owner' an auto sales company in San Francisco. Therefore, as a retailer of tangible personal property, he was required, under permits duly issued pursuant to the Retail Sales Act of 1933, to make accurate returns of sales and to pay the tax found to be due on account of sales of tangible personal property.

"On June 22, 1936, the State Board of Equalization filed in the County Clerk's office in Sacramento, pursuant to said section 26, a 'certificate of amount of tax, interest and penalty due and request for judgment.' The Board itemized the tax due as $9,413.81; interest, $569.39; penalty, $1,220.08; total $11,203.28. Pursuant to the request and on the same day a 'judgment for Retail Sales Tax' was entered against the defendant for the total tax shown by the certificate to be due.

"About one-third of the tax was computed on voluntary returns made by defendant. The balance comprised two additional assessments made by the Board on sales not reported by the defendant. By the defendant's testimony it appeared that several auditors occupied a month or six weeks in examining his records before the final additional assessment was made and total tax, interest and penalties computed. There was evidence that notices of such additional assessments were duly mailed to the defendant. A notice was mailed to the defendant on March 20, 1936, which showed that on January 25, 1936, there was due from the defendant a total of tax, interest and penalty of $10,904.85. The defendant was adjudged a bankrupt, and on May 25, 1936, under oath in the bankruptcy proceeding, he listed his sales tax liability to the State of California as $10,904.81.

[1] "Subsequent to the filing of the certificate of the Board of Equalization in the County Clerk's office in Sacramento, and on May 17, 1939, the defendant filed his affidavit and notice of motion to set aside and vacate the 'judgment' entered pursuant to said section 26. The motion was made on the ground that the judgment was void because it violated the due process clauses of the state and federal constitutions, and the prohibition against special legislation contained in section 25 of Article IV of the state constitution. It was stipulated that no summons or notice of any kind was ever served personally on the defendant. As stated, there was evidence that notices of the additional assessments were mailed to the defendant at his place of address in San Francisco. In his affidavit the defendant alleged 'that all notices served upon him by the State Board of Equalization under the provisions of the "Retail Sales Act of 1933" as amended, were served upon him by mail.' He also alleged that 'during all of said times he was actually living and employed in said city and county of San Francisco; that during all of said times and more particularly at the time of the mailing of said notices of additional assessment and of estimate, tax and penalty, the home address, the business address and the personal whereabouts of said defendant were known to the State Board of Equalization.' The foregoing testimony and admissions are sufficient upon which to predicate a conclusion, at which the trial court arrived, that the requirements respecting the notices provided by the pertinent portions of the act were complied with by the Board. As noted, the trial court granted the defendant's motion on the grounds that the provisions of section 26 deprived the defendant of due process, and that they constituted special legislation. Therefore the principal question for determination is whether the pertinent provisions of the act are in harmony with constitutional requirements.

"Section 17 of the Act provides that if the Board is not satisfied with the return and payment of tax made by the retailer, it may make an additional assessment based upon the facts contained in the return or upon any information that it may have or obtain; and provides also for certain penalties on account of such additional assessment which it is not necessary to note specifically. That section also requires written notice to be given to the retailer, which may be served either personally or by mail. Section 18 makes similar provisions with respect to assessments imposed by reason of the failure of the retailer to make any return.

"Section 20 gives to the retailer against whom an assessment was made pursuant to sections 17 or 18, the right to file, within fifteen days after the service of notice, a petition for reassessment. It states: 'If a petition for reassessment is not filed within said fifteen day period the amount of the assessment becomes final at the expiration thereof.' The section also provides for a hearing by the Board in the event a petition for reassessment is filed within the time specified. The act (sections 20 and 33) also makes provision for resort to a judicial tribunal for a consideration and determination of the question whether there was an abuse of discretion on the part of the Board.

"Section 21, as applied to the facts of this case, requires that every notice of additional tax proposed to be assessed be mailed to the retailer within three years after the retailer's return is filed. No question arises with respect to the time of the mailing of the notices herein.

"Section 26 of the act provides that when any tax, etc., is not paid when due, the Board may file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount of the tax, interest and penalties, with the name and last known address of the retailer liable therefor; stating that the Board has complied with all the provisions of the act in relation to the computation and levy of the tax; and requesting that 'judgment be entered against the retailer in the amount * * * set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment * * * against the retailer * * *.' It also provides that an abstract of the judgment may be recorded in any county, whereupon the amount shown shall constitute a lien upon all real property of the retailer in such county, which shall have the force, effect and priority of a judgment lien, and that execution shall issue upon such judgment upon request of the Board in the same manner as upon other judgments under the Code of Civil Procedure. By the same section the Board is also given power, after delinquency in the payment of tax and notice thereof by registered mail and notice of an intended sale by mail and publication any time within three years, forthwith to collect such taxes by seizure and sale of sufficient real or personal property not exempt from execution to satisfy the amount due. That section also expressly provides that the remedies of the State shall be cumulative, and that the pursuit of one remedy shall not be deemed an election to the exclusion of any other remedy.

[2] "The trial court concluded that the certificate of the Board was executed and filed in accordance with the provisions of section 26. There is no merit in the contention that the certificate was invalid because signed by tax counsel appointed by the Board, rather than by the Board itself. Section 27 of the act specifically empowers the Board to appoint such assistants as it may deem necessary to enforce its powers and perform its duties under the act. The execution of the certificate through such duly appointed administrative assistant is a compliance with the provisions of the act.

"The defendant contends that section 26 of the act offends the constitutional due process clauses in two respects, namely that a personal judgment is permitted to be entered against the retailer without provision for prior personal notice and hearing in a court as provided by the Code of Civil Procedure, and that the section confers on the Board of Equalization arbitrary and unreasonable powers. In urging that the provisions of section 26, permitting a judgment to be entered against the retailer in the manner therein prescribed, is special legislation, the defendant argues that the 'judgment' provided by said section is a 'judgment in personam', is governed by the rules of due process, that said rules require personal service of notice and a judicial hearing before such judgment may be entered, and is further governed by the general laws relative to actions in personam.

"The defendant and the trial court have misapprehended the requirements of due process involved in proceedings for assessment, levy, and collection of taxes, and the significance of the procedure prescribed by section 26 in relation to the constitutional provisions invoked by the defendant.

[3] "Obviously if an action in a court or other judicial tribunal be necessary for a judgment for the collection of taxes, the State is bound by the provisions applicable to the conduct of such action, and by the general law governing jurisdiction of parties and subject matter. But as long standing as the common law itself is the rule that a more summary method may be provided for the collection of taxes due to the sovereign than is provided for the recovery of judgment for debts between private citizens. This power of government received early recognition in this country. The case of Den ex dem. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 18 How. 272, 276, 15 L.Ed. 372, involved the collection of moneys from a defalcating customs inspector. Summary seizure of property to satisfy the debt was objected to on the ground of lack of due process. The court said: 'The words, "due process of law", were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in Magna Charta. * * * We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown * * *. It is cer-

tain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the declaration of independence and before the formation of the constitution of the United States. * * * For, though "due process of law" generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings * * * yet, this is not universally true. There may be, and we have seen that there are cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial. * * * The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the constitution. * * * It may be added, that probably there are few governments which do or can permit their claims for public taxes * * * to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to.'

"Springer v. United States, 102 U.S. 586, 593, 26 L.Ed. 253, involved a summary method of execution and collection of personal income taxes, objected to under the constitutional guaranty of due process. In holding that congress could provide the power to distrain realty as well as personalty, the court said: 'The proceedings of the collector were not in conflict with the amendment to the Constitution which declares that "no person shall be deprived of life, liberty, or property without due process of law." * * * The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government.'

[4] "It has been held that due process is satisfied if notice and an opportunity to question the validity or amount of the tax be provided for at some stage in the proceedings; that the notice does not have to be personally served; that notice of every step in the proceedings is not required; and that it is sufficient if the finality of the assessment be determined by the taxing authorities. Weyerhaeuser v. Minnesota, 176 U.S. 550, 20 S.Ct. 485, 44 L.Ed. 583; Hodge v. Muscatine County, 196 U.S. 276, 25 S.Ct. 237, 49 L.Ed. 477; In re Sutter-Butte By-Pass Assessment No. 6, etc., 191 Cal. 650, 218 P. 27; Wulzen v. Board of Supervisors, 101 Cal. 15, 35 P. 353, 40 Am.St.Rep. 17.

[5] "In the discussion of the general subject of the system of enforcing the government's claims for taxes, the court said in Bull v. United States, 295 U.S. 247, 259, 55 S.Ct. 695, 699, 79 L.Ed. 1421: 'A tax is an exaction by the sovereign, and necessarily the sovereign has an enforceable claim against every one within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation, which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount of tax payable, and assessments of federal estate and income taxes are of this type. Once the tax is assessed, the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the lifeblood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is

given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

"'In recognition of the fact that erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness, invariably afford the taxpayer an opportunity at some stage to have mistakes rectified. Often an administrative hearing is afforded before the assessment becomes final; or administrative machinery is provided whereby an erroneous collection may be refunded; in some instances both administrative relief and redress by an action against the sovereign in one of its courts are permitted methods of restitution of excessive or illegal exaction. Thus, the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment * * *, and his only redress for unjust administrative action is the right to claim restitution.'

[6] "The courts of this State have given full recognition to the foregoing precepts. From a discussion of the question of sufficiency of notice in a street improvement condemnation proceeding appearing in the opinion in the case of Wulzen v. Board of Supervisors, supra, 101 Cal. at pages 18-20, 35 P. at page 354, 40 Am.St. Rep. 17, we quote the following:

"'Justice Bradley, in discussing what is due process of law in Davidson v. New Orleans, 96 U.S. 97 [24 L.Ed. 616], uses the following language:

"'"In judging what is due process of law, respect must be had to the cause and object of the taking,—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law."

[7] "'In commenting upon the above quotation in Lent v. Tillson, 72 Cal. [404] at page 414, 14 P. 71, Temple, J., says: "In other words, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand. And, further, in matters of assessment and taxation, the same character of notice is not required as in ordinary actions in a court of justice, for the reason, I presume, that in such summary proceedings it is not practical or usual." * * *

"'The power of taxation is confided to the legislative department of the government, and "an act for levying taxes and providing the means of enforcement is within the unquestioned and unquestionable power of the legislature. It is therefore the law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation." Cooley, Tax'n, pp. 48, 49. It was said in Kelly v. Pittsburgh, 104 U.S. 78, 80 [26 L. Ed. 658]: "Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people have established a different procedure, which, in regard to that matter, is, and always has been, due process of law."' The court concluded: 'In matters of taxation and assessment the state is not bound to accord personal service of process upon the citizen.'"

"In People v. Central Pac. R. Co., 105 Cal. 576, 38 P. 905, the question was whether provisions for taxation of a distinct class of railroads was special legislation. It was said at pages 588-589 of 105 Cal., 38 P. at page 908: 'The collection of taxes is not, however, the mere collection of a debt, but is a sovereign act of the state, to be exercised as may be prescribed by the legislature. Whether the tax is collected by an action in court, or by summary sale by the tax collector, is immaterial. The state through its legislature, can avail itself of the judicial power as the means by which it will collect the tax; and in such proceedings it may prescribe such procedure as may best avail for that purpose, irrespective of the mode of procedure provided for the determination of controversies between individuals, just as it may avail itself of the executive branch of the government by authorizing the sheriff to sell the property upon which the taxes are delinquent, without requiring him to pursue the same course as is required in sales upon judgments between individuals. Although the tax is an obligation from the citizen to the state, it is not of the same character of obligations as exist between citizens, and for the purposes of its collection the state is not limited to the same mode or to the same procedure which it prescribes for individuals in the collection of obligations between themselves.'

"The contention was made in Merchants' Trust Co. v. Wright, 161 Cal. 149, 118 P. 517, 518, that the sale of an entire tract of land to satisfy a tax lien, when sale of a smaller portion would produce sufficient, was a deprivation of property without due process of law. The court said: 'That the Legislature may provide for the present system of taxation under which the state acquires title to the propery of one who permits the taxes thereon to become delinquent and may authorize a subsequent sale thereof is not open to question. While it is undoubtedly true that a delinquent owner cannot be deprived of his property under such proceedings without due process of law, this due process of law, as far as tax proceedings are concerned, means only that due notice of sale shall be given to the delinquent owner, and this is fully accorded him by sections 3764–3767 of the Political Code, which provide for a notice to him by publication of the sale to the state. This is all the notice he is constitutionally entitled to, and when this is provided for by law, as it is here, he has been accorded the full measure of his constitutional right in that respect', (citing cases).

"We also note the case of East Tennessee Brewing Co. v. Currier, 126 Tenn. 535, 150 S.W. 541, where the plaintiff, in addition to its brewer's manufacturing license tax, became liable for a liquor dealer's tax. A warrant issued to distrain sufficient property to satisfy taxes of $9,909, interest and penalties. The tax was paid under protest and suit was brought to enjoin further proceedings and to recover the tax paid. It was contended that the distraint, issued without notice or demand, was illegal and in violation of the rule of due process. The statute provided what facts would constitute a prima facie showing of liability for the tax and placed the burden on the dealer to prove that he was not engaged as such liquor dealer. There was no question that the brewer was in fact engaged in dealer's activities. It was held that under the authorities he was not entitled to advance notice that the tax was due; that if he was engaged in the wholesale or retail liquor business, he, of course, knew it, and was charged with notice that he was liable for the license tax exacted by the state. The court relied on Hagar v. Reclamation District, 111 U.S. 701, 709, 710, 4 S.Ct. 663, 28 L.Ed. 569, to the effect that from the nature of a vast number of different kinds of taxation, as poll or license taxes, or taxes on things, persons, or occupations, notice to the tax payer would be of no particular advantage and was, therefore, unnecessary. It quoted the following from 37 Cyc., p. 1233: 'Laws providing summary remedies for the collection of delinquent taxes are not open to the constitutional objection, because they dispense with some of the formalities of ordinary judicial procedure, or cut off technical defenses, or authorize the seizure of the property first and the hearing afterward, provided only that the taxpayer is given an opportunity at some stage of the proceedings, and before his rights are finally cut off, to contest the validity of the tax or his liability in respect thereto.' (126 Tenn. 535, 150 S.W. 544.) Continuing, it said: 'The question of summary remedies for the collection of taxes is also discussed at length by Judge Cooley, in Cooley on Taxation, vol. 2, pp. 827–830, and the question of due process and the law of the land are discussed in the same work, in volume 1, p. 51 et seq.

" 'From all the authorities, it is evident that the state has the power to assess taxes and fix methods for the collection thereof, and it does not matter if these remedies be summary in their nature, so long as the taxpayer is in some way, at some stage of the proceedings, given an opportunity to be heard and have his rights determined before some competent tribunal.

" 'The statute in this case directed the issuance of a distress warrant upon certain conditions made to appear to the clerk of the county court.

" 'The statute might have prescribed that notice be given to the delinquent taxpayer before the issuance of a warrant; but the Legislature did not see proper to include such a provision, and it was entirely within their power to omit it, inasmuch as the taxpayer has open to him the several methods, heretofore pointed out, of calling in question the validity of the demand made against him.'

[8-12] "Unquestionably the 'first section of the fourteenth amendment places a limit upon all the powers of the state, including, among others, that of taxation.' Santa Clara County v. Southern Pacific R. Co., C. C., 18 F. 385, 397. But the limit in respect to the levy and collection of taxes is well exemplified by the authorities herein discussed. The conclusion to be drawn therefrom is that the provisions of section 26 of the Retail Sales Tax Act do not contravene the constitutional inhibitions upon the Legislature. The retailer knows or should know the amount of tax due on the sales reported by him. The statute provides for adequate notice of any additional assessment and an opportunity for mistakes to be rectified upon the filing of a petition within the time prescribed. He is notified by the provisions of the statute that the tax will become delinquent and collectible summarily and without further notice unless he makes objection within the specified time. Nothing further is necessary in so far as the objections raised by the defendant are concerned. No contrary significance may be inferred from the provisions that a 'judgment' is to be entered against the retailer upon the filing of the Board's certificate, or that the lien created thereby 'shall have the force, effect and priority of a judgment lien.' The fact that the word 'judgment' was used to designate the method of the summary procedure does not of itself require all the antecedent steps in a judicial tribunal usually applicable when private debts are the subject of collection. The foregoing authorities are clear to the effect that the sovereign may adopt any appropriate procedure known to the law for the purpose of collecting taxes and that it is not required to provide for a hearing in a judicial tribunal before it may use the processes which follow upon the entry of a judgment in such tribunal. It is plain that a hearing in a judicial tribunal was not intended and is not required by the statute here in question. The use of the word 'judgment' in tax collection provisions for the purpose of calling in operation summary execution on and sale of property subject to tax liens is not strange nor unfamiliar. Section 3716 of the Political Code before its repeal in 1939 provided that 'every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.' See California Loan, etc., Co. v. Weis, 118 Cal. 489, 50 P. 697; see also State of California v. Hisey, 9 Cir., 84 F.2d 802; Bull v. United States, supra; Simpson v. Warren, 106 Fla. 688, 143 So. 602, 144 So. 324; State Revenue Comm. v. National Biscuit Co., 49 Ga.App. 409, 175 S.E. 607; In re State Tax Commission, 136 Misc. 104, 240 N.Y.S. 309.

[13] "Such a 'judgment', not being ordered by a judicial tribunal, is not governed by provisions of the Code of Civil Procedure in like matters, such as the requirement for notice of entry of judgment, with the right to resort to an appellate tribunal.

[14] "The foregoing also leads to the conclusion that the provisions of section 26 do not vest in the Board of Equalization arbitrary or unreasonable powers, and do not constitute special legislation. As indicated, the Legislature may employ such procedure without providing for a judgment ordered by a judicial tribunal. The law is general, applicable to all in the class specified, viz., persons engaged in retail sales of tangible personal property. No serious question is or may be raised that that class of taxpayers may not be subjected to the method of tax collection provided by the statute if otherwise its provisions are in accord with the requirements of due process. Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 57 P.2d 1022; see also People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029.

"Cases relied upon by the defendant do not require or justify a contrary conclusion. State v. Security National Bank, 143 Minn. 408, 173 N.W. 885, involved a judicial proceeding wherein a judgment was reversed which was entered without notice or hearing against certain bank stockholders for a proportion of a tax assessed in the name of the bank. The court there, however, recognized that personal service of notice is not considered essential to due process in respect to the assessment and levy of taxes. As we have noted, the provisions of the Retail Sales Tax Act here in question relate solely to the assessment and collection of taxes and not to any proceeding in a judicial tribunal. The case of Griffin v. Cook County, 369 Ill. 380, 16 N.E.2d 906, 118 A.L.R. 1157, involved a statute which provided for a court proceeding to confirm a certain tax levy, and an appeal to the supreme court. It was held that the substituted service of notice by publication only in such judicial proceeding was not a compliance with due process of law. That case likewise is inapplicable to the facts involved here.

"The case of Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068, 1072, involved the Idaho sales tax law. Laws 1935, 1st Ex. Sess., c. 12. That law contained provisions with respect to the filing of a notice of lien which should have the force and effect of a judgment duly docketed against the retailer. Section 17 of that act provided that if fraud or evasion on the part of a retailer be discovered by the commissioner, he should determine the amount by which the State has been defrauded, add to the amount so determined a penalty equal to twenty-five per cent thereof, and assess the same against the retailer, the amount so assessed to become immediately due and payable. Notice to delinquents and notice of sale were provided for, but apparently without any opportunity to make any objection to the finality of any additional assessment except by way of payment of the tax under protest and suit for recovery thereof. It was held that the arbitrary processes authorized by section 17, among others, were a deprivation of due process. It was also held that the powers sought to be conferred belong to the judicial branch of the government and could not be conferred upon the department of finance nor its commissioner. The court relied on the provisions of its state constitution, and authorities stating the rule that 'due process of law requires that one be heard before his rights are adjudged'. It is questionable whether the court there would have come to any different conclusion had the act and particularly section 17 thereof provided for notice and an opportunity to object to the amount or validity of the tax before the finality of the assessment therein provided; but in any event the absence of any such provision in section 17 of the statute there involved distinguishes that case from the present. Aside from that distinction, if the decision be deemed to be support for the defendant's contentions herein, we must conclude that it is not in accord with the weight of authority.

"The foregoing disposes of all the contentions presented by the defendant."

The judgment is reversed.

We concur: GIBSON, C. J.; CARTER, J.; SPENCE, J., pro tem.

TRAYNOR, J., took no part in the consideration or decision of this case.

EDMONDS, Justice (dissenting).

In my opinion, the decision of the majority authorizes a procedure which ignores constitutional rights, and is directly at variance with the fundamental principles of our government. The question for decision, it seems to me, is not answered by reference to the well established rule that the sovereign may provide a summary method for the collection of taxes.

I fully recognize that the maintenance of government is dependent upon the prompt collection of revenue for public purposes. But the provision of the Retail Sales Tax Act (Stats.1933, p. 2599, as amended; Deering's Gen.Laws, 1937 Ed., Act 8493), which is upheld in this case permits an administrative body to usurp the functions of the superior court in violation of the constitutional provision: "The powers of the government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." (Art. III, sec. 1, Const.) It is, of course, true that although there are different departments of our government and each must act within its own prescribed limitations, executive agencies and judicial tribunals may cooperate for the accomplishment of governmental purposes. However, the constitutional provision contemplates independent action. To require the superior court to enter a judgment against an individual upon the mere demand of an administrative agency, in effect, subjects the judicial department of government to the other branches which are coordinate with but not superior to it.

According to section 26 of the Retail Sales Tax Act, supra, the clerk of the superior court, immediately upon the filing of a certificate made by the State Board of Equalization "shall enter a judgment for the people of the State of California against the retailer. * * * Execution shall issue upon such a judgment upon request of the board in the same manner as execution may issue upon other judgments and sales shall be held under such execution as prescribed in the Code of Civil Procedure."

Under these provisions a judgment in personam is entered against the retailer without any compliance with judicial procedure.

This is not a determination which, under section 3716 of the Political Code has the "effect" of a judgment. "A judgment is the final determination of the rights of the parties in an action or proceeding." (Sec. 577, Code Civ.Proc.) But a determination of liability which is given the "effect" of a judgment is an obligation collectible by administrative proceedings. And although by section 3716 of the Political Code, tax liens are given the "force and effect" of an execution, the execution to be issued upon the judgment provided for in section 26 is the same kind of execution as is issued "upon other judgments".

In my opinion, therefore, the contention that the proceedings authorized by section 26 of the Retail Sales Tax Act are purely administrative cannot be sustained. "The state, through its legislature, can avail itself of the judicial power as the means by which it will collect the tax", and for that purpose may prescribe procedure summary and different than is provided for the determination of controversies between individuals. People v. Central Pacific R. Co., 105 Cal. 576, 38 P. 905, 908. But where at the instigation of the state the courts are called upon to aid another department of the government and to add judicial action to administrative order, the indispensable prerequisities of judicial action must exist. Notice by an administrative board of a hearing to be held by it is not a substitute for the due process which must underlie judicial action.

Not one of the cases relied upon by my associates concerned procedure similar to that which is here challenged. In accordance with long established principles they hold that summary methods of an administrative body in the levy, assessment and collection of taxes do not violate due process of law if, somewhere in the administrative proceeding, the taxpayer had notice and an opportunity to be heard. However, these cases are not authority for the enforcement of an administrative determination as the judgment of a court of law.

For example, in Springer v. United States, 102 U.S. 586, 26 L.Ed. 253, the tax collector caused a warrant to issue and levied upon real estate. It was urged that the summary levy and sale deprived the taxpayer of property without due process of law. The court held that this administrative process did not violate the constitutional guarantees. In the case of Bull v. United States, 295 U.S. 247, 55 S.Ct. 695, 699, 79 L.Ed. 1421, the court held that administrative procedure of a summary nature is valid, yet its opinion indicates that there is a clear line of demarcation between the administrative and judicial process in the collection of taxes. In this connection it is said that if the amount assessed by the taxing authorities is not paid when due, "administrative officials may seize the debtor's property to satisfy the debt".

So also in People v. Central Pacific R. R. Co., supra, an administrative procedure to assess and collect taxes upon railroads was upheld, but the decision is not authority for the conclusion reached in the present case. The court said: "The collection of taxes is not, however, the mere collection of a debt, but is a sovereign act of the state, to be exercised as may be prescribed by the legislature. Whether the tax is collected by an action in court, or by summary sale by the tax collector, is immaterial." In other words, the court in that case clearly recognized the distinction between an administrative remedy and judicial process. For, as my associates have pointed out, a statute may require the government to proceed by an action at law or it may authorize the summary seizure of property by the administrative officers. The government may choose its remedy but if it proceeds by way of judicial authority, it must follow the due process required in actions at law.

I concur: CURTIS, J.

18 Cal.2d 382

RICE v. SCHMID et al.

L. A. 17840.

Supreme Court of California.

July 31, 1941.

Rehearing Denied Aug. 27, 1941.

1. Damages ⚷163(3)

Under code provisions relating to contract provisions for liquidated damages, a plaintiff seeking the enforcement of a liquidated damage clause has the burden of establishing that at the time the contract was entered into, the nature of the agreement was such that it would be impracticable or extremely difficult for the court to fix the actual damage in the event of a breach. Civ. Code, §§ 1670, 1671.

2. Damages ⚷208(1)

In seeking the enforcement of a liquidated damage clause, whether at the time the contract was entered into the nature of the agreement was such that it would be impracticable for a court to fix the actual damage in the event of a breach, is a question of fact. Civ.Code, §§ 1670, 1671.

3. Sales ⚷384(1)

Under uniform sales act provision that where buyer fails to accept goods for which he has contracted, measure of damages is difference between contract price and market price at the time when the goods ought to have been accepted, it is not necessary that there be an organized exchange for determining market price. Civ.Code, § 1784(3).

4. Damages ⚷79(1)

Under statutes voiding provisions for liquidated damages unless it would be impracticable or extremely difficult to fix actual damage, measure of damages is not too difficult of ascertainment even though dependent on price of articles as to which no regular market exists. Civ.Code, §§ 1670, 1671.

5. Damages ⚷79(5)

Where at time contract for sale of named brands of flour was entered into, and thereafter, it was not impracticable or extremely difficult to fix actual damage for failure to accept the flour and there were daily quotations upon the brands of flour sold from which the market price could be ascertained at any time, provision for liquidated damages was void notwithstanding that there was no organized exchange at which daily quotations of flour prices were furnished and no quotations were published in papers. Civ.Code, §§ 1670, 1671, 1784(3).

6. Damages ⚷80(1)

A valid liquidated damage clause must represent a reasonable endeavor by the parties to estimate the fair compensation for the loss sustained. Civ.Code, § 1671.

7. Damages ⚷76

In determining validity of liquidated damage provisions of a contract, courts cannot disregard plain provisions of statutes relating thereto. Civ.Code, §§ 1670, 1671.

8. Sales ⚷384(1)

In seller's action for breach of contract for sale of flour it was error to allow the seller to recover sum representing profit which he would have made calculated on basis of contracts which he had with flour mills for purchase of the flour since the measure of damages was the difference between the contract price and market price at the time when the goods should have been accepted, notwithstanding that such measure of damages might authorize a larger recovery. Civ.Code, § 1784.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action for breach of contract to purchase flour by R. L. Rice against John Schmid and others wherein Augusta Schmid, as administratrix of the estate of John Schmid, deceased, was substituted as a party defendant. From a judgment for the plaintiff in the sum of $712.45, actual damages, notwithstanding plaintiff's demand for the sum of $13,251.79 as liquidated damages, the plaintiff appeals.

Reversed with directions.

Prior opinion, 108 P.2d 68.

H. M. Lineman, Mab Copland Lineman, and Benjamin Lewis, all of Los Angeles, for appellant.

W. W. Wallace, Michael Lavelle, Lavelle & Thompson, and S. W. Thompson, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

Plaintiff recovered judgment for damages in the sum of $712.45 for breach of a contract to purchase flour. Being dissatisfied with the amount of the judgment, he brings this appeal.

Plaintiff is a wholesale flour merchant. On July 16, 1937, he entered into a written contract with John Schmid, the proprietor of the Eagle Bakery, in which he agreed to sell to Schmid 6000 barrels of flour at the following prices:

Barrels	Price per barrel
2000 "Ravalli" brand wheat flour at	$7.10
2750 "Gold Cross" brand wheat flour at	7.65
1250 "Isis" brand wheat flour at	7.15

The contract provided that shipment was to be made upon instructions from the buyer within ninety days from the date of the contract. The contract was to be automatically extended if, on account of the fault of the buyer, not all of the flour was shipped within the ninety-day period unless the seller chose to terminate it upon that ground.

A portion of the flour had been delivered under the terms of the contract when John Schmid sold the Eagle Bakery to the defendants Anthony Marik, Felix Marik, John A. Dull and E. A. Osterman, who assumed the obligations of Schmid's contract with plaintiff. Further deliveries of flour were made to the Eagle Bakery under the contract until a total of 3245 barrels had been delivered. Thereafter defendants refused to furnish any further instructions for delivery of the balance of the flour.

On December 2, 1938, plaintiff notified the new proprietors of the Eagle Bakery of his election to terminate the contract and to hold them liable in damages for breach of the contract. The contract contained a provision for liquidated damages, and plaintiff sought to recover such damages. In a separate count plaintiff also asked for recovery based upon the actual damage suffered. The trial court gave judgment for the plaintiff, but held that the liquidated damage provision was invalid. Actual damages were fixed at $712.45.

Augusta Schmid has been substituted as administratrix of the estate of John Schmid, who died after the commencement of this action.

[1-5] The question thus presented is whether the provision for liquidated damages is invalid, as was held by the trial court. Civil Code, section 1670, provides: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." Section 1671 provides: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Under these code sections a plaintiff, seeking the enforcement of a liquidated damage clause, has the burden of establishing that at the time the contract was entered into the nature of the agreement was such that it would be impracticable or extremely difficult for a court to fix the actual damage in the event of a breach. Robert Marsh & Co., Inc. v. Tremper, 210 Cal. 572, 292 P. 950; Hanlon Drydock, etc., Co. v. McNear, Inc., 70 Cal. App. 204, 215, 232 P. 1002; Thomas v. Anthony, 30 Cal.App. 217, 220, 157 P. 823; McInerney v. Mack, 34 Cal.App. 153, 166 P. 867; Kelly v. McDonald, 98 Cal.App. 121, 276 P. 404; Mente & Co., Inc. v. Fresno Compress & Warehouse Co., 113 Cal. App. 325, 298 P. 126. It is a question of fact in each instance whether the nature of the case is such that it would be impracticable or extremely difficult to fix the actual damage. Pacific Factor Co. v. Adler, 90 Cal. 110, 27 P. 36, 25 Am.St.Rep. 102; Hanlon Drydock, etc., Co. v. McNear, Inc., supra, 70 Cal.App. page 214, 232 P. 1002. Civil Code, section 1784(3), which is part of the Uniform Sales Act, provides that where a buyer fails to accept goods for which he has contracted, the "measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted * * *". The trial court found that neither at the time the contract was entered into nor thereafter was it impracticable or extremely difficult to fix the actual damage, and this finding is supported by the record. There was testimony that the particular brands of flour involved in this contract were actually sold and offered for sale at quoted prices each day. From such evidence the court found that there were daily quotations upon these brands of flour and that the market price could be ascertained at any time. Plaintiff relies upon the fact that there was no organized exchange at which daily quotations of flour prices were furnished and also upon the fact that there were no quotations published in the papers.

It is not necessary, however, that there be an organized exchange for determining "market price". Decisions have indicated that the measure of damages is not too difficult of ascertainment even though dependent upon the price of articles as to which no regular market exists. Stark v. Shemada, 187 Cal. 785, 204 P. 214; Pacific Factor Co. v. Adler, supra; Mente & Co., Inc., v. Fresno C. & W. Co., supra. Since the actual damage involved in the breach of this contract could have been estimated in accordance with the established principles, it follows that the situation contemplated in Civil Code, section 1671, was not present and, as held by the trial court, the provision for liquidated damages must be held void under section 1670.

[6] The question has also been raised whether, assuming that the circumstances would permit a proper liquidated damage clause, the provision in the present agreement is a proper one. A valid liquidated damage clause must, of course, represent a reasonable endeavor by the parties to estimate fair compensation for the loss sustained. Dyer Bros. Iron Works v. Central Iron Works, 182 Cal. 588, 593, 189 P. 445; 3 Williston, Contracts (1936), p. 2192, sec. 779; Restatement of Contracts, sec. 339; 10 Calif.L.Rev. 8, 14. The agreement involved herein is the standard form of "Millers' National Federation Uniform Sales Contract", used widely in sales between millers or manufacturers of flour and buyers, and the liquidated damage clause of this contract has been upheld in some other states. Larabee Flour Mills Co., v. Carignano, 10 Cir., 49 F.2d 151; Lettellier v. Abilene Flour Mills Co., 101 Ind.App. 20, 198 N.E. 111; Quaile & Co. v. Kelly Milling Co., 184 Ark. 717, 43 S.W.2d 369, 79 A.L.R. 183, 188; Yerxa, Andrews & Thurston, Inc. v. Randazzo Macaroni Mfg. Co., 315 Mo. 927, 288 S.W. 20; see 3 Williston, supra, p. 2218. Whether the considerations controlling in those cases might warrant approval of the same clause in a contract between a flour merchant and a buyer is a more difficult question, and, in view of our holding above, we expressly refrain from deciding it.

[7] Plaintiff suggests that the courts have tended in recent years to look with more favor upon the attempts of contracting parties to estimate their damages in advance of breach by means of a liquidated damage clause. Wise v. United States, 249 U.S. 361, 39 S.Ct. 303, 63 L.Ed. 647; United States v. Bethlehem Steel Corp., 205 U.S. 105, 27 S.Ct. 450, 51 L.Ed. 731; Larabee Flour Mills v. Carignano, supra; see 25 Col.L.Rev. 278, 297 et seq. In states like California, however, which have code sections governing the matter of liquidated damages, the courts can not disregard the plain provisions of the statute. See McCormick, Damages, p. 606; cf. Home Bakery v. Robinson Milling Co., 170 Okl. 349, 40 P.2d 637. The Massachusetts case relied upon by plaintiff, Calvin Hosmer, etc., Co. v. Paramount Cone Co., Inc., 285 Mass. 278, 189 N.E. 192, in which the court upheld a clause providing for liquidated damages where a flour merchant was involved, is not persuasive. The decisions in that state do not require proof that the actual damages would be extremely difficult to estimate, but require only that the parties have intended to provide for damages rather than for a penalty. Cf. Kaplan v. Gray, 215 Mass. 269, 102 N.E. 421.

[8] Although the trial court was correct in refusing to enforce the contract provision for liquidated damages, nevertheless the judgment must be reversed because an improper measure of damages was applied. It appears that at the same time plaintiff entered into his contract with Schmid he made a contract with the Montana Flour Mills Co., the manufacturer of the particular brands of flour ordered by the Eagle Bakery. Plaintiff's contract with Montana Flour Mills Co. left a margin of profit of 25 cents per barrel on the "Ravalli" and "Gold Cross" brands and 30 cents per barrel on the "Isis" brand. In assessing the actual damage, the trial court treated both contracts as though they were part of the same transaction, and allowed plaintiff a recovery of 25 cents per barrel on the undelivered amount of the former brands and 30 cents per barrel on the undelivered amount of the latter brand. This, the court found, amounted to $712.45, the amount for which judgment was given. While this may have been the difference between the contract price and the market price of the flour on the date the contracts were entered into, it does not constitute the proper measure of damages. Under Civil Code, section 1784, plaintiff is entitled to recover the difference between the contract price and the market price at the time when the goods should have been accepted. The contract by its terms was automatically extended despite the defendants' failure to give

further shipping instructions, and since there was no repudiation of the contract by them, their obligation to accept the goods continued until the plaintiff exercised his option to terminate the contract. Therefore, the damages should be the difference between the contract price and the market price on the date of final termination of the contract. Cf. Fitchburg Yarn Co. v. Hope Webbing Co., 46 R.I. 290, 127 A. 148.

This case does not present a situation where the seller is bound to manufacture the goods or to procure them from any particular source, in which situation his damages may be limited by the cost of manufacturing or procuring the goods. 5 Williston, Contracts, p. 3866, sec. 1380. Here plaintiff's only obligation was to procure flour of the specified brands, whether from the miller or on the market, for delivery in accordance with shipping instructions to be furnished him by the defendants. He was free to enter into a contract with a manufacturer to protect himself or to speculate upon a decline in the market before delivery would be required. The fact that he did enter into a separate contract should not affect his damages. He was obligated to deliver the flour in any event; his duty was not conditioned upon the performance of any contract he should chance to make with the miller. Therefore his damages should not be affected by his loss or profit upon any such contract. Since he was free to wait and procure flour at the market price when ordered by the buyer, he is entitled to recover as damages the profits which he would have made in that event, the difference between the market price and the contract price. The contract was freely entered into by the defendant Schmid and freely assumed by the other defendants. Had they performed the contract according to its terms they would have been in exactly the same position as will follow from an award of damages based upon the differential between the market and the contract prices. The possibility that the plaintiff may make a large profit is a result of the decline in the market price and is not a sufficient reason for allowing the defendants to escape the obligations of their contract. (For a full discussion of the principles herein involved, see United States v. Burton Coal Co., 273 U.S. 337, 47 S.Ct. 351, 71 L.Ed. 670; 27 Col.L.Rev. 877.)

The judgment is reversed with directions to the trial court to determine the damages in accordance with the rules herein set forth and thereafter to enter judgment in favor of plaintiff.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.; PULLEN J., pro tem.

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18 Cal.2d 279

GARVEY et al. v. BYRAM

L. A. 17800.

Supreme Court of California.

July 24, 1941.

Rehearing Denied Aug. 22, 1941.

1. Taxation 🔑679(5)

In statute authorizing auction sale by state of property taken for taxes, lack of specific exclusion of bids by former owner of the property does not authorize such bids, in view of long-established rule that owner who has held title throughout period of tax delinquency cannot purchase at tax sale. Pol.Code, § 3834.25.

2. Taxation 🔑527, 680

Whatever payment the original owner of property deeded to state for unpaid taxes makes to tax collector in course of a purported sale must be regarded as a "payment" of taxes and cannot effectuate an actual sale which would convey title to him. Pol.Code, §§ 3817, 3834.20 to 3834.25.

See Words and Phrases, Permanent Edition, for all other definitions of "Payment".

3. Taxation 🔑527, 674, 680

One under moral or legal obligation to pay taxes cannot become purchaser at tax sale, and if he permits the property to be sold and buys it in, either in person or indirectly through agency of another, he does not thereby acquire any right or title, but his purchase is deemed one mode of paying taxes. Pol.Code, §§ 3817, 3834.20 to 3834.25.

4. Statutes 🔑212

When a rule is long engrained in public policy of the state, it must be presumed that legislature took it for granted rather than sought to alter it, in omitting specific provision for its application.

5. **Taxation** ⚷753

One who owned realty when tax lien attached and when the realty was deeded to the state for unpaid taxes, and who purchased at statutory auction for less than amount of taxes delinquent, but not less than minimum price specified pursuant to statute, could not compel execution of deed to him. Pol.Code, §§ 3817, 3834.25, 3836.1.

CARTER, J., dissenting.

In Bank.

Petition by Richard Garvey, Jr., and others, against H. L. Byram, for writ of mandate to compel respondent tax collector to execute a deed to petitioners pursuant to a public tax sale of realty.

Writ denied.

For prior opinion, see 106 P.2d 623.

Rehearing denied; HOUSER and CARTER, JJ., dissenting.

J. H. O'Connor, Co. Counsel, A. Curtis Smith, Deputy Co. Counsel, and Richard Garvey, Jr., in propria persona, all of Los Angeles, for petitioners.

Landels, Weigel & Crocker, of San Francisco, and Walter S. Home, of Los Angeles, for respondent.

TRAYNOR, Justice.

Petitioners have instituted this proceeding in mandamus to compel the respondent, the tax collector of Los Angeles county, to execute a deed to petitioner Garvey pursuant to a public tax sale of certain real property. Respondent has generally demurred.

Garvey was the owner of the property in question when the tax lien attached and when the property was deeded to the state for unpaid taxes. Pursuant to the procedure prescribed in Political Code sections 3834.20 to 3834.25, a public sale was held on April 11, 1940, at which petitioner Garvey made the highest bid. He bid less than the amount of the taxes which were delinquent when the property was deeded to the state exclusive of penalties, interest and costs, but not less than the minimum price specified in the resolution of the board of supervisors approving the sale. Respondent, H. L. Byram, as tax collector of Los Angeles county refuses to issue a deed to Garvey on the grounds that Political Code section 3834.25 (added by Stats. of 1939, chap. 529, p. 1917, sec. 2) does not contemplate a sale to the delinquent owner of the property for an amount less than the accumulated unpaid taxes, and that it could not be so construed without violating article XIII, section 1 of the California Constitution requiring all property in the state to be taxed in proportion to its value, and article IV, section 31, prohibiting the legislature from making or authorizing the making of any gift of any public money or thing of value to any individual.

Political Code section 3834.25 provides: "If the property is not redeemed before the sale, the tax collector shall sell the property at public auction to the highest bidder at the time and place fixed in the notice of intended sale; but no bid shall be accepted for a sum less than the minimum price fixed in the resolution of the board of supervisors." The section contains no specific exclusion of bids by the former owner of the property

[1, 2] Such an omission, however, cannot be interpreted as an authorization of such bids in view of the long established rule in this state that an owner who has held title throughout the period of tax delinquency cannot be a vendee at the tax sale. Whatever payment he makes to the tax collector in the course of a purported sale under such circumstances must be regarded as a payment of taxes and cannot serve to effectuate an actual sale which would convey to him title to the property. Moss v. Shear, 25 Cal. 38, 85 Am.Dec. 94; McMinn v. Whelan, 27 Cal. 300; Coppinger v. Rice, 33 Cal. 408; Bernal v. Lynch, 36 Cal. 135; Barrett v. Amerein, 36 Cal. 322; Garwood v. Hastings, 38 Cal. 216; Reily v. Lancaster, 39 Cal. 354; Christy v. Fisher, 58 Cal. 256; Barnard v. Wilson, 74 Cal. 512, 16 P. 307; Emeric v. Alvarado, 90 Cal. 444, 27 P. 356; Gates v. Lindley, 104 Cal. 451, 38 P. 311.

[3] "It is well settled that one who is under a moral or legal obligation to pay the taxes is not in a position to become a purchaser at a sale made for such taxes. If such person permits the property to be sold for taxes, and buys it in, either in person or indirectly through the agency of another, he does not thereby acquire any right or title to the property, but his purchase is deemed one mode of paying the taxes." Christy v. Fisher, 58 Cal. 256, at page 258; see, also, Black on Tax Titles, 2d ed., secs. 273-274; Blackwell on Tax Titles, 4th ed., pp. 443, 444.

[4] When a rule is so long engrained in the public policy of the state it must be

presumed that the legislature took it for granted rather than sought to alter it in omitting any specific provision for its application. Thus, in the present situation the failure of the legislature to provide that bids are subject to the rule must be construed not as a rejection but as a tacit acceptance of the rule.

If a defaulting owner were allowed in effect to redeem his property through the simple device of submitting the highest bid at the tax sale, he could evade the conditions of redemption set forth in section 3817 of the Political Code, namely, the payment, before the state shall have disposed of the property, of "the amount of taxes, penalties for delinquency, and costs due thereon at the time of such sale, and also all taxes that were a lien upon said real property at the time said taxes became delinquent; and also all unpaid taxes of every description which are a lien against the property, for each year since the sale, as shown on the delinquent assessment rolls * * *". It is significant that Political Code section 3817 was re-enacted with minor amendments during the same legislative session in which Political Code section 3834.25 was enacted and it is not plausible that the absence of a specific provision in the second should serve to destroy the effectiveness of the specific provisions in the first.

Political Code section 3897 originally provided that bids had to equal at least twice the taxes plus interest, costs, and expenses. Amendments to the Codes 1873–74, p. 153. When the legislature, commencing in 1905 (Stats. and Amend.1905, p. 31-32; Stats.1933, p. 2586; Stats.1935, p. 1437; Stats.1939, chap. 529, p. 1921, sec. 2), allowed lower minimum bids, it did not thereby enable defaulting owners to make such bids. Legislation which is concerned only with allowing a greater latitude in fixing the amount of the minimum bid cannot be construed to enlarge the field of bidders.

[5] Petitioners seek to distinguish the cases cited above on the ground that they prevent a defaulting owner, not from becoming a vendee at a tax sale, but only from improving his title thereby through the elimination of other private interests. They advance the view that if his title is subsequently questioned by a private encumbrancer, the court should hold that the purchase "is in effect only a redemption". Such a view, however, is at variance not only with Political Code section 3817 which sets forth the conditions of redemption, but with Political Code section 3836.1 which provides that the tax collector's deed shall vest title in the grantee "free of all encumbrances of any kind existing before the sale" except liens for future installments of assessments, direct assessments, and taxes of a nonconsenting tax agency. Faced with this clear statutory provision, petitioners maintain that should the defaulting owner become a grantee, principles of equity should prevail over the statutory provision to preclude his receiving a clear title. The court would thus be required not only to circumscribe the rule of the cases cited, but to run counter to express statutory provisions in order to formulate a policy, which finds no express legislative sanction, that defaulting owners may bid at tax sales. It is for the legislature and not the courts to formulate such a policy.

The petition for a peremptory writ of mandate is denied.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; PULLEN, Justice pro tem.

CARTER, Justice (dissenting).

I dissent.

I do not agree with the conclusion reached in the majority opinion or the reasons upon which it is based. I am convinced that the majority opinion entirely misconceives the purpose of the legislature in the enactment of sections 3834.20 to 3834.25 of the Political Code, and overlooks the serious consequences which will flow from the rule laid down therein. Abstractly stated, the majority opinion purports to hold that a person, holding the record title to real property which has been assessed and the taxes permitted to go delinquent and the property sold to the state for delinquent taxes, cannot purchase said property from the state at delinquent tax sale even though he is the highest bidder at such sale. No legislative declaration is relied upon for this holding. On the contrary it is conceded that the statutes of this state create no prohibition whatever against a former owner becoming a purchaser of property at delinquent tax sale from the state under any circumstances.

The principal reason for the conclusion reached in the majority opinion is stated therein as follows: "If a defaulting owner were allowed in effect to redeem his property through the simple device of submitting the highest bid at the tax sale, he could evade the conditions of redemption set forth in section 3817 of the Political Code, * * *." That this reason is unsound and not a just or reasonable basis for discriminating against the owner of tax delinquent property in favor of a stranger to the title thereto, is to my mind obvious.

The majority opinion does not indicate the extent to which the prohibition against an owner of property to bid for the purchase of same at a tax sale may go; that is, whether such prohibition extends to all persons interested in the property or only to an owner in severalty who held the title thereto in fee simple and to whom the property was assessed at the time of the tax delinquency. What the situation will be with reference to the owners of various interests in such property is not indicated. In other words, is a remainderman who is entitled to the fee after the termination of a life estate within the prohibited class? Is a conditional vendee under a contract of sale likewise within the prohibited class? Is a mortgagee or beneficiary under a trust deed covering the property in such prohibited class? Are the heirs or legal representatives of a deceased property owner in such prohibited class? Are trustees to whom property has been conveyed in trust in such prohibited class? Is the owner of property which has been erroneously assessed to another person in such prohibited class? Are persons entitled to future or conditional estates or interests in real property in such prohibited class? All of these and many other questions may arise to plague property owners and officials administering the tax laws as the result of the conclusion reached in the majority opinion.

Section 3780 of the Political Code provides that property sold for delinquent taxes may be redeemed by the owner or *any party in interest;* and section 3817 of the same code provides that such property may be redeemed by the owner, *his heirs, executors, administrators or other successors in interest.* If the reason given by the majority opinion for prohibiting an owner from purchasing property at delinquent tax sale is sound, then all other parties enumerated in the last-mentioned sections of the Political Code who are given the right to redeem should likewise be prohibited from purchasing such property at delinquent tax sale.

But aside from the untoward consequences which will flow from the rule announced in the majority opinion, there are cogent and persuasive reasons why it was not the intention of the legislature by the enactment of sections 3834.20 to 3834.25 of the Political Code to preclude or prohibit an owner or person having an interest in real property from becoming a purchaser at delinquent tax sale of such property if he qualifies as the highest bidder at such sale.

I can perceive of no reason founded upon equity or justice or any consideration of public policy as a basis for the conclusion that such owner or person interested should not be permitted to become a purchaser of such property.

It is a matter of common knowledge that at the time of the enactment of the legislation in question many thousands of parcels of real property in this state had been sold to the state for delinquent taxes and had not been redeemed, and, in my opinion, there is no basis for any other assumption than that the reason for such tax delinquency was due almost entirely to the inability of property owners to pay their taxes because of the period of great financial stringency which has existed in this country since 1929. In other words, people lost their property on account of tax delinquency because they were financially unable to pay their taxes. this situation was recognized by the legislature of this state in the various tax moratorium statutes adopted between 1933 and 1939. It is also a matter of common knowledge that as a result of the great financial depression through which this country passed between 1929 and 1939, real estate values greatly decreased, and in my opinion it is a reasonable assumption that numerous parcels of land in this state were assessed for the purposes of taxation at the beginning of the depression at a value which would produce a tax for an amount in excess of the deflated value of that property during the period of the depression. For this reason owners who became financially able refrained from redeeming their property because to do so would require them to pay to the various taxing entities more than the fair market value of the property at the time of redemption; hence, the property remained unredeemed and it could not be sold under the law as it existed prior to the enactment of the Political Code sections authorizing the board of supervisors with the approval of the tax collector and the state controller to fix a minimum price at which such property could be sold less than the amount of delinquent taxes and penalties against it. Hence, in order to get the title to the property back into private ownership and restored to the assessment rolls, the legislature enacted the statutes here under consideration.

Conceding that it was the purpose and object of the legislature in the enactment of these statutory provisions to reinstate such tax delinquent property on the assessment rolls of the various taxing entities of the state, and that such provisions were not intended primarily for the relief of owners who had lost their property because of their financial inability to redeem it, I can nevertheless see no reason why an owner or person interested in such property should not be accorded the same right as a stranger to bid at the delinquent tax sale of such property and acquire the title thereto pursuant to the statutory provisions above-mentioned. In fact, I can see many reasons why the owner should be permitted to bid for the purchase of such property. He is obviously more familiar with the property and should have a better idea of its value and would be disposed to place a higher bid for the property than a stranger. Obviously, the taxing entities would profit in such event. Furthermore, since the taxing entities would receive no more money from the sale of the property whether it is purchased by the owner or a stranger to the title, considerations of public policy should favor the owner retaining the title to his property even though the sale to him is considered nothing more than a method of redeeming the property from delinquent tax sale. Even if the legislature had provided that the owner would not be permitted to become a purchaser of the property at delinquent tax sale, in my opinion there is grave doubt as to whether or not such provision would not be in violation of the equal protection clause of the fourteenth amendment of the Constitution of the United States. In other words, such provision would discriminate against a former owner of real property who should have the same standing as any other member of the public as a purchaser of the property from the state at delinquent tax sale.

The cases cited in the majority opinion commencing with the case of Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94, to Gates v. Lindley, 104 Cal. 451, 38 P. 311, are not in point, as in none of these cases was the owner's right to bid for the purchase of his property at delinquent tax sale questioned by the officials administering the sale, and the title which the owner acquired as the result of such purchase was not attacked by the taxing entity. These cases simply hold that under well-settled principles of equity jurisprudence a property owner cannot cut off junior lien claims against his property by permitting the taxes levied against it to become delinquent and then purchase the title from the taxing entity at delinquent tax sale to the detriment of such junior lien claimants. No question of this character is involved in the case at bar. The sole question involved here is whether or not when the legislature provided that the board of supervisors, with the approval of the tax collector and state controller fixed the minimum amount at which tax delinquent property could be sold by the state to the highest bidder, it thereby intended to preclude the owner of the property at the time of the delinquency from becoming a purchaser at such sale even though he was the highest bidder for such property.

To my mind, it is improbable and contrary to human instincts and inclination to say that to permit an owner to become a purchaser at delinquent tax sale would tend to encourage tax delinquency because it would encourage owners to let their taxes go delinquent with the intention and design of purchasing the property at delinquent tax sale and evading the payment of a portion of the tax burden which had accrued against their property. In my opinion, no reasonably prudent person would run the risk of losing his property as the result of such a procedure in order to avoid the small saving which might result therefrom. My experience as a member of the bar for more than twenty-five years and as attorney for counties, cities and other taxing entities in dealing with problems of this character convinces me that there is no basis for an argument of this character and it affords no sound reason for the conclusion reached in the majority opinion.

It seems much more reasonable and logical to me to conclude that in fixing the minimum amount at which property sold to the state for delinquent taxes could be purchased, the tax collector and board of supervisors would take into consideration the fair market value of the property and fix such amount as in their judgment a prospective purchaser would be justified in paying therefor in view of the changed conditions as to market value since its sale to the state, and since the former owner has nothing to say about the amount so fixed, and the taxing entities are benefited because his bid is higher than all others, it is impossible for me to see how it can be claimed that the taxing entities are in any way injured or that it is not in the public interest to permit the owner to become a purchaser at such sale.

It can be appropriately stated that the situation here presented is "a condition not a theory", and that its solution requires the application of nothing more than a little common sense. If the legislature had intended to prohibit the owner from bidding, it would have said so, and this court has no authority to write anything into a statute which the legislature has omitted therefrom. Code Civ.Proc. sec. 1858. Is it not much more reasonable to assume that the legislature intended, by its failure to prohibit the owner from bidding, to thereby afford him an opportunity to regain title to his property without being required to pay more than it is worth in order to redeem it? I am forced to so conclude.

Respondent contends that to permit an owner to purchase his property at delinquent tax sale for less than the full amount required to redeem the property would constitute a gift of public money, and an interpretation of section 3834.25 which would permit such owner to purchase his property at delinquent tax sale would render said section unconstitutional as being in violation of article IV, section 31 of the Constitution of California. Section 31 of article IV restricts the legislature from making any gift or authorizing the making of any gift of any public money or thing of value to any individual, etc., but the above-mentioned section of the Political Code does not make or authorize the making of a gift to the owner of real property which has been sold to the state for delinquent taxes by permitting him to become a purchaser at the delinquent tax sale of said property. In the case at bar the state has by foreclosure acquired title to Garvey's land. The Political Code sections in question authorize the sale of this land at a price not less than that fixed by the tax collector, approved by the board of supervisors and the state controller. Any member of the public has the right to bid for the purchase of this land at the delinquent tax sale thereof. Garvey placed the highest bid for the land, which means that the taxing entity received more for the land than if he had not bid. Obviously, any member of the public had the right to purchase this property if he placed a higher bid than that submitted by Garvey. In either case the tax lien is extinguished by the sale of the property. It is presumed that the highest bidder paid all that the property was worth at the time of the sale. Therefore, the state was not giving Garvey anything by permitting him to bid more for the property than any other member of the public was disposed to bid for it. Under such circumstances it cannot be said by any stretch of the imagination that the state gave Garvey anything or that the state lost anything by permitting him to bid more for the property than anyone else was disposed to bid.

Respondent also contends that a sale to a record owner for less than the amount of delinquent taxes would constitute non-uniform taxation in contravention of article XIII, section 1 of the California Constitution. The first sentence of said section reads as follows: "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided." While this section provides for uniformity of taxation and not for uniformity in collection of taxes, it must be conceded that if a statutory system of taxation were devised whereby all property would be uniformly taxed in the first instance and thereafter certain classes of property was favored in the matter of tax collection resulting in substantial variation in the amount collected, such system of taxation would violate the above-quoted constitutional provision. That, however, is not the situation here. The property of no particular person or no particular class is singled out for different treatment, but all are subjected to precisely the same statutory method of taxation and collection. That one person is enabled in a particular instance to discharge his tax lien for less than his neighbor does not change the situation. The primary obligation of real property taxation in this state is not upon the person but upon the property. Since 1933 there has been no enforceable personal obligation for taxes against the owner of real property. In that year section 3899 of the Political Code was repealed and in the same year section 3771 was amended so as to provide as follows: "Provided, further, that no suit shall be brought against the owner or person in possession of said property to recover any taxes, assessments, penalties, or costs if said property is real property."

Thus, in applying the constitutional provisions abovementioned, we should disregard the person to whom the property is assessed and consider only the property taxed. Considered in that light, there is no difference between permitting the record owner or possessor to purchase the property at tax sale for less than the amount of the tax lien and permitting an entire stranger to do the same thing. In either event the property bears the same tax burden. In either event the taxation of property is equally either uniform or nonuniform. Since it must be conceded that a stranger may purchase at delinquent tax sale for less than the amount of extended taxes, there can be no violation of article XIII, section 1 of the Constitution in permitting a record owner to do likewise.

For the foregoing reasons I am of the opinion that a peremptory writ of mandate should issue requiring respondent to execute and deliver to petitioner Garvey a deed conveying the title of the property in question to him.

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46 Cal.App.2d 169

PREUITT et al. v. MARSHALL et al.

Civ. 12428.

District Court of Appeal, Second District, Division 1, California.

July 21, 1941.

1. Death 🔑76

In action for death of motorist who sustained chest injury in automobile collision at intersection, evidence supported jury's finding that accident was the contributing cause of death from pneumonia.

2. Automobiles 🔑245(80)

Whether deceased motorist whose automobile traveling southerly was struck on the left side by defendants' automobile traveling northerly and making a left turn at intersection was contributorily negligent was for the jury.

3. Trial 🔑127

In action for death of motorist, the trial court did not err in denying defendants' motion for a mistrial based on statement made by motorist's widow on cross-examination that after physician "got through taping him the insurance adjuster came", where the trial judge told the jury that the statement should not be considered or referred to and that the only parties to the case were the widow, motorist's daughters, the driver of the other automobile involved in the collision, and her father.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action for wrongful death by Lilly E. Preuitt and others against Virginia Marshall and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Schell & Delamer, of Los Angeles, for appellants.

Jerome J. Mayo and Guy H. Hayes, both of Los Angeles, for respondents.

DESMOND, Justice pro tem.

This appeal is from a judgment, entered upon a jury verdict, in favor of plaintiffs, in an action in which damages were claimed for the death of Peyton L. Preuitt, who died of pneumonia at a Los Angeles hospital on July 4, 1938. One of the plaintiffs is the widow of deceased; the other two plaintiffs are his daughters.

It is claimed that errors arose in connection with admission and rejection of evidence; that the evidence offered is insufficient to sustain the verdict and judgment; also, that the injection of the element of insurance into the case by the plaintiff widow while a witness on the stand requires a reversal of the judgment; further, that error arose when the trial court denied a motion for a mistrial proffered immediately thereafter.

Appellants' principal exceptions to the rulings on evidence relate to hypothetical questions propounded by counsel for each side; citing in the one instance, the overruling of an objection by defendants to inclusion of the date June 10th as the date on which pneumonia developed, the claim being that there was no evidence to that effect; in the other, sustaining an objection to the inclusion by defendants of a reference to an injury to the left side of deceased. In view of testimony given on both these subjects, part of which we shall quote in this opinion, we do not feel that any prejudicial error resulted from these rulings.

[1] On May 6, 1938, at about 4 o'clock p.m. on a clear day, the deceased was driving his automobile in a southerly direction on one of the streets of Los Angeles, accompanied by one of his employees. As he was traveling through an intersection his car was struck on the left side by another automobile which had approached the intersection in a northerly direction and then turned to the left within the intersection. Neither car traveled more than twenty or twenty-five feet from the point of impact, nor did either car overturn.

Mr. Olympius, the workman who was riding with Mr. Preuitt, stated on direct examination at the trial: "Well, we were quite excited, more or less. I asked Mr. Preuitt, I said, 'Are you hurt?', and he said, 'Yes.' I said, 'Where?' He said, 'My side and chest, it hurts me.' So I started to get out and the door kind of jammed on the right side, but I got it opened; and when I got out I started to stand and my knees buckled up, and I almost fell down, I guess it was the jolt I got myself, and then I helped Mr. Preuitt out."

The car which collided with the Preuitt automobile was being driven at the time of the accident by defendant Virginia Marshall and belonged to her father, codefendant. A Miss Peterson was riding with her. There is nothing in the record to indicate that either of these young ladies was injured; but Mr. Preuitt called a doctor that evening who attended him and taped his chest, principally on the right side.

It may be noted at this point that the witness Olympius had signed a statement prior to the trial, which read as follows: "Mr. Preuitt received no external cuts or injuries as far as I was able to see but I understand he sustained some cracked ribs on his left side." Also that Dr. Bidwell, an interne at the hospital where Mr. Preuitt was taken, in making a record of the history given by Mrs. Preuitt recorded that "patient had had pneumonia on right side and pleurisy for three weeks. * * * Complains of slight pain in left side. * * * Had an automobile accidents six weeks ago, was struck on left chest."

Mrs. Preuitt testified that Dr. Gordon, the physician who was called to attend the deceased on the evening of the accident, "examined his chest and then taped him up and said he had a fractured rib * * * on the right side". She also stated that after a day or two he tried to return to his business "and he complained about pains in his right side".

Although, as may be seen from the foregoing, there was a suggestion that the deceased suffered some injury to his left side, it does not appear from the testimony of Dr. Frank R. Webb, chief autopsy surgeon of the County of Los Angeles, that he found any evidence on the date of the autopsy, July 6th, of injury to the left side, but according to his autopsy report: "Further examination showed the lateral wall of the right side of the chest showed in the deep tissues a faded out bruise and the ribs were intact. The area of the pleura opposite the bruised area was thickened and adherent to the right lung. The right lung was pneumonic with areas of red and gray hepatization, and on cutting the surface was bathed with a seropurulent exulate. The left lung was partly red hepatized. The heart and other vital organs were commensurate with his age. His age was 59 years. From these findings it was determined that the primary cause of death was acute right lobar pneumonia contributary to contusion of right side of chest."

In explanation of the rather technical description contained in the foregoing excerpt from the autopsy report, Dr. Webb testified further as follows: "Well, the side of the chest, as stated here, shows a faded out bruise. Now, a bruise after a period of time fades out. At first it is quite dark, a bluish color, or black almost; then it gradually fades out to a purple, and that purple color remains for quite some time. Eventually as the blood and pigment is absorbed that disappears. So the color there will indicate to a certain extent the age of the bruise. A faded out bruise would be a bruise that had been received at quite some previous time to the time of the examination. Now, a bruised part of the chest—if there were any broken ribs, I could not see them. The ribs may have been cracked by his injury, but healing of a rib takes place very rapidly and there was no evidence at the time of the autopsy of any broken ribs. Any injury to the chest wall creating an inflammatory condition of the pleura or lining of the wall is likely to bring about adhesions between the lung and the wall. Ordinarily the lungs are free inside the chest, grating back and forth on the chest wall as they expand or contract; but adhesions will form if there is any inflammation, and you see it after a pleurisy, from pneumonia, you see it after injuries or broken ribs, there is an adhesion. In this case there was such an area of adhesion corresponding to the bruised area, and around this area and throughout that right lung was a pneumonic condition. The first stages of pneumonia are usually a solidification of the lungs—we call it hepatized, hepa referring to the liver; and the lung, instead of being soft and puffy, is of a liver-like consistency, hard and red because it is engulfed with blood and inflammation. As the pneumonic condition progresses the reaction, or the action of the bacteria or infection creates a grayish color which goes on to a stage where the disease is expressed by expectoration. Now, in this lung there showed evidences of the red and gray hepatization. In other words, there had been an established and continuous pneumonia in that right lung for some period of time. In the left lung, which is more of a sympathetic action, there had begun to show a red pneumonic condition. I think that explains the picture. * * * The pneumonia developing later was due to the lowered vitality of the lung tissue at the site of this adhesion which allowed the pneumonia to start from that region. I would consider the injury as tributary to his condition. The Court: In other words, you give the cause of death as pneumonia? A. Yes. The Court: The contributory cause as what? A. The contused right side of the chest." The doctor also testified: "Well, what I found was on the right chest wall; I found no evidence of injury in the left chest wall, or any diseased condition resulting from an injury to the left chest wall.

"Q. By Mr. Schell: Injury to the left side of the chest would not in your opinion, as I understand you, have any significance so far as this particular condition was concerned you found in the right lung? A. It would not cause the condition which I found present in the right side. * * *

"Q. And in this case there was no evidence of injury to the lung tissue at all? A. No; the injury was to the chest wall, and involvement of the lung was secondary to that. * * *

"Q. Doctor, I understand you correctly, do I not, the only thickening and adherence of the pleura was opposite this bruised area? A. The adhesion was opposite the bruised area.

"Q. The only place in either one of the two lungs that condition prevailed? A. Yes. Mr. Hayes: That is all."

A physician, produced as a witness for the defendant, testified: "My opinion is that the bruising of the chest wall, if it occurred along May 6th, would not be a contributing factor to the pneumonia of which this patient died in July.

"Q. Why? A. Because of the time element, and assuming in your question this man spit up no blood, had no cough, and was able to attend to his business, ran no fever, and a time element of approximately 35 days, as I remember your dates, before he became ill, in my opinion the bruising would not be a factor because, in a period of 35 days, healing of any bruising would be practically complete." In answer to a question propounded by the court, this doctor also testified: "There is no causal connection from a fair medical certainty. There is a probability of a lowered resistance due to confinement, strapping of the chest, not getting around, influence of probably not eating as much as he should, and taking the amount of exercise he should. In other words, a lowering of his general resistance would be the only causal connection between the pneumonia he developed in July and the injury he received in May."

Another medical witness produced by the defendants, testified: "I believe the pneumonia has no relation to the apparent contusion to the chest wall."

It is apparent from the verdict which the jurors rendered that they accepted the testimony of Dr. Webb to the effect that "the pneumonia developing later was due to the lowered vitality of the lung tissue at the site of this adhesion which allowed the pneumonia to start from that region. I would consider the injury as tributary to his condition". Having read all the medical testimony reported in the transcript, we cannot say that the evidence, so far as it relates to the accident as the contributing cause of death, was insufficient to support the verdict.

[2] Appellants, however, rely upon another element which they claim was so clearly proven as to make the evidence insufficient to sustain the verdict, namely, that the deceased was guilty of contributory negligence as a matter of law. This claim is based upon the incidents occurring at the time of the accident, particularly in regard to the manner in which both automobiles were driven at and immediately before the collision. Here was another question of fact which the jurors were called upon to decide. They determined it adversely to the appellants and having all the evidence in mind upon which this decision was reached, we cannot say that the jury was in error upon that phase of the case.

[3] It follows from the foregoing that we do not consider that the court erred in denying the defendants' motions for a directed verdict and for judgment notwithstanding the verdict. It remains to determine whether error arose when the court denied the motion for a mistrial made by defendants.

The incident upon which the motion was based occurred while Mrs. Preuitt was being cross-examined.

"Q. How often did Dr. Gordon come to see Mr. Preuitt? A. Well, now, does that question mean before or after, or what?

"Q. Well, how many times altogether did he treat him? A. He just came that one night, and I wouldn't say it was treatment because he put tape—taped Mr. Preuitt, and then told him that he had better get his own physician. And he taped him up, and just before he got through, after he got through taping him the insurance adjuster came, and that was just before Mr. Preuitt—he was in bed that night until the next day."

In support of their claim of error in this regard appellants cite a formidable array of cases in which references to insurance companies were held to be a proper cause of reversal. However, it does not follow that in every case where an insurance company is mentioned during a trial that such action is necessary or right. As appears from a perusal of the cases cited by appellant, the courts have not hesitated to set aside a verdict on the grounds stated in cases where a suspicion arose that the objectionable reference was made designedly or where it was inspired by a plan to let the jury know that one or more of the defendants were protected from loss by an insurance policy. In the instant case we are not convinced that the reference to insurance by the widow of deceased was made through design on her part and it is to be noted that the statement, while it had no connection whatever to the question propounded, was brought out under cross-examination and not through any suggestion or inquiry of her own counsel. Incidentally, we may say that the jurors, if they paid any particular attention to the remark made by Mrs. Preuitt that "the insurance adjuster came", may have thought that he was the representative of an insurance company under which Mr. Preuitt himself was protected from accidental injury. In fact, we do not know at the present time whether "the insurance adjuster" in question had any connection whatever with the defendants. We feel that the matter was properly and sufficiently disposed of by the trial judge, when he stated: "The last answer of the witness, ladies and gentlemen, will be stricken; and, ladies and gentlemen of the jury, you are ordered to disregard and make no reference to it now or in the jury room, the last answer given by this witness; and, further, you are instructed that the only parties to this case are Lilly E. Preuitt, Barbara Bentley and Marion L. Dalrymple, and Virginia Marshall and E. Fayette Marshall. Those are the only parties to this case."

In taking this action the court followed the course that was adopted by the trial judge in the case of Klingenstein v. Miehle P. P., etc., Co., 41 Cal.App. 352, 182 P. 768.

Judgment affirmed.

We concur: DORAN, Acting P. J.; WHITE, J.

46 Cal.App.2d 103

PAVLOVICH v. WATTS.

Civ. 6552.

District Court of Appeal, Third District,
California.

July 17, 1941.

Hearing Denied Sept. 11, 1941.

1. Judgment 🔑141

A default judgment entered by the trial court 4½ years after service and return of summons was not void on ground that trial court was without jurisdiction to enter such a judgment after expiration of three-year period provided by codal provision, and in absence of objection at time of application for entry of such judgment, a motion to set it aside was properly denied. Code Civ. Proc. §§ 473, 581a.

2. Dismissal and nonsuit 🔑60(1), 65

Codal provision that an action must be dismissed by the court in which it is pending on its own motion or on motion of any interested party if summons has been served and no answer has been filed and plaintiff fails, or has failed to have judgment entered within three years after service of summons, is not a jurisdictional limitation on the power of the court. Code Civ.Proc. § 581a.

3. Appeal and error 🔑870(2)

Although judgment entered more than three years after service of summons may not be void for lack of jurisdiction the court's error in failing to perform statutory duty to dismiss the action upon expiration of the three-year period may be corrected on appeal from the judgment. Code Civ.Proc. §§ 473, 581a.

4. Dismissal and nonsuit 🔑57

The codal provision requiring dismissal of an action unless summons is issued within one year after commencement of action imposes jurisdictional limitations on the power of the court. Code Civ.Proc. § 581a.

5. Execution 🔑132, 226

Where property levied on consisted of claim against a corporation evidenced by nonnegotiable notes, the property was not required to be taken into possession of the sheriff nor exposed to the view of the purchaser, since the levy was not made upon personalty capable of manual delivery. Code Civ.Proc. § 542, subd. 6 and § 688.

6. Execution 🔑250

Where notes evidencing claim levied on had face value of $21,000 but were subject to terms of an option and lease agreement so that their actual value was not that great, fact that the claim was sold for $250 did not require the sale to be set aside on ground of inadequacy of price. Code Civ.Proc. § 542, subd. 6, and § 688.

🔑7. Execution 🔑250

Mere inadequacy of price, however gross, is not of itself a sufficient ground for setting aside an execution sale, legally made.

◆

Appeal from Superior Court, Plumas County; James O. Moncur, Judge.

Action by Amelia Pavlovich against Oswald Watts on a promissory note, wherein a default judgment was entered, and wherein certain property was sold under execution. From order denying motions to set aside the sale under execution, to set aside the judgment and to dismiss the action, the defendant appeals.

Affirmed.

Chellis M. Carpenter and Walter Christie, both of San Francisco, for appellant.

S. C. Young, of Quincy, for respondent.

PULLEN, Presiding Justice.

From orders denying motions to set aside a sale under execution, to set aside the judgment and to dismiss the action, this appeal is taken.

In 1935 an action upon a promissory note was commenced by the predecessor in interest of plaintiff against Oswald Watts, the defendant and appellant herein.

Defendant was promptly served with a copy of the summons and complaint, and the original summons with return of service immediately filed with the clerk of the court. No answer or other appearance was ever made by the defendant. In 1939, approximately four and one-half years after the summons had been served and returned, plaintiff filed with the clerk a request for the entry of the default of the defendant, which was entered, followed on the same day by a default judgment. No appeal was ever taken from this judgment nor motion for relief under section 473 of the Code of Civil Procedure.

Thereafter in May, 1940, plaintiff caused an execution on the judgment to issue, and levied the same upon a claim for money evidenced by five promissory notes of a face value of approximately $21,000 in favor of

Oswald Watts. On June 7, 1940, the sheriff sold the right, title and interest of appellant Watts in this personal property to respondent for $250.

Upon this sale by the sheriff, appellant made the several motions, the details of which are the basis of this appeal.

[1] The first and principal point urged by appellant is that the default judgment entered by the court was void and in excess of the jurisdiction of the court, under the provisions of the last paragraph of section 581a of the Code of Civil Procedure, and that it was mandatory upon the court to have granted the several motions of appellant.

The particular portions of section 581a upon which appellant relies provides that "all actions heretofore or hereafter commenced, must be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if summons has been served, and no answer has been filed, if plaintiff fails, or has failed, to have judgment entered within three years after service of summons".

[2] It has already been held, however, that this provision is not a jurisdictional limitation upon the power of the court. In Merner Lumber Company v. Silvey 29 Cal. App.2d 426, 84 P.2d 1062, under similar facts it was held the court had jurisdiction, and a motion there made to set the same aside was improperly granted, where no objection was made at the time of application for entry of the judgment, and further holding no language of prohibition was to be found in section 581a of the Code of Civil Procedure, indicating a want of jurisdiction.

[3] In Lynch v. Bencini, Cal.Sup., 110 P.2d 662, 667, upon an appeal from the default judgment, and from an order denying a motion to vacate such judgment, the court was primarily considering the power of the clerk to enter the default, and the effect of the judgment based thereon. In determining this issue the court, with reference to that portion of section 581a of the Code of Civil Procedure, here involved, said: "If it be assumed that the clerk had power to enter judgment in this case under section 585 and irrespective of section 579, the next question is whether a judgment thus entered is not only good upon its face but conclusive and immune from a direct attack on appeal. This question involves the effect of the last paragraph of section 581a. * * * The precise question seems never to have been determined." The court then distinguished Cook v. Justice's Court, 16 Cal.App.2d 745, 61 P.2d 357, and continued: "In Merner Lumber Co. v. Silvey [supra], a motion was made more than a year and a half after the judgment was entered, and after it had become final, to set it aside and dismiss the action. It was there held that the court had jurisdiction in spite of section 581a [Code of Civil Procedure], so the judgment was not void upon its face. * * * While a judgment so entered may not be void for lack of jurisdiction the court's error in failing to perform that duty is one which may be corrected on appeal from the judgment, if taken within the statutory time. The duties and rights of the parties are still affected by the last paragraph of section 581a and the judgment itself is still subject to review on a direct and timely appeal."

[4] Cases arising under the first paragraph of section 581a are not helpful in determining the question here involved owing to the difference in the language of the two paragraphs. The first paragraph of this section reads: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, * * * unless summons shall have issued within one year * * *." It is admitted that this paragraph imposes jurisdictional limitations upon the power of the court, and had been so held in such cases as Modoc Land & Live-Stock Co. v. Superior Court, 128 Cal. 255, 60 P. 848; Evans v. Superior Court, 14 Cal.App.2d 743, 59 P.2d 159; Bellingham Bay Lumber Co. v. Western Amusement Co., 35 Cal.App. 515, 170 P. 632.

Also it had been so held as to section 981a (Napolitano v. Superior Court, 81 Cal.App. 639, 254 P. 647) where similar language is found requiring the appealing party to bring the appeal to trial within one year, and that in default thereof, no further action shall be taken, pointing out that where the section contains such prohibition against further action by the court as is found in the first part of section 581a or section 581b, the jurisdiction of the court to act is limited. The same distinction had previously been made in Rio Vista Mining Co. v. Superior Court, 187 Cal. 1, 200 P. 616, where the court was considering section 583 of the Code of Civil Procedure.

A second point urged is that the sale should be set aside because there was no proper levy or seizure, and that the sheriff failed to take the property into his possession; also that the property was not exposed to the view of the purchaser, and the purchase price was grossly inadequate.

[5] The property here levied upon was a "claim for money against Brown Estate Inc. a corp. * * *, said claims being evidenced by five instruments in the forms of promissory notes in favor of Oswald Watts * * *". The parties who signed the notes were not parties to the action filed by Watts in the federal court, an action in which Watts sought to recover upon a claim for money due. It also appeared the notes were not negotiable, as each note contained a statement it was subject to the terms of an option and lease agreement. This levy appears to have been made pursuant to the provisions of sections 688 and 542, subdivision 6 of the Code of Civil Procedure. Section 688 provides that debts and credits, and property not capable of manual delivery may be levied upon in the same manner property may be attached, and section 542, subdivision 6, provides that debts and credits and other property not capable of manual delivery may be attached by leaving either with the person owing such debts or with the person having in his possession or under his control such credit, a copy of the writ together with a notice that such personal property is attached. Since the levy was not made upon personal property capable of manual delivery, it was not required that the property to be sold be taken into the possession of the sheriff nor exposed to the view of the purchaser.

[6] As to the inadequacy of the amount bid, it cannot be said the promissory notes had a value of $21,000, as such notes were subject to the terms of an option and lease agreement, and although Watts obtained a verdict in his favor, a new trial was granted in the federal court upon the ground of the insufficiency of the evidence.

[7] Mere inadequacy of price, however gross, is not of itself a sufficient ground for setting aside a sale legally made. Sutter Investment Co. v. Keeling, 123 Cal.App. 323, 11 P.2d 418.

There is no evidence here adduced that the sale was not fairly made or conducted. The judgment is affirmed.

We concur: TUTTLE, J.; THOMPSON, J.

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46 Cal.App.2d 135

FUNK v. CAMPBELL et al.

Civ. 2764.

District Court of Appeal, Fourth District, California.

July 18, 1941.

1. Municipal corporations 🔑569

In action to foreclose street improvement bond, finding that return to warrant was made, signed by a corporation by its president, which company was assignee of contractor who performed work, and that after signature of president return was signed by named notary public, who affixed his seal thereto, was not sufficient in itself to establish that return was not properly verified by individual acting as agent of and in behalf of corporation which was assignee of contractor who performed work. St.1911, p. 1029, § 12.

2. Municipal corporations 🔑569

In action to foreclose street improvement bonds, any deficiency and incompleteness in finding as to whether return to warrant was properly verified by individual acting as agent of and in behalf of corporation which was assignee of contractor who performed work could not aid defendants, where court in another finding found that every act and proceeding required under Boundary Line Act affecting validity of bond had been regularly performed. St.1911, p. 1018, as amended; p. 1029, § 12.

3. Appeal and error 🔑907(2)

On appeal in action to foreclose street improvement bond, in absence of any record as to the evidence, finding that every act and proceeding required under Boundary Line Act affecting validity of bond had been regularly performed was sufficient to sustain validity of bond as against contention that return to warrant was improperly verified by corporation. St.1911, p. 1018, as amended; p. 1029, § 12.

4. Statutes ⚷109

The title of an act need not express all of the details found in the body of the act, but is usually sufficient when it suggests to the mind the subject or field of legislation to be covered therein.

5. Statutes ⚷123(4)

The title to City Boundary Line Act as adopted in 1911, which referred to work on streets forming exterior boundaries of municipality, whether partly or wholly within such boundary, and to construction of sewers, drains and sidewalks thereon and in connection therewith, was sufficient to cover sewers and drains on cross-streets when installed in connection with such improvements on boundary line streets. St.1911, p. 1018, as amended.

6. Statutes ⚷123(7)

The amended title of amendatory city Boundary Line Act, which referred to three classes of work together with any and all appurtenances and appurtenant work in connection with any of such work or improvements, sufficiently embraced matter of such work or improvements on cross-streets when done in connection with and as part of scheme of improvements upon and along boundary line streets. St.1923, p. 633.

7. Appeal and error ⚷907(2)

On appeal from order refusing to set aside judgment for plaintiff in action to foreclose street improvement bond, District Court of Appeal could assume in support of judgment in absence of the evidence that proceedings involved construction of storm drains or sewers. St.1911, p. 1018, as amended.

◆

Appeal from Superior Court, Los Angeles County; A. F. Bray, Judge.

Action by N. Funk against Mary A. Campbell and others, to foreclose a street improvement bond. From an order denying defendants' motion to set aside a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Robert Cockins, of Santa Monica, for appellants.

Bender & Cullinan, John F. Bender, and Robt. E. Rosskopf, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action to foreclose a street improvement bond issued pursuant to the provisions of the "City Boundary Line Act" (Stats. 1911, p. 1018), as amended. The proceedings were initiated by a resolution of intention adopted on March 27, 1927. The bond in question was issued on April 2, 1928. Five of the annual payments provided for in the bond were made and a default having been made in the payment of the five remaining annual instalments this action was begun on December 12, 1938. The court entered findings and judgment in favor of the plaintiff and the defendants have appealed from an order denying their motion to set aside the judgment and to enter a different judgment. The appeal is taken on the judgment roll alone and the record does not disclose the nature of the work done under the proceeding leading to the issuance of this bond. However, the appellants especially direct our attention to the language of the act relating to "storm drains", which may indicate that the work was of that nature.

The appellants first contend that a conclusion of law drawn by the court to the effect that they are barred from now attacking the validity of the form of the return of the warrant, or from attacking the validity of the assessment lien represented by this bond, is erroneous. In this connection it is argued that the Boundary Line Act, as adopted in 1911, contained no limitation of time or curative provisions which cut off the appellants' right to defend this action, and that the 30-day limitation in section 13 of the Boundary Line Act which was added by an amendment in 1927 (Stats. 1927, pp. 805, 815), is inapplicable to the appellants because it went into effect July 29, 1927, after the resolution of intention for this work was adopted although prior to the issuance of the bond. It is unnecessary to pass upon this contention since we entertain the view that the proceedings themselves are not vulnerable to the attack which the appellants now desire to make upon them.

[1-3] Section 12 of the act provides that the warrant shall be returned within thirty days after its date with a verified return endorsed thereon signed by the con-

tractor or his assigns or some other person in his or their behalf, stating the nature and character of the demand and whether any of the assessments remain unpaid and the amount thereof. That section further provides that if any contractor shall fail to make such a return "he shall thenceforth have no lien upon the property assessed". It is not here contended that a return was not made, endorsed upon the warrant, and no attack is made upon the sufficiency of the statements in the return as made. The only objection is that "in our case there is no return except a showing that the corporation swore to the return. A corporation cannot swear, so this is not an oath of anybody". The return, as made, does not appear in the record and this objection thereto is based upon paragraph II of the findings. It was therein found that a return was made within thirty days after the date of the warrant "signed by Pacific Seaboard Corporation, by Nels Gross, President, which company was the assignee of the contractor who performed the work", and that after the signature of the said Nels Gross the return was signed by a named notary public, who affixed his seal thereto.

This is not a finding that the corporation swore to the return and the only reasonable inference is that any oath involved was that of the individual acting on behalf of the corporation. While the finding is incomplete, it is not sufficient in itself to establish that the return was not properly verified by an individual acting as the agent of and in behalf of the corporation which was the assignee of the contractor who performed the work. See Woodworth v. Town of Sebastopol, 72 Cal.App. 187, 236 P. 981; Hotaling & Co. v. Brogan, 12 Cal.App. 500, 107 P. 711. Moreover, any deficiency and incompleteness in this finding cannot aid the appellants since the court, in another finding, found that each and every act and proceeding required under the Boundary Line Act of 1911, as amended, affecting the validity of this bond, had been duly and regularly done and performed. In the absence of any record as to the evidence, this finding is sufficient to sustain the validity of this bond in so far as the attack now made upon the proceedings which led to the bond is concerned.

The only other point requiring consideration is as to the constitutionality of the City Boundary Line Act as relating to a portion of the work involved in the proceedings which led to this bond. The court found that work was done upon streets which formed the exterior boundaries of the city of Los Angeles and the city of Santa Monica, and that it was also true that work was "done under the same proceedings upon streets which did not form the exterior lines of any municipality". The appellants state that work was done upon cross streets as well as upon boundary line streets. While they admit that such work upon cross streets in connection with the boundary streets was authorized by the provisions of the City Boundary Line Act as amended in 1923 (Stats. 1923, p. 633), they contend that the provisions of the act which permit work to be also done upon cross streets are unconstitutional because such matters were not embraced within the title of the act.

[4-6] It is well settled that the title of an act need not express all of the details found in the body of the act. Pacific Coast Dairy v. Police Court, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217. The title of an act is usually sufficient when it suggests to the mind the subject or field of legislation to be covered therein. People v. Jordan, 172 Cal. 391, 156 P. 451; Hunt v. Manning, 24 Cal.App. 44, 140 P. 39. The title to the City Boundary Line Act as adopted in 1911 refers to work upon the streets forming the exterior boundaries of a municipality, whether partly or wholly within said boundaries, and to the construction of sewers, drains and sidewalks "thereon and in connection therewith". This was sufficient, at least, to cover sewers and drains on cross streets when installed in connection with such improvements on the boundary line streets. The title to the amendatory act of 1923 (Stats. 1923, p. 633) refers to and quotes the title of the 1911 Act and expresses an intention to amend the title of the 1911 Act, to amend certain sections thereof and to add a new section thereto. Section 1 of this amendatory act mentions and restates the title of the original act and this amendment, with the amended title, was in force at the times here in question. This amended title refers to three classes of work, namely: (1) to establishment and change of grade on streets forming the exterior boundaries of any municipality whether partly or wholly within or without said boundaries or extending into other territory; (2) to work upon the improvement of such streets; and

(3) to the construction of sanitary and storm sewers, drains and drainage systems. The reference to these three kinds of work is followed in the same sentence with the provision "together with any and all appurtenances and appurtenant work in connection with any of such work or improvements". We think the provision just quoted relates and refers to all three classes of work which had just been referred to in the amended title and that the title sufficiently embraces the matter of such work or improvements upon cross streets when done in connection with and as a part of a scheme of improvements upon and along boundary line streets.

[7] Moreover, if we assume in support of the judgment, as we are entitled to do in the absence of the evidence, that the proceedings here in question involved the construction of storm drains or sewers the precise question here presented was passed upon and determined adversely to the appellants in the case of Torson v. Fleming, 91 Cal.App. 168, 266 P. 845, in which case a hearing was denied in the Supreme Court.

No question having been raised as to whether the order appealed from was an appealable order, we have given no consideration to that matter and have decided the case on its merits.

The record before us discloses no reversible error and the order appealed from is affirmed.

We concur: MARKS, J.; KELLY, J. pro tem.

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46 Cal.App.2d 187

SHAHEN v. SUPERIOR COURT OF SAN BERNARDINO COUNTY et al.

Civ. 2811.

District Court of Appeal, Fourth District, California.

July 21, 1941.

Hearing Denied Sept. 15, 1941.

1. Injunction 🔑148(1), 181, 190

A temporary injunction has served its purpose when, after a trial on the merits, a permanent injunction is issued, and ordinarily a bond is required only on the issuance of a temporary injunction, and none can be required on the issuance of a permanent injunction. Code Civ.Proc. § 529.

2. Courts 🔑207(4)

Where an action to restrain the sale of realty under execution was tried on its merits and a permanent injunction was issued enjoining the sale, the District Court of Appeal, on petition for a peremptory writ of mandate, could not order any bond on the issuance of the permanent injunction after final judgment, and there was no preliminary injunction on which that court could order a bond to be given. Code Civ.Proc. § 529.

◆

Petition by Elias Shahen for a peremptory writ of mandate against the Superior Court of San Bernardino County and others, commanding the respondent court to increase the bond required of the plaintiffs in an action to restrain the sale of realty under execution issued on a judgment in another case.

Alternative writ discharged, and peremptory writ denied.

Hearing denied; CURTIS, J., did not participate herein.

John A. Hadaller, of San Bernardino, for petitioner.

Guthrie & Curtis and Donald W. Jordan, all of San Bernardino, for respondents.

MARKS, Justice.

Petitioner seeks a peremptory writ of mandate commanding the respondent court to increase the bond required of plaintiffs in the case of Weadon v. Shahen, in the Superior Court of San Bernardino County, wherein plaintiffs sought to restrain the sale of certain real property under execution issued on a judgment in another case. The trial judge fixed the bond on the temporary injunction at $500. Petitioner's judgment, with interest, exceeds $2,000, and the property which he sought to sell under execution has a value of at least $4,600. Petitioner maintains that the lien of his judgment on the property will expire on September 17, 1941. He maintains that it was a breach of discretion on the part of the respondent judge to fix the bond on the temporary injunction at an amount less than the amount of his judgment.

[1] The undertaking in question was given under the provisions of section 529 of the Code of Civil Procedure. This section is found in Part II, Title VII,

Chapter Three of that Code. Title VII treats with "Provisional Remedies in Civil Actions", and a bond is ordinarily required only on the issuance of a temporary injunction. Lambert v. Haskell, 80 Cal. 611, 22 P. 327. A temporary injunction has served its purpose when, after a trial on the merits a permanent injunction is issued, upon the issuance of which no bond can be required in the ordinary case.

The case of Weadon v. Shahen was tried on its merits and a permanent injunction was issued enjoining petitioner from selling the real property under the execution. There is an appeal pending from that judgment.

The fact that the case was tried on its merits and a final judgment rendered under which petitioner is enjoined from proceeding with his execution sale disposes of the issues here presented.

In People's Ditch Co. v. Foothill Irr. Dist., 103 Cal.App. 321, 284 P. 514, 515, it was said: "It is well settled that an injunction pendente lite remains in force only until rendition of the final judgment in the case. When granted, it is a provisional remedy that is merged in a perpetual injunction, and thereupon the injunction pendente lite ceases to have any force or effect. Doudell v. Shoo, 159 Cal. 448, 114 P. 579; Webber v. Wilcox, 45 Cal. 301; Harris v. McGregor, 29 Cal. [124] 125. 'An injunction by order is a provisional remedy, and temporary in its character. It assumes a pending litigation in which all questions are to be settled by a judgment, and operates only until the judgment is rendered. If by that a permanent injunction is granted the temporary one is of course ended, and equally so if a permanent injunction is * * * denied.' Jackson v. Bunnell, 113 N.Y. [216] 220, 21 N.E. 79, 80."

In the case of Sheward v. Citizens' Water Co., 90 Cal. 635, 27 P. 439, 440, a preliminary injunction was issued, the case was thereafter tried on its merits and a permanent injunction was issued. The defendant appealed from the order granting the temporary injunction, and from the final judgment. In dismissing the appeal from the order, the Supreme Court said: "Upon the entry of the final decree this provisional remedy was merged in the perpetual injunction thereby granted to the plaintiff, and ceased to have any operative effect upon the defendant. Its functions having thus terminated, there was thereafter no existing 'order' granting an injunction from which an appeal could be taken. Webber v. Wilcox, 45 Cal. 301; Lambert v. Haskell, 80 Cal. 611, 22 P. 327; Gardner v. Gardner, 87 N.Y. 14; Jackson v. Bunnell, 113 N.Y. [216] 220, 21 N.E. 79."

[2] It follows, that as the case has been tried on its merits and a permanent injunction has issued, there is no preliminary injunction upon which we may order any bond to be given. We cannot order any bond on the issuance of the permanent injunction after final judgment, under the facts before us.

However, petitioner may not be without a remedy. See Food & Grocery Bureau v. Garfield, 18 Cal.2d 174, 114 P.2d 579.

The alternative writ of mandate is discharged and the peremptory writ is denied.

We concur: BARNARD, P. J.; MUNDO, Justice pro tem.

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46 Cal.App.2d 126

PEOPLE v. FLETCHER.

Cr. 3477.

District Court of Appeal, Second District, Division 1, California.

July 18, 1941.

1. Criminal law 🔑260(11)

In prosecution for grand theft, the strength or weakness of identification of accused was matter addressed to consideration of trier of fact, and his conclusion in that regard could not be disturbed by the reviewing court unless it could say as a matter of law that there was no evidence to support the conviction.

2. Larceny 🔑65

Evidence, including complaining witness' identification of accused, sustained conviction for grand theft.

3. Criminal law 🔑1202(3)

The record established that accused who was convicted of grand theft, had been previously convicted of a felony as charged in the information, and had served a term of imprisonment therefor.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Raymond Fletcher was convicted of grand theft, and he appeals.

Affirmed.

Curtis C. Taylor, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Upon this appeal from a judgment of conviction of the crime of grand theft, after trial before the court without a jury, the sole ground of reversal urged is that the evidence is insufficient—specifically, that the testimony of the complaining witness is so "palpably weak and inherently improbable" as to amount to no substantial evidence at all. This contention cannot be upheld. The complaining witness testified that on February 10, 1941, between 6:30 and 7 o'clock in the evening, the defendant came up behind her as she was about to enter the back door of her home, and snatched her purse, which contained $53 in cash and other articles. She testified that she then saw his face; that she followed him around the building to the corner where he entered a car and drove away; that the defendant had nothing covering his face; that she saw his face from a distance of about two feet; and that she next saw the defendant at the police station about a week after the commission of the crime. Upon cross-examination the witness testified in part as follows:

"* * * A. He was near enough I snatched the purse away from him, and he took it away from me again.

"Q. You snatched the purse away from him? A. Yes.

"Q. And he snatched it again? A. He snatched it again, that is right.

"Q. And all this time you saw him in his face, is that right? A. He was toward me, yes.

"Q. What was it? A. He was turned toward me, yes.

"Q. Turned toward you. Did you see his face at all times? A. Yes, I could see his face. * * *

"Q. Now, what was there about the man whom you saw that night that made you feel that he was the same man you saw at the police station? A. Why, I saw his face.

"Q. You saw his face. A. Yes, I saw his face.

"Q. Is this the same face you saw? A. That is the same man.

"Q. And on what do you base the fact that this is the same man you saw that evening; what is there about his face that makes you say that it is the same face? A. It is the same man I saw.

"Q. And your identification is due to the fact you know by this man's face it is the same man? A. Yes.

"Q. Is that right? A. Yes.

"Q. You just know it? A. I recognize the person, yes. * * *"

[1, 2] The strength or weakness of the identification was a matter addressed to the consideration of the trier of fact, and his conclusion in that regard cannot be disturbed by this court unless we can say, as a matter of law, that there was no evidence to support the conviction. People v. Farrington, 213 Cal. 459, 2 P.2d 814; People v. Hightower, 40 Cal.App.2d 102, 106, 104 P.2d 378. The defendant's denial from the stand that he committed the crime, as well as the testimony introduced in support of his alibi, created but a conflict with the evidence of the people, and it was the function of the trial court to resolve such conflict either for or against the defendant.

[3] The trial court also found, as charged in the information, that the defendant had theretofore been convicted of a felony and had served a term of imprisonment therefor. In his closing brief appellant asserts for the first time that there is no evidence in the record that he served a term of imprisonment. This claim is without foundation. From the record it appears that a certified transcript of the prison records was introduced in evidence, and defendant upon the stand admitted that he had served time.

An examination of the entire record discloses no prejudicial error. The judgment is affirmed.

I concur: DORAN, Acting P. J.

46 Cal.App.2d 111

HESSE v. RAILWAY FEDERAL SAVINGS & LOAN ASS'N et al.

Civ. 6583.

District Court of Appeal, Third District, California.

July 17, 1941.

Hearing Denied Sept. 11, 1941.

1. Mortgages ⟾369(7)

Where it is alleged in an action to set aside sale under trust deed that the inclusion of advances under the trust deed is wantonly or arbitrarily made and that the advances are fraudulent and unjust, it should appear from the complaint just what such advances were for, so that it can be determined as a matter of pleading at least whether they are authorized. Civ.Code, § 2904.

2. Mortgages ⟾369(7)

Where first trust deed provided that it covered advances made for certain enumerated purposes, complaint in action by assignee of second trust deed to set aside sale under the first trust deed, which alleged that advances included in the sale were not allowed or justified under the trust deed nor permitted under its terms was subject to special demurrer on ground of uncertainty because it could not be ascertained therefrom how or in what manner the demands of the trustee were wanton or arbitrary or fraudulent or unjust. Civ.Code, § 2904.

3. Pleading ⟾34(4)

It is a rule of construction that the pleader has stated his case as favorably as possible and that all ambiguities therein must be resolved against the pleader.

4. Pleading ⟾236(1)

Where five amended complaints were filed, without stating a good cause of action, the trial court's refusal to permit the filing of another amended complaint was not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Arthur T. Hesse against the Railway Federal Savings & Loan Association and others to set aside a sale of property under trust deed. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

A. G. Reily, of Los Angeles, for appellant.

J. Howard Edgerton, of Los Angeles (Bundy Colwell, of Los Angeles, of counsel), for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment of dismissal following an order by the trial court sustaining respondents' demurrer to appellant's fifth amended complaint without leave to amend.

The complaint alleged that on September 18, 1936, the Better Housing Association, a corporation, borrowed $3,100 from respondent Railway Federal Savings and Loan Association, predecessor in interest of respondent California Federal Savings and Loan Association, upon a promissory note secured by a deed of trust upon certain real property, a copy of which said deed of trust being attached to the complaint as exhibit "A"; that on September 18, 1936, the said Better Housing Association borrowed $500 from W. A. Morey upon a promissory note secured by a second deed of trust upon the same real property; that "since a date prior to August 30, 1937", appellant has been the owner of said note and deed of trust as the assignee of said W. A. Morey; that at the time appellant purchased said note and second deed of trust he did so relying on the terms and conditions of said first deed of trust, and that said real property was at all times of a value in excess of said $3,100 and said $500. The complaint further alleges that on May 3, 1937, respondent California Federal Savings and Loan Association gave notice of default claiming there was "default in the payment of advances made under the terms of said deed of trust in the principal amount of $731.41, together with interest thereon as of April 1, 1937, in the sum of $22.99, totalling $754.40"; that said claim was "arbitrarily and wantonly made in that said alleged 'advances' were not allowed nor justified under said deed of trust nor permitted under its terms"; that on August 4, 1937, the trustee under said first deed of trust published and posted a notice of sale of said real property, and that on August 30, 1937, said trustee offered said real property for sale and "did require and demand as a purchase price of said property the entire principal sum of $3,100.00", together with $124 interest, and $754.40, with costs and charges. The property was thereupon sold to respondent Railway Federal Savings and Loan Association for $4,187.50. It is further alleged in the complaint that "save for the said wanton, arbitrary, fraudulent and unjust demands of said trustee, plaintiff would have paid the just demands of said beneficiary in entirety in subrogation to the rights of said beneficiary in said $3,100.00 trust deed in accordance with section 2904 of the Civil Code, and thereby saved to himself his security"; that by reason of said sale he has been deprived of his security in said property; that he is unable to collect upon said note by reason of the insolvency of the maker, and that unless said sale is set aside and the security made available, he will suffer irreparable damage in said sum of $500 and accrued interest; that he has no plain, speedy or adequate remedy at law; that he is now, and at all times has been, ready, willing and able to do all things required of him in law or equity.

The demurrer of respondents was both general and special. We will consider the special grounds of demurrer first, because if any of the grounds of special demurrer are well taken, it will not be necessary to decide the principal question discussed in the briefs.

The fourth ground of demurrer is "that the complaint, and particularly paragraph IX thereof, is uncertain in that it cannot be ascertained therefrom, nor from any part thereof, how, or in what manner the demands of the trustee were wanton, arbitrary, fraudulent or unjust". In paragraph VII of the complaint it is alleged there was "default in the payment of advances made under the terms of said deed of trust in the principal amount of $731.00, etc.," but that charges were arbitrarily and wantonly made, in that said alleged "advances" were not allowed or justified under said deed of trust, nor permitted under its terms. The complaint then alleges that the trustee proceeded with the sale and "did require and demand as a purchase price of said property all of the principal, interest, alleged advances, and trustee's expenses and charges", and sold the property to respondent for the total sum of $4,187.50; and that save for the wanton, arbitrary, fraudulent and unjust demands of said trustee, plaintiff would have paid the amount justly due.

[1] The basis of the attack upon the inclusion of advances of $731.41 in the notice of default and in the notice of sale, is that they were not allowed nor justified under the deed of trust. Nowhere in the complaint is there any statement or allegation as to what the alleged advances were for. Where it is alleged that the inclusion of advances under a deed of trust are wantonly or arbitrarily made, and that they are fraudulent and unjust, it should appear from the complaint just what such advances were for, so that it can be determined as a matter of pleading at least whether they are authorized. Appellant seems to assume that no advances for any purpose are justified under the deed of trust, but a reading of that instrument does not support this assumption. It is true that the deed of trust, after stating that conveyance is granted for the purpose of securing the payment of the promissory note, also contains the clause that it is made "for the payment of such additional sums, not to exceed $ nil, as may be hereafter borrowed from the beneficiary by the maker of said note". But it is also true that the deed of trust provides in paragraph "A" thereof that the trustee agrees to do certain things to protect the security, such as maintaining, repairing, etc., keeping it insured, and defending any action affecting the title, including the payment of taxes and assessments and the discharging of prior liens. The beneficiary is authorized to do any of said things at the expense of the trustor, should the trustor fail to do so.

[2] If the advances in question were for any of the purposes enumerated, they could not be considered as wanton, arbitrary, fraudulent or unjust. While the mere statement that such advances were not allowed nor justified under the deed of trust might be a sufficient allegation as against a general demurrer, we feel that in view of the provisions of the deed of trust, it must be held, in the absence of allegations showing just what the advances were for, the complaint is uncertain in that it cannot be ascertained therefrom how or in what manner the demands of the trustee were wanton or arbitrary or fraudulent or unjust. The trial court therefore properly sustained respondents' demurrer to the complaint.

[3, 4] There is no showing that appellant made application for leave to amend, or expressed a desire to do so. The appellant makes no point on appeal as to the court's denial of leave to amend. It should be borne in mind that the sale in question was on August 30, 1937, and that appellant's fifth amended complaint was filed on

January 24, 1938. The appellant had ample time in which to inform himself as to the facts. We should also bear in mind the familiar rule of construction that the pleader has stated his case as favorably as possible, and that all ambiguities therein must be resolved against the pleader. Higgins v. Security Trust, etc., Bank, 203 Cal. 398, 401, 264 P. 744. While courts are inclined to hear a case upon its merits, yet there must be an end of litigation. After filing five amended complaints, without stating a good cause of action, it can hardly be said that the trial court abused its discretion in refusing to permit the filing of another amended pleading.

Our conclusion as to the fourth ground of demurrer makes it unnecessary to discuss the other points urged in the briefs.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

46 Cal.App.2d 225

RYPKA v. FIELD et al.

Civ. 2776.

District Court of Appeal, Fourth District, California.
July 25, 1941.

1. Contracts 🔑111
Husband and wife 🔑179

Where married grantor was of sound mind and was not acting under duress, menace, fraud, or undue influence when she executed and delivered deed to her separate property to a man who was not her husband, and there was no evidence that marriage was contemplated as a consideration for transfer, conveyance was a "gift" which grantor had a right to make, and it was not void as based on unlawful consideration. Civ.Code, § 1040.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

2. Wills 🔑90

Where married grantor two days before her death handed deed to her separate property to grantee in the presence of her two nieces and said, "This is your property from now on," and grantor later told one niece that grantee would thereafter collect rents, the conveyance was a "gift" which grantor had a right to make and was not tantamount to an attempt to make testamentary disposition by deed.

3. Appeal and error 🔑1043(7)

Where the trial court had already decided that deceased grantor's husband seeking to set aside certain deeds was not entitled to any relief, husband's rights were not prejudiced by continuance of the case for 30 days to allow grantee to secure written waivers to property involved from grantor's heirs other than husband, and in refusing to allow husband's counsel to cross-examine grantee with respect to securing waivers.

4. Evidence 🔑155(1)
Witnesses 🔑270(1)

A party may not cross-examine his adversary's witness on matters irrelevant to the issues, and the introduction of irrelevant evidence by one side does not justify the introduction of further irrelevant evidence by the other.

5. Appeal and error 🔑110

An appeal does not lie from an order denying a motion for new trial.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Frank E. Rypka, etc., against Oswald George Field and others to set aside certain deeds. From a judgment for the named defendant and from an order denying a motion for new trial, plaintiff appeals.

Appeal from order dismissed, and judgment affirmed.

John J. Beck, of Los Angeles, for appellant.

Delamere F. McCloskey and Russell D. Hardy, both of Los Angeles, for respondent.

MUNDO, Justice pro tem.

This action was brought by appellant to set aside certain deeds to property conveyed by the deceased, Edna E. Rypka, just prior to her death. The deceased owned the Flower Court Apartments as her separate property and a ranch in Baldwin Park, California, which had been acquired after her marriage to the appellant, and which appellant concedes was also her separate property. It stood of record in her name only, and in a divorce action brought by Edna E. Rypka against Frank E. Rypka the court found that there was no community property of the parties. On February 21, 1938, deceased conveyed the Baldwin Park property to Oswald George Field, respondent herein, and the deed thereto was personally recorded by the deceased on February 23, 1938. Respondent Field and the deceased had been on friendly terms for a number of years prior thereto and were engaged to be married, although the deceased was still married to appellant. The deceased secured an interlocutory judgment of divorce, uncontested, on January 26, 1938. On April 21, 1938, deceased conveyed the Flower Court Apartments to respondent Field. She died two days later. This deed was not recorded until two days after her death.

Respecting the deed to the Flower Court Apartments, it appears that the deceased was preparing to go to a hospital for an operation; that she asked respondent to drive her to a notary so she could execute a deed in his favor; that respondent drove her to the notary's office but did not go into the office with deceased; that upon their return home, in the presence of nieces of deceased, she handed the deed to respondent and said: "This is your property from now on." She also said to one of the nieces: "From now on the rents will be collected by Mr. Field." Respondent stated he did not record the deed until April 23, 1938, because he was at the hospital attending the deceased. He paid the deceased no consideration for the property but at divers times he had given deceased sums of money and had paid out money on her behalf. He said he thought she conveyed the property to him because she was fond of him.

The testimony of other witnesses showed that appellant had not been living with deceased since the divorce was filed in December, 1937; that deceased lived with one of her nieces; that deceased complained of the treatment of her husband; that deceased did not want her husband to have any part of her property; and that she was of sound mind and not acting under the influence of any person.

After all the testimony had been introduced the court said that it did not feel that the respondent was entitled to any of the deceased's property, but that it was the court's duty to protect the interests of the other heirs. Whereupon, counsel for defendant and respondent Field stated in effect that the other heirs were not interested in the properties deeded to Field but that he would secure waivers from them, other than the appellant Rypka. The case was continued for thirty days for the purpose of allowing respondent to secure such waivers.

At the continued hearing respondent Field was called as a witness and offered as evidence waivers of all heirs with the exception of the husband of deceased, Frank E. Rypka, to their interests in the properties involved in this action. Appellant Rypka objected to their introduction. The objection was overruled and thereafter the court denied appellant's counsel the opportunity to cross-examine respondent regarding said waivers. Judgment was given in favor of respondent Field.

[1] The first question upon this appeal is whether the conveyance of the Baldwin Park property is void as based upon unlawful consideration. By way of argument appellant says: "If we are to believe the respondent Field when he states that he paid no consideration for the Baldwin Park property, but that the deceased conveyed him the said property because she was fond of him, then we must conclude that the consideration therefor was said respondent's promise to marry the deceased, still a married woman. Therefore such consideration, being unlawful, the said property should be restored to the estate of the deceased." Respondent Field did testify that he considered himself engaged to the deceased since on or about February 12, 1938, and that he thought she conveyed the property to him because she was fond of him. But this testimony is no basis for the inference that Field procured the conveyance upon a consideration of marriage. The respondent Field and Edna E. Rypka may have been engaged to be married, but there is not the slightest intimation in the evidence that marriage was contemplated as a consideration for the transfer of the real property in question. As likely as not, the transfer was made for the reason given by Field, namely, that the deceased was fond of him, and if it were made for that reason it would conform to the pattern of a gift. It would be a voluntary transfer, and no consideration would be necessary to its validity. Civ.Code, sec. 1040. The execution and delivery of the deed was the

free and voluntary act of the deceased. She was of sound mind and not acting under duress, menace, fraud or undue influence of any person at the time of the execution and delivery of the deed. In these circumstances, there being no attempt to defraud anyone, the deceased had a perfect right to make a present of her property to respondent if she so desired.

[2] The second question raised by appellant is: "Was the action of the deceased in conveying the Flower Court Apartments to respondent Field just prior to her death, tantamount to an attempt to make testamentary disposition by deed?" The evidence answers this question with an emphatic "No". It shows without contradiction that Edna E. Rypka handed the deed to respondent Field in the presence of her two nieces and said to him: "This is your property from now on", and later she told Mrs. Hager that Mr. Field would thereafter collect the rents. The character of this disposition was anything but testamentary. It was an unequivocal, absolute, disposition effective immediately. There were no conditions attached to the delivery of the deed. The language used by the deceased when she handed the deed to respondent indicates unmistakably her intention to pass title to Field and to divest herself of same not at some future time, but presently. It, like the other disposition, was a gift based, if we will, upon "fondness", but nevertheless a voluntary disposition of her property, and in such a manner as she had a right to make.

[3, 4] The third point urged by appellant is: "Did the Court prejudice the rights of appellant by continuing the case thirty days after all evidence had been submitted for the purpose of allowing respondent Field to secure written waivers to said property from the heirs, excepting the husband, and then refusing to allow appellant's counsel to cross-examine said respondent as to whether or not the said waivers had been secured by him upon his representation to the said heirs that the deceased had conveyed the said property in trust to him by deed just prior to her death for the purpose of having him reconvey the same to her said heirs, excluding her husband, should she die, thereby avoiding testamentary disposition thereof?"

The obvious answer to this question is that no substantial rights of appellant were prejudiced by the continuance, the admission in evidence of the waivers, or the refusal to allow cross-examination, for the plain reason that the whole matter of the waivers was immaterial to the issues of the case. The court had already decided that appellant was not entitled to any relief, and it could not affect appellant one way or the other how the waivers were procured or whether waivers were obtained or not. The court, upon the evidence, could have decided in favor of respondent, regardless of the waivers from the heirs. If we should suppose for the moment that Field did make the representations to the heirs as contended by appellant, would this have any bearing on what the deceased did respecting the grants? The answer, of course, is "No". It would raise a collateral issue, and it is settled that a party may not cross-examine his adversary's witness on matters irrelevant to the issues. The introduction of irrelevant evidence by one side does not justify the introduction of further irrelevant evidence by the other.

[5] Appellant has attempted to appeal from an order denying motion for new trial. No appeal lies from such an order and the appeal therefrom is dismissed.

Judgment affirmed.

We concur: BARNARD, P. J; MARKS, J.

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46 Cal.App.2d 73

BAUMANN v. HARRISON et al.

Civ. 2747.

District Court of Appeal, Fourth District, California.

July 16, 1941.

Hearing Denied Sept. 11, 1941.

1. Mortgages 🔑578

Where recital in preamble to findings of fact and conclusions of law stated that 27 days in the year 1937 were devoted to trial of action to foreclose trust deed on realty and reporter's transcript supplied to appellate court reported only proceedings had in connection with an accounting taken by court in 1938 after referee's report had been objected to, appellate court must assume that evidence sufficient to support findings was received at the trial in 1937, unless evidence appearing in the reporter's transcript required a contrary conclusion.

2. Appeal and error 🔑596

It is the duty of appellant to furnish appellate court with a complete record.

3. Mortgages 🔑576

Where separate appeals were taken by different defendants from judgment foreclosing trust deed on realty, in one of which the appellate court was supplied with a complete transcript, such transcript could not be utilized in the other appeal, in which the transcript supplied reported only proceedings had in connection with an accounting taken by the court after referee's report had been objected to, in the absence of stipulation by the parties to such appeal with respect to such utilization.

4. Courts 🔑82

Where appellant failed to furnish appellate court with a complete record and the demand for transcript was made in August, 1938, appellant could not rely on amendment to court rule which did not go into effect until January of the following year. Rules of District Court of Appeal, rule 9.

5. Mortgages 🔑250

Where corporation named as beneficiary in trust deed to realty, executed to secure repayment of series of notes, issued certificates of assignment of such notes to various individuals, holding notes for collection as trustee for benefit of such assignees, and subsequently through its nominee acquired title to realty subject to trust deed, such corporation, upon being held indebted to assignee in action by assignee to foreclose trust deed, was not entitled to credit for money expended to purchase supplies on hand used in connection with club operated on realty, and purchased when corporation acquired title thereto, since neither the good will of the club nor the personal property used in connection with the operation thereof on the realty were available to assignees as security under the trust deed which covered only the realty.

6. Mortgages 🔑126

Where corporation named as beneficiary in trust deed to realty, executed to secure repayment of series of notes, issued certificates of assignment of such notes to various individuals, holding notes for collection as trustee for benefit of such assignees, and subsequently through its nominee acquired title to realty covered by trust deed, the personal property used on the realty in connection with a club operated thereon, which personal property was also acquired by corporation through its nominee, was not impressed with the trust created by the trust deed to realty.

7. Mortgages 🔑486

Where corporation named as beneficiary in trust deed to realty, executed to secure repayment of series of notes, issued certificates of assignment of such notes to various individuals, holding the notes for collection as trustee for benefit of such assignees, and subsequently through its nominee acquired title to realty covered by trust deed and to personal property used on realty in connection with club operated thereon, although such personal property was not subject to lien of trust deed, court in action by holder of certificate of assignment of notes to foreclose trust deed properly allowed $4,000 for the use of such personal property payable to the person found by the court to be the owner thereof.

8. Mortgages 🔑250

Where corporation named as beneficiary in trust deed to realty, executed to secure repayment of series of notes, issued certificates of assignment of such notes to various individuals, holding the notes for collection as trustee for benefit of such assignees, and subsequently through its nominee acquired title to the realty covered by trust deed and to personal property used thereon in connection with club operated on the realty, such corporation upon being held indebted to assignee in action by assignee to foreclose trust deed was not entitled to credit for expenditures made and obligations incurred in resistance of foreclosure of a trust indenture upon such personal property.

9. Mortgages 🔑250

Where corporation named as beneficiary in trust deed to realty, executed to secure repayment of series of notes, issued certificates of assignment of such notes to various individuals, holding the notes for collection as trustee for benefit of such assignees, such corporation and the individual who was substantial owner thereof, upon being held indebted to such assignees in action by assignee to foreclose trust deed, were not entitled to credit for counsel's fees and costs paid by such corporation and its owner in connection with foreclosure of junior deed of trust on same realty.

10. Mortgages ⚷576

Contention that trial court in judgment foreclosing trust deed to realty erroneously disallowed defendants' claims on account of expenditures made and obligations incurred for counsel fees and costs in connection with the foreclosure of a junior trust deed to same realty was rejected by appellate court, where defendant failed to point out any portion of reporter's transcript containing evidence from which court could determine whether claims were valid or reasonable as to amounts.

11. Mortgages ⚷329

The proper methods for the foreclosure of a deed of trust to realty are prescribed by statute.

12. Mortgages ⚷250

Where corporation named as beneficiary in deed of trust to realty, executed to secure repayment of series of notes, issued certificates of assignment of such notes to various individuals, holding the notes for collection as trustee for benefit of such assignees, such corporate beneficiary and the individual who was the substantial owner thereof, upon being held indebted to assignee in action by assignee of note to foreclose trust deed, were not entitled to credit for payment allegedly made to auditor allegedly employed by committee of holders of such certificates of assignment in the absence of a showing of any authority on the part of such committee or the corporate beneficiary or its owner to employ an auditor.

13. Trusts ⚷325

An item of trustee's account, the correctness of which is not supported by satisfactory evidence, must be disallowed, since it is trustee's duty to support every item of his account.

14. Attorney and client ⚷86

Defendants in action to foreclose trust deed to realty were bound by stipulation made by attorney representing them at trial, whereby attorney admitted all items appearing in accountant's report as having been received by the defendants during a designated period of time.

15. Mortgages ⚷250

Where corporation named as beneficiary in trust deed to realty, executed to secure repayment of series of notes, issued certificates of assignment of such notes to various individuals, holding the notes for collection as trustee for benefit of such assignees, and subsequently through its nominee acquired title to and possession of realty covered by such trust deed, such corporate beneficiary and individual, who was substantial owner thereof, upon being held indebted to holder of certificates of assignment in action by such assignee to foreclose trust deed, were not entitled to credit for money deposited in trust account by owner of corporate beneficiary as a loan to make up for delinquency of corporation's nominee in possession of realty in failing to make payment of rentals received therefrom, since claim on account of such payments, if any, was against nominee of corporate beneficiary.

16. Mortgages ⚷578

Where plaintiff did not appeal from judgment foreclosing deed of trust to realty, upon appeal by corporation, named as beneficiary in trust deed and which held notes secured by trust deed for collection as trustee for benefit of holders of certificates of assignment of such notes, plaintiff could not complain of alleged error in granting corporation compensation as such trustee, since a party who has not appealed cannot on appeal by opposing party ask a court of review to consider errors allegedly committed against appellee.

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Anna Baumann, etc., against H. O. Harrison and others to foreclose a trust deed on realty and for declaratory relief. From that part of judgment decreeing them indebted to plaintiff in specified amount, W. G. Lane and Lane Mortgage Company, separating themselves from other judgment debtors, appeal.

Judgment affirmed.

C. H. Scharnikow and Wm. J. Clark, both of Los Angeles, for appellants.

Thomas F. McCue, of Los Angeles, for respondent.

KELLY, Justice pro tem.

In the month of May, 1930, H. O. Harrison and Daisy Harrison, husband and wife, made, executed and delivered to the Bank of America, National Trust & Savings Association of California, trustee, in favor of Lane Mortgage Company, a corporation, as beneficiary, a deed of trust upon certain real estate therein specifically described and commonly known as the Commercial Club Building at Eleventh and Broadway, in the city of Los Angeles, California. The deed of trust was duly recorded. It secured a series of 225 promissory notes in various amounts aggregating $500,000, and ranging from a principal sum of $500 to one of $100,000, and each identified by a serial number. These notes are frequently referred to in the briefs and the reporter's transcript, as "bonds", and on their face are designated "First Lien Gold Bonds". They were signed by the Harrisons as makers, payable to the Lane Mortgage Company, and bear interest at the rate of 7 per cent per annum evidenced by coupons. The Lane Mortgage Company issued certificates of assignment to various individuals, approximately seventy-five in number, by the terms of which they sold and assigned to the purchasers, referred to throughout the proceedings as "bondholders", certain of the promissory notes described by serial numbers. The certificates of assignment provided that the original notes or bonds were to be held by the Lane Mortgage Company for collection. Four of these notes were assigned to the plaintiff, Anna Baumann, described by serial numbers and in the principal sums of $5,000 and $1,000, aggregating $8,000. Lane Mortgage Company, throughout the various transactions, was the alter ego of W. G. Lane who owned substantially all of the stock in the company. The certificates of assignment provided that the Lane Mortgage Company retained possession of the notes for collection on behalf of the several assignees, which was done. The Lane Mortgage Company constituted itself trustee for the benefit of its assignees in the collections of any and all moneys and things of value which came into its hands as income, rental or otherwise, as proceeds of the real property described in the deed of trust. The record is silent as to any acceptance or rejection of the trust by the bank prior to the filing of this action. The real estate described in the deed of trust, and the buildings thereon, were utilized as a club, known as the Cabrillo Club, to facilitate the operation whereof furniture, furnishings, ranges, dishes and equipment were placed upon the premises. None of these articles of personal property, nor the good will of the club were embraced as security for the series of promissory notes.

In August, 1931, the Harrisons conveyed the real estate to B. L. Vaughn who assumed and agreed to pay the indebtedness evidenced by the 225 promissory notes. Vaughn conveyed to the Cabrillo Holding Corporation which in turn assumed and agreed to pay the indebtedness. Cabrillo Holding Corporation, on January 6, 1933, conveyed to the defendant Perry who accepted the deed as the nominee of the appellants W. G. Lane and Lane Mortgage Company. Perry paid no part of the consideration out of his own funds and accepted the deed as nominee of appellants with full knowledge of the trust existing between the appellants and plaintiff and the other bondholders and agreed with Lane that he would pay into Lane's office all income from the property for the benefit of the bondholders. This deed was delivered, not to Perry, but to the Lane Mortgage Company and remained in the files of the corporation until received as an exhibit in this action. The deed of January, 1933, was not intended to and did not merge the deed of trust with the title but on the contrary the deed of trust securing the $500,000, evidenced by the several promissory notes remained in full force and effect. In the negotiations culminating in this deed of January, 1933, the appellants W. G. Lane and the Lane Mortgage Company, Vaughn and the Cabrillo Holding Corporation, only, participated and the appellants promised and agreed to hold harmless in consideration of the delivery of the deed, Vaughn, the Cabrillo Holding Corporation and Cabrillo Club of California from any deficiency judgment arising out of such portion of the notes and beneficial interest in said deed of trust on said date held by the appellants, to-wit, promissory notes in the principal sum of $27,000. All these interests in the promissory notes held by the appellants, as aforesaid, were transferred and assigned by the appellants subsequent to January 6, 1933, and prior to the filing of this action on March 18, 1937. But some interests had been reacquired by the appellants and at the time of the filing of this action they owned interests in notes in the aggregate sum of $3,684.

On January 6, 1933, Perry went into possession of the premises as the nominee of the appellants and proceeded to conduct the affairs of the club thereon located, making collections on certain portions of the building and distributing these collections in part to the appellants and in part to himself. Those portions of the rental not collected by Perry were paid directly by the tenants to the appellants. No part of the rentals collected either by Perry or the appellants was paid to the holders of the promissory notes either on account of principal or interest. At the request of Lane the property was taken in the name of Perry and with his consent on behalf of the bondholders. Although certain sums thus collected were in the hands of the appellants, the taxes on the property were not paid and on August 25, 1937, the unpaid taxes for the years 1931–32 to 1936–37, inclusive, amounted to $65,122.41. Principal and interest being in default on the promissory notes held by the plaintiff, she demanded of appellants that they reveal to her the names of her fellow bondholders and that appellants join with her in an action to foreclose. Appellants declined to comply with this request, but on the contrary, upon the filing of this action to foreclose the trust, they answered, resisting the foreclosures and praying that plaintiff take nothing by her complaint. The bank answered refusing to act as trustee. Thereafter one R. E. Allen was appointed trustee by order of court.

The furniture, furnishings and equipment standing on the real estate were claimed by various parties, including Perry, the appellants and the plaintiff. At the time of judgment, from which this appeal is taken, litigation was pending to determine the ownership of the personal property. The trial court found that the reasonable value of the use of the furniture, furnishings and equipment from January 5, 1933, to and including April 28, 1937, was the sum of $4,000. On the last date indicated possession was taken by receivers. In its judgment the trial court stayed execution to the extent of $4,000 until ownership and right to compensation for the use of the furniture, furnishings and equipment could be determined. The issues with reference to the personal property were, of course, not determined in this action. In the pending action, however, it developed that the personal property was the subject of a trust indenture securing bonds of which the appellant W. G. Lane owned approximately six-sevenths and that on April 19, 1936, the personal property was sold by a commissioner appointed in proceedings to foreclose this last mentioned trust indenture. The personal property was purchased by W. G. Lane in the name of B. W. Goes, his secretary, who served also as secretary of Lane Mortgage Company. In the accounting by the appellants of moneys received by them in the form of income from the building, they attempted to charge against the funds in their hands collected from the building, as aforesaid, on behalf of the holders of the promissory notes held by the plaintiff and others, sums of money expended by them in protecting their interests in the personal property and in acquiring title thereto in the foreclosure of the trust indenture on the personal property.

At the conclusion of the trial in chief of the instant case, the lower court filed its memorandum of decision indicating the court's view that the appellants should account to the plaintiff and the note holders generally for money and other things of value received by appellants. This memorandum, however, does not constitute the formal findings of fact and conclusions of law upon which the judgment herein is founded and appears to be of interlocutory character merely. Thereafter the trial court made its "Order of Reference and Accounting" wherein it was ordered that an accounting be taken between the appellants and plaintiff and appointed one Sutherland as accountant and referee. The accountant having completed his labors on May 3, 1938, the plaintiff gave notice that she would on May 10, 1938, move the court to receive and approve the report and return of the referee. All parties concerned came into court on May 10th and objections having been made to the proceedings had by the accountant out of court, the court proceeded to take an accounting itself.

[1] We are supplied with the reporter's transcript reporting only the proceedings had in connection with such additional evidence as the court took on the accounting phase of the case. These proceedings were had on April 13, May 10, 18 and 19, all in the year 1938. The preamble to the findings of fact and conclusions of law herein recite that twenty-seven days in the year 1937 were devoted to the trial of this action. This recital is not challenged and it therefore follows that wherein it is contended that the evidence is insufficient we must assume that evidence sufficient to support the findings was received at the trial not reported to us, unless evidence appearing in the reporter's transcript with which we are supplied forces a conclusion otherwise. It may be assumed on this appeal that evidence was received during the twenty-seven unreported days in 1937 sufficient to sustain any finding or conclusion

by the court now challenged on the ground of insufficiency of evidence. It will be presumed that the omitted evidence authorized the decision unless there is something in the record to overcome that presumption. Messer v. Tait's, Inc., 121 Cal. App. 698, 9 P.2d 536; Faris v. Bank of America, 102 Cal.App. 420, 283 P. 99. A separate appeal was taken by the defendant Perry in which the court is supplied with a complete transcript. The parties, however, did not stipulate that such transcript may be utilized in this appeal, but on the contrary, the respondent expressly declined to so stipulate.

[2-4] It was the duty of the appellants to furnish the court with a complete record. Haase v. Central Union H. S. Dist., 27 Cal.App.2d 319, 80 P.2d 1044. Appellants cannot rely on the amendment to rule IX which went into effect on January 4, 1939. In this case the demand for transcript was made on August 15, 1938.

The complaint in this action was filed March 18, 1937, praying the foreclosure of the trust deed and for declaratory relief. Issues of fact being joined the trial commenced on June 17, 1937. Allen was appointed trustee on June 21, 1937. He accepted the trust on August 25, 1937. He exercised the power of sale contained in the deed of trust and sold the corpus of the trust. The plaintiff having filed certain amendments to her complaint prior to the sale, filed a supplemental complaint, subsequent thereto, reciting the sale by and under the power of sale and praying that the appointment of Allen be confirmed, that his sale be approved and confirmed, that a commissioner or receiver be appointed, and for money judgment against the several defendants, and for other relief. The cause being again at issue the trial was resumed. The plaintiff having had judgment, W. G. Lane and Lane Mortgage Company separating themselves from the other judgment debtors, took this appeal from that part of the judgment which decrees them indebted to the plaintiff in the sum of $12,584.33.

The appellants complain that the judgment is excessive and contrary to the evidence. Upon taking testimony as to the amount of money, if any, held by these appellants and by defendant Perry, who has taken a separate appeal, as trustees for the plaintiff, certain credits claimed by these appellants were allowed and others rejected, leaving the entire sum for which judgment was entered as $12,584.33. The credits allowed total $1,290.08. The first item of claimed credits disallowed by the court was the amount covered by two checks to B. L. Vaughn for deeds, supplies, etc., totaling $400.

[5, 6] As we have seen, the corpus of the trust was deeded to Perry as the nominee of the appellants. The court found that Perry received and held title to this real estate in trust for the bondholders, including the plaintiff. We have also seen that the real estate conveyed by the trust deed was occupied as a club. When appellants, through their nominee Perry, acquired the property, they purchased from Vaughn supplies on hand, groceries and other materials. It must be kept in mind that the real estate alone was held as security for the total debt due the bondholders and evidenced by the 225 promissory notes and deed of trust. Neither the good will of the club nor the furniture, fixtures, nor the equipment therein, were available to the bondholders as security under the deed of trust. When Perry acquired these various items of personal property they were not impressed with the trust created by the deed on behalf of the bondholders. This plaintiff had no interest whatever as beneficiary, or otherwise, in the personal property in so far as the deed of trust is concerned. This personal property was held in trust as security for the bonds therein involved, six-sevenths of which were owned by Lane. It cannot be said that Lane, or his nominee Perry, could charge to this plaintiff or her fellow bondsmen the expenses of acquiring the personal property, the benefits of ownership in which were acquired by Lane.

[7] While the personal property was acquired by Perry as nominee of Lane and title thereto vested in the purchaser unincumbered by the lien of the trust deed securing the plaintiff's bonds, nevertheless the trial court found that $4,000 should be allowed for its use payable to the owner of such personal property as determined by the court in the suit now pending in the lower court. Of this we approve but we cannot allow as a credit in the accounting both the reasonable value of the use of the personal property and the cost of its acquisition.

[8] Five items of expense aggregating $4,314.32 were claimed by the appellants as

a set-off in the accounting and disallowed by the trial court. All of these charges were for obligations and payments incurred or made by the appellants in resisting the foreclosure of a trust indenture by virtue of which the personal property was made subject to a lien securing a loan of $350,000 represented by bonds, six-sevenths of which were owned by Lane. This trust was entirely separate and distinct from the trust impressed on the real estate securing the bonds, four of which were assigned to the plaintiff and to foreclose which the present action was instituted. The mere fact that the property consisting of furnishings was used in the operation of the Cabrillo Club on the premises subject to the trust herein foreclosed does not entitle these appellants to charge against the plaintiff the cost of resisting, by the appellants, a suit to foreclose a trust indenture in litigation foreign to that in the instant litigation. It may be that the operation of the club on the premises held in trust for the benefit of the plaintiff and her fellow bondholders enhanced the value of the corpus of the trust. But in such event the equitable solution was the allowance of a reasonable sum for the use of the personal property and not by charging the plaintiff with the cost of defending title to such personal property which, as we have seen, was not a part of the corpus of the trust in the instant litigation. The defense of the title to the property was the problem of the appellants and not of the respondent.

Appellants claimed a further set-off in the amount of $480.41, which was rejected by the trial court. It seems that in 1936, the bondholders demanded possession of the real estate held in trust for them from the defendant Perry who was then in possession thereof.

[9-11] A committee of the bondholders was appointed to represent all thereof. The record is far from clear as to the authority of this committee to act on behalf of all the bondholders. However, they selected an attorney and proceeded to acquire the property impressed with the trust in the instant litigation by foreclosing a junior deed of trust in the sum of $5,000. The defendant Lane was the owner and holder of the junior trust deed and note secured thereby. Lane assigned to them the junior trust deed and advanced money to pay the expenses of foreclosure. The junior lien was foreclosed by exercise of the power of sale. The questioned item of $480.41 covers counsel's fees and costs in this foreclosure of the junior lien. Two insurmountable barriers bar the appellants' claim. First, the appellants do not invite our attention to any portion of the reporter's transcript now available. Hence it cannot be determined whether or not the claims are valid or reasonable as to amounts. Second, the statutes prescribe the methods authorized for the foreclosure of a deed of trust. The devious method of foreclosing a junior lien in order to acquire title to property impressed with a senior lien is not a prescribed method. It not being shown that this plaintiff acquired any benefit thereby, the claim was properly rejected. We are not required to search the record for evidence tending to sustain the claim to which our attention has not been specifically invited. Faris v. Bank of America, supra.

[12, 13] Appellants also claim credit for $500 alleged to have been paid by them to one Mrs. Townsend, the wife of one of the members of the committee of the bondholders hereinbefore referred to. Appellants claim that Mrs. Townsend was used as an auditor at the suggestion of "some of the board". The record does not disclose any authority vested in "some of the board" or in the appellants to employ an auditor. The scanty evidence available was not sufficient, in the opinion of the trial court, to sustain the claim. In stating their accounts, "it is the duty of the trustees to support every item of their account, and that, wherever they fail to support the correctness of a charge or a credit by satisfactory evidence, the item must be disallowed". Purdy v. Johnson, 174 Cal. 521, 531, 163 P. 893, 897.

[14-16] Appellants complain that $590 is charged against them in the account. The appellant Lane contends that Perry was delinquent in making payments of receipts from the tenants of the building and that to adjust the matter he, Lane, paid $590 into the trustee account, thus, in effect, constituting a loan of that sum by Lane to Perry. The deposit was made on June 30, 1936. The attorney representing these appellants at the trial admitted all items appearing in the accountant's report as having been received by the appellants commencing January 13, 1936, to and including October 1, 1936. The appellants are bound by the stipulation of

their counsel. Furthermore, if Lane placed the money in the trust to remedy Perry's delinquency, his demand should be against Perry and not against the beneficiaries of the trust. Respondent seeks a reduction of the credits allowed the appellants to the extent of $328.33, being 5 per cent on moneys collected by them on behalf of the beneficiaries of the trust, on the ground that the trustee was faithless and therefore not entitled to compensation. A respondent who has not also appealed, cannot, on appeal by the opposing party, ask a court of review to consider errors against him.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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46 Cal.App.2d 84

BAUMANN v. HARRISON et al.

Civ. 2748.

District Court of Appeal, Fourth District, California.

July 16, 1941.

Rehearing Denied Aug. 13, 1941.

Hearing Denied Sept. 11, 1941.

1. Appeal and error 🔑110

An order denying a motion for new trial is not appealable. Code Civ.Proc. § 963.

2. Mortgages 🔑559(3)

Where after assignee of notes secured by trust deed to realty had commenced action to foreclose trust deed, realty was sold by trustee under power of sale contained in trust deed, assignee was not precluded from thereafter obtaining deficiency judgment under amendment to complaint filed in foreclosure action seeking judgment for balance due after application of proceeds of sale of realty.

3. Mortgages 🔑411

The rule of "election of remedies" was not applicable to preclude the recovery of a deficiency judgment in judicial proceeding for foreclosure of trust deed to realty after a sale of the realty made by the trustee under power of sale contained in trust deed subsequent to institution of judicial proceeding for foreclosure.

See Words and Phrases, Permanent Edition, for all other definitions of "Election of Remedies".

4. Election of remedies 🔑3(1)

In order that the election of one remedy may constitute a bar to another under the rule of "election of remedies", the two remedies must be inconsistent on the same state of facts.

5. Election of remedies 🔑1

The doctrine of election between inconsistent remedies presupposes a choice of remedies.

6. Election of remedies 🔑1

The doctrine of election of remedies is regarded as an application of the law of estoppel and is founded upon the theory that a party should not be allowed to occupy inconsistent positions.

7. Election of remedies 🔑1

A change in remedies does not bring about an election of remedies unless the change involves a prejudice to the opposing party.

8. Election of remedies 🔑1, 3(1)

In order to invoke the doctrine of "election of remedies", it must be shown that the two remedies are inconsistent and repugnant and that by the exercise of both the defendant would suffer unconscionable, unfair and unjust detriment, since doctrine of election of remedies is based upon the doctrine of estoppel.

9. Mortgages 🔑337, 411

A judicial proceeding to foreclose trust deed to realty and a sale of realty under power of sale contained in trust deed are neither inconsistent nor repugnant remedies but may be pursued either concurrently or successively in order to secure a complete remedy to obligee.

10. Pleading 🔑129(2)

The allegations, contained in complaint seeking foreclosure of trust deed to realty, that corporation named as beneficiary in trust deed had refused to disclose to plaintiff the names of other holders of certificates assigning notes secured by trust deed and that such persons were unknown to plaintiff, were admitted by defendant's failure to deny such allegations.

11. Parties 🔑10

Where corporation named as beneficiary in trust deed to realty, executed to secure repayment of series of notes, issued certificates of assignment of such notes to various individuals, holding the notes for collection as trustee for benefit of such assignees and refused to disclose to a holder of such certificate the names of holders of other such certificates, under statute, authorizing one of several persons having a common or general interest to sue for benefit of all, such holder of certificate of assignment was not precluded from maintaining action to foreclose trust deed for herself and on behalf of all assignees having a beneficial interest by reason of the fact that all such assignees were not made parties, plaintiff or defendant in the action. Code Civ.Proc. § 382.

12. Mortgages 🔑479

In action to foreclose trust deed to realty, the trial court, having appointed a referee to take an accounting of rents and profits, was not thereby precluded from itself taking an accounting after referee had reported. Code Civ.Proc. § 639.

13. Account 🔑20(1)

Court may appoint a referee to take an accounting without a preliminary order. Code Civ.Proc. § 639.

14. Account 🔑19

Where court itself proceeds to take an account, that act is itself tantamount to an adjudication that plaintiff is entitled to an accounting, and an order of reference made after some testimony addressed to the issues has been taken should likewise be deemed such an adjudication. Code Civ.Proc. § 639.

15. Reference 🔑27

Notice before appointment of a referee is not necessary, since the statute provides for no formal notice of a hearing before a referee. Code Civ.Proc. § 639.

16. Account 🔑19

The better practice is for lower court to try the issues to determine whether an accounting should be had before appointing a referee to take such accounting. Code Civ. Proc. § 639.

17. Trusts 🔑30½(1)

Where nominee of corporation named as beneficiary in trust deed to realty, executed to secure repayment of series of notes, took title to realty, knowing that it was not worth the amount of indebtedness secured thereby and that such indebtedness was in default, and agreed to account for all income to holders by assignment of notes secured by trust deed, such nominee became a "trustee" for the holders by assignment of the several notes and bound to account to such holders for the income received from the realty. Civ.Code, §§ 2219, 2228, 2229, 2233.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

18. Trusts 🔑231(1)

The nominal title holder of realty, incumbered by a trust deed, by assuming the obligation of a trustee, was bound to maintain toward obligees, whose claims were secured by trust deed, the highest good faith and not to use the profit from realty for his own benefit. Civ.Code, §§ 2228, 2229.

19. Trusts 🔑231(1)

The nominal title holder of realty incumbered by a trust deed, by assumption of obligation of trustee, was bound not to assume, without immediately disclosing it, any interest adverse to obligees, whose claims were secured by trust deed, any violation of trust obligations constituting fraud. Civ. Code, §§ 2233, 2234.

20. Mortgages 🔑559(4)

An accounting taken by the court in action to foreclose trust deed to realty was sufficiently complete to sustain deficiency judgment against nominal title holder of realty for rents and profits received by him while in possession of the realty.

21. Mortgages 🔑578

Where accounting taken by court in action to foreclose trust deed to realty was sufficiently complete to sustain judgment, appellate court would not weigh the evidence nor express a preference of conflicting theories in the absence of errors of law.

22. Trusts 🔑183

The nominal title holder of realty, incumbered by a trust deed, who upon taking title to realty assumed obligations of trustee for benefit of obligees whose claims were secured by trust deed, differed from a mortgagor in possession and was liable for all rents and profits received while in possession of the realty even prior to sale thereof under power of sale contained in trust deed.

23. Mortgages 🔑209

Where a substitute trustee was appointed by court upon the refusal of bank nominated as trustee in trust deed to realty to act as such trustee, such substitute trustee was immediately invested with power to do all things necessary to protect the corpus of the trust, conserve the security, and exercise all powers in him created either by the trust deed or by the law. Civ.Code, § 2289.

24. Mortgages ⚷113, 342

Where bank nominated as trustee in trust deed to realty failed to assume obligations of trust and upon institution of action to foreclose trust deed filed answer declining to act as such trustee, the appointment by court of a substitute trustee and the sale of trust property by such trustee under power of sale contained in trust deed were valid. Civ.Code, § 2289.

25. Mortgages ⚷335

The nominal title holder of realty subject to trust deed, who was held liable to account for rents and profits received while in possession of realty, could not challenge validity of sale of realty by trustee under power of sale contained in trust deed on the ground that realty had previously been sold for accrued taxes.

26. Mortgages ⚷559(6)

Where after holder by assignment of notes secured by trust deed to realty had instituted action to foreclose trust deed, the corpus of the trust was sold under the power of sale contained in trust deed and the proceeds credited on the secured debt, the plaintiff in foreclosure action was entitled to file a supplemental pleading alleging the sale and praying judgment for the deficiency.

27. Mortgages ⚷463

In action to foreclose trust deed to realty, evidence sustained finding that nominal title holder of realty subject to trust deed took title thereto as the nominee of corporation named as beneficiary in trust deed and that conveyance was actually to such nominal title holder, the corporate beneficiary, and the individual who was substantial owner of such corporation.

28. Evidence ⚷595

The trial court may rest its decision upon reasonable inferences as well as upon direct evidence.

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Anna Baumann, etc., against H. O. Harrison and others to foreclose a trust deed to realty and for declaratory relief. From a judgment in favor of plaintiff and from an order denying motion for new trial, Will H. Perry appeals.

Judgment affirmed; appeal from order dismissed.

C. E. Spencer, of Los Angeles, for appellant.

Thomas F. McCue, of Los Angeles, for respondent.

KELLY, Justice pro tem.

This is an appeal by Will H. Perry, one of the judgment debtors, from that judgment from which W. G. Lane and Lane Mortgage Company, a corporation, appealed separately in case Civil Number 2747, 115 P.2d 523, this day decided. Judgment was rendered against Perry for the sum of $7,670.47, $4,000 of which was stayed until the ownership of certain personal property was determined in the suit now pending in the lower court, as indicated in the Lane appeal. It is also an attempted appeal from an order denying a new trial. We are, however, supplied with a full and complete reporter's transcript in this appeal. The facts and history of the case are stated in the Lane appeal and the same are hereby referred to as the facts and history in this appeal, except in so far as the appellant Perry raises points not presented by the Lane appeal. The appellant Perry separating himself from the other judgment debtors presents issues not heretofore considered and in the determination of the same we will from time to time refer to other facts in the evidence necessary for the determination of the issues now presented.

[1] (1) The appellant first contends that the lower court erred in denying a motion for a new trial and supports his contentions exhaustively. An order denying a motion for new trial is not appealable. Code Civ.Proc., sec. 963. All questions there raised may be reviewed on appeal from the judgment. We have considered all material questions raised under this heading.

[2] (2) Appellant contends that the pleadings do not support the judgment. As pointed out in the Lane appeal, this suit was originally instituted to foreclose a trust deed by judicial action. Later the power of sale contained in the trust deed was exercised by the substituted trustee Allen. Plaintiff then amended her complaint pray-

ing judgment for the deficiency existing after the sale of the corpus of the trust. It is contended by the appellant that the two remedies, that of judicial foreclosure and exercise of the power of sale, are not available. There is no merit in this contention. In the case of Commercial Centre Realty Co. v. Superior Court, 7 Cal.2d 121, 59 P.2d 978, 981, 107 A.L.R. 714, a suit was instituted to foreclose a mortgage and on the same date a notice of election to sell the real property mortgaged in exercise of a power of sale contained in the mortgage was filed. After sale under the power of sale the complaint was amended praying for a deficiency. Petitioner then contended that the trial court was without jurisdiction to proceed further in the matter. That inasmuch as the mortgagee by sale of the property under the power of sale took away from the trial court its power to enter a decree of foreclosure and sale by a commissioner, the cause of action thereby expired and that the mortgagee was therefore without power to resurrect it or give it vitality by amendment, as the mortgagee's right to a deficiency judgment after a sale under a power of sale only accrued after the sale and as no new complaint was filed subsequent to the sale, no cause of action based upon these facts is now before the trial court. Therein the Supreme Court said: "This reasoning is necessarily based upon the theory that two different and distinct causes of action were stated, one in the original complaint in which a foreclosure of the mortgage was sought, and the other in the amended complaint in which payment of the balance due after the application of the proceeds of the sale to the debt was sought. We are satisfied, however, that under all the tests as to whether or not a new cause of action is set up, the supplemental and amended complaint did not state a new cause of action. The cause of action set out in the original complaint was the debt evidenced by the promissory notes. The cause of action set out in the amended complaint was the same debt, evidenced by the same promissory notes, a portion of which had been paid by the giving of credit by the mortgagee for the amount of the proceeds of the sale. In both instances it was the same debt."

[3-7] The rule of election of remedies does not apply. The two remedies available to the plaintiff in the instant case are not inconsistent but on the contrary each may be deemed the complement of the other. To constitute a bar the two remedies must be inconsistent on the same state of facts. Verder v. American Loan Society, 1 Cal.2d 17, 33 P.2d 1081. The doctrine of election between inconsistent remedies presupposes a choice of remedies. Atchison, T. & S. F. R. Co. v. Superior Court, 12 Cal.2d 549, 86 P.2d 85. The doctrine of election of remedies is regarded as an application of the law of estoppel and is founded upon the theory that a party should not be allowed to occupy inconsistent positions. Mailhes v. Investors Syndicate, 220 Cal. 735, 32 P.2d 610; Mercantile Mortgage Co. v. Chin Ah Len, 3 Cal.App.2d 504, 39 P.2d 817. A change in remedies does not bring about an election of remedies unless the change involves a prejudice to the opposing party. Commercial Centre Realty Co. v. Superior Court, supra.

[8] As the doctrine of election of remedies is based upon the doctrine of estoppel, in order to sustain a theory of irrevocable election it must be shown that the two remedies are inconsistent and repugnant and that by the exercise of both the defendant would suffer unconscionable, unfair and unjust detriment.

[9] In the instant case had the plaintiff first exercised the power of sale, and had a deficiency existed, and had she then sued upon her notes for recovery of a judgment for the deficiency, it is plain she would be pursuing two valid remedies, the exercise of both being necessary to the attainment of a complete remedy for the money due her. That she should choose to exercise these remedies concurrently and not seriatim cannot impair her position. If the remedies were inconsistent and repugnant under the doctrine of estoppel the exercise of one would forever bar the exercise of the other. If both may be pursued, as we have seen, it follows that they are neither inconsistent nor repugnant. While in Commercial Centre Realty Co. v. Superior Court, supra, both remedies were simultaneously pursued and in the instant case the power of sale was exercised after the institution of the suit and thereafter the foreclosure suit pursued by amended complaint, the rule we have stated is not thereby modified. If pursuit of both remedies were inconsistent, repugnant and inequitable that would be true regardless of the time at which both procedures were instituted.

[10, 11] (3) The appellant next contends that the trial court at no time had

jurisdiction for want of necessary parties. By reference to the stated facts in the Lane appeal it will be seen that a series of 225 notes were made and issued by the Harrisons to secure which the trust deed herein was executed, and that Lane and Lane Mortgage Company, his alter ego, assigned these notes but retained possession thereof. The plaintiff in the instant action sues for herself and on behalf of all bondholders having a beneficial interest who join with her herein. She recites in her complaint that about seventy-five persons are assignees of these notes and that she demanded from the defendant Lane Mortgage Company that it disclose to her the names and addresses of all parties and beneficiaries interested in said notes or bonds together with the amount held by each or to which each is beneficially entitled and that the defendant declined to supply the demanded information. This allegation is admitted by this defendant by failure to deny. The court found these allegations to be true. It would be a most amazing solution if the appellant here could sustain his contention that because certain bondholders are not named in the complaint the plaintiff's attempted statement of a cause of action is fatally defective. The appellant is the nominee of Lane and Lane Mortgage Company and is scarcely in a position to take advantage of the unfairness of those whose nominee he is and attempt to prejudice the plaintiff for not reciting in her complaint that which she had no means of knowing because of the inequitable concealment of relevant facts by Lane and his alter ego. Equity can tolerate no such injustice. It will further be noted that section 382 of the Code of Civil Procedure provides an exception designed to protect a plaintiff in such a position as that which the respondent now occupies. "* * * but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Code Civ.Proc., sec. 382. See, also, Farmers' & Merchants' Nat. Bank v. Peterson, 5 Cal.2d 601, 55 P.2d 867; Moore v. Bowes, 8 Cal.2d 162, 64 P.2d 423.

(4) Appellant next contends that the judgment for money against appellant cannot be sustained under either the law or the evidence. As we have seen in the Lane appeal, after some twenty-seven days of trial the case was submitted. The trial court then having reached a conclusion that this appellant had appropriated funds to his own use which should have been paid to the bondholders, ordered an accounting of rents and appointed a referee. The referee having reported in the presence of all parties the court proceeded to take an accounting itself. The appellant strenuously and voluminously objects to this procedure. It should be borne in mind that the right to a fair trial is not the exclusive prerogative of the appellant. The court, after submission of the case, having reached a conclusion or suspicion of misappropriation of funds by the defendants could and should, in the exercise of its jurisdiction in equity proceed to the taking of further testimony pertaining to that issue. This right and duty of the trial court and this right to a fair trial on behalf of the plaintiff cannot be frittered away by a strained attempt to apply technical rules of procedure.

"Reference Ordered on Motion, in What Cases. [Except in Justices' Courts.] When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

"1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;

"2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

"3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action;

"4. When it is necessary for the information of the court in a special proceeding." Sec. 639, Code Civ.Proc.

[12-14] While it is true that a referee was appointed by the court after submission of the cause, it is also true that after the referee reported the trial court proceeded to take an accounting itself. We see no error in this procedure. The court could have appointed a referee without a preliminary order. "The plaintiffs were entitled to an accounting, and, if the case

had been submitted without further evidence, an interlocutory judgment directing such accounting would have been proper. [Citing cases.] The accounting might have been ordered through a reference, or the court might, with or without a preliminary interlocutory order, have proceeded to take and state the account itself. (Emery v. Mason, 75 Cal. 222, 16 P. 894), rendering such final judgment thereon as might appear to be proper." Fox v. Hall, 164 Cal. 287, 128 P. 749, 750.

"If, in other words, when the court itself proceeds to take the account, that act, under the decision in the case above named and quoted from, is itself deemed tantamount to or practically sufficient as an adjudication that the plaintiff is entitled to an accounting, then a fortiori an order of reference, made after some testimony addressed to the issues has been taken, as the record shows was the case here, either by the court sua sponte or upon motion of the plaintiffs should be deemed such an adjudication or one to all intents and purposes." Fredendall v. Shrader, 45 Cal.App. 719, 188 P. 580, 583.

[15] Neither is notice before appointment of a referee necessary. "The statute provides for no formal notice of a hearing before a referee. Formal notice is therefore not jurisdictional." Spadoni v. Maggenti, 121 Cal.App. 147, 8 P.2d 874, 880.

[16] "Undoubtedly the better practice is for the lower court to try the issues to determine whether an accounting should be had before appointing a referee to take an accounting, and even at this date this procedure might be followed by setting aside and vacating the former order, and then proceed to try the issues presented by the pleadings in order to determine first whether an accounting will be required." Merrill v. Superior Court, 108 Cal.App. 501, 291 P. 609, 610.

"The language of this court in the case last above cited would seem to indicate that the conclusion to be arrived at in our solution of the problem before us is that as to the stage in an equity proceeding before the court when it may proceed of itself and in the course of the trial to take testimony in the process of an accounting, or may order a reference for the purpose of taking such testimony, it is, after all, not a matter of jurisdiction, but rather of the order of proof in the particular case." Putman v. Superior Court, 209 Cal. 223, 286 P. 425, 427.

[17-19] (5) The appellant next argues that "the judgment is against the finding that appellant was not a principal in the transaction of January, 1933". The transaction referred to is the deed of January 6, 1933, by which the appellant took title as the nominee of Lane but did not assume or agree to pay the indebtedness secured by the deed of trust or any part thereof. The trial court found that the appellant took title in trust for the plaintiff and other note holders and that Perry, Lane and Lane's company had at all times been in control and possession of the premises and that they and each of them have been receiving all rentals from the real property. The court below also found that by the deed of January 6, 1933, the trust did not merge with the title but on the contrary the deed of trust remained in full force and effect. There is evidence in the record that when Perry received the deed of January, 1933, he knew of the existence of the bonded indebtedness and the amount thereof and that the loan was in default and that the property was not worth the amount due the bondholders. He agreed to hold title for the bondholders and was told by Lane that all income had to be accounted for to the bondholders, to which he agreed. Having assumed this obligation the appellant became a trustee for the plaintiff and the other holders by assignment of the several notes. Civ.Code, sec. 2219. By assumption of the obligation as a trustee he was bound to maintain toward the bondholders the highest good faith and not to use the profit for his own benefit. Civ.Code, secs. 2228, 2229. He was bound not to assume any adverse interest without immediately disclosing it. Civ.Code, sec. 2233. Any violation of these obligations constituted fraud. Civ.Code, sec. 2234. It would seem that the appellant and Lane were cotrustees, in which event he would still be liable for all money misappropriated to his own use. As the judgment against him, of which appellant complains, is for money received as income from the property, less credits, he cannot escape.

[20, 21] (6) Appellant then complains that the accounting was incomplete. The record discloses that the accounting was taken by the court itself. This, as we

have seen, was properly the prescribed order of proof. The appellant was represented by counsel who cross-examined witnesses but offered no evidence nor did he dispute any record. The accounting was sufficiently complete to sustain the judgment. We are not, on appeal, to weigh the evidence nor to express a preference of conflicting theories in the absence of errors of law.'

[22] (7) Appellant next contends that no judgment for rents and profits received by Perry prior to the sale can be sustained. It will be remembered, however, that by the deed of January 6, 1933, the appellant assumed obligations on behalf of the bondholders and as their trustee distinct from the rights and obligations created by the deed of trust. In this respect he differed from a mortgagor in possession and was, as we have seen, liable for all profits.

(8) Appellant then contends that the appointment of a substitute trustee followed by a sale of the corpus of the trust was void. As stated in the Lane appeal, the bank as nominated trustee in the deed of trust, at no time assumed the obligations of the trust but on the contrary when this action was instituted filed its answer declining to act as such. Thereupon Allen was appointed as substitute trustee and he immediately assumed his obligation and proceeded to act. Section 2289 of the Civil Code reads: *"Superior court to appoint trustee when.* When a trust exists without any appointed trustee, or where all the trustees renounce, die, or are discharged, the superior court of the county where the trust property, or some portion thereof, is situated, must appoint another trustee, and direct the execution of the trust. The court may, in its discretion, appoint the original number, or any less number of trustees."

In Sacramento Bank v. Murphy, 158 Cal. 390, 394, 115 P. 232, 234, the Supreme Court said: "It was not necessary to bring an action for the purpose of having trustees appointed or their appointment confirmed, and then a separate action to have it decreed that they were invested with all the title and powers of the original trustees to whom they were successors, and to be afforded the other relief prayed for in the complaint. All these matters, which were of equitable cognizance, could be determined in one action, and it was proper to embrace them all in the action brought and to apply for full and equitable relief, as was done."

[23, 24] Allen having been appointed trustee by the court was immediately invested with power to do all things necessary to protect the corpus of the trust, conserve the security and exercise all powers in him created either by the trust deed or by the law. The sale by the trustee was valid.

[25] (9) Appellant contends that the substituted trustee had no power to sell at the time of the purported sale because the real estate held in trust had, previous to the sale, been sold for accrued taxes. The appellant must stand or fall upon the merits of his controversy with the plaintiff. We are not called upon by this appeal to decide such questions as the validity of the sale or the right of redemption. With the problems which may be involved in the tax sale the appellant has nothing to do. Sufficient for his day are the evils thereof.

[26] (10) Appellant complains that it was error to allow the plaintiff to file a supplemental complaint. This is not so. The plaintiff having filed her complaint to foreclose the trust deed and the corpus of the trust thereafter having been sold under the power of sale and the price having been credited on the secured debt, the plaintiff very properly filed supplemental pleading alleging the sale and praying judgment for the deficiency. As we have seen, the two remedies of judicial foreclosure and exercise of the power are concurrent. Commercial Centre Realty Co. v. Superior Court, supra.

[27] (11) Appellant contends that the evidence does not support the finding that the Cabrillo Holding Corporation conveyed to Perry, Lane and Lane Mortgage Company. It is true that Perry alone was named as grantee in that deed. It is also true, however, that Perry was the nominee of Lane and the Lane Company and that the deed was delivered into the physical possession of the Lane Company and remained in its files until produced in court at the trial. The inference drawn by the trial court is sustained.

[28] Many other criticisms of the court's findings are presented, too numerous and too trivial to warrant particular statement and analysis. Generally speaking, these criticisms overlook the rule that the

trial court may rest its decision upon reasonable inferences as well as upon direct evidence. We find no merit in the appeal.

The judgment is affirmed. The attempted appeal from the order denying a new trial is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

* * *

46 Cal.App.2d 115

RUBINSTEIN v. MINCHIN et al.

Civ. 2752.

District Court of Appeal, Fourth District, California.

July 17, 1941.

Limitation of actions 🔑179(2)

The amended complaint, in an action filed in February, 1939, to establish a trust on land and to compel conveyance thereof to plaintiff, showed that action was barred by five-year statute of limitations if regarded primarily as an action to compel reconveyance of realty, or by four-year statute of limitations if regarded primarily as an action to establish a trust, where it was alleged that defendants had possession of realty since October 28, 1933, and plaintiff's allegation that deceit and fraud in repudiation of trust were not discovered until summer of 1938, would be disregarded, where paragraph of pleading immediately preceding such allegation alleged that defendants repudiated the trust, refused to reconvey, and denied that plaintiff had any right to income from land in June, 1934. Code Civ.Proc. §§ 318, 338, subd. 4; § 343.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Louis Rubinstein against Michael Minchin and another to establish a trust on land and to compel conveyance thereof to plaintiff. From a judgment of dismissal following an order sustaining a demurrer to plaintiff's second amended complaint, the plaintiff appeals.

Affirmed.

Marshall A. Stutsman, of Los Angeles, for appellant.

Mitchell, Silberberg, Roth & Knupp and Guy Knupp, Jr., all of Los Angeles, for respondents.

KELLY, Justice pro tem.

This is an appeal from a judgment of dismissal following an order sustaining a demurrer to the plaintiff's second amended complaint. Somewhat condensed and summarized, the second amended complaint recites that in the year 1929 the plaintiff and his then wife, since deceased, borrowed the sum of $6,500 from the defendants, evidenced by a promissory note secured by a trust deed on a one-half interest in a certain lot described as number 278; that on December 20, 1932, the plaintiff was in default in the sum of $615 for the payment of which the defendants were pressing, and that to secure payment of the sum in default a deed of trust was executed by the plaintiff on another lot referred to as number 151; that the parties had an oral agreement by which it was stipulated that if the plaintiff would convey lot 151 to the Union Bank and Trust Company in a trust of which the defendants would be beneficiaries, they would accept the conveyance as security in lieu of the amount in default and that whenever within one year or five or more, the plaintiff would cure the default by the payment of $615 with interest, defendants would reconvey lot 151 and that until paid the defendants would hold title to lot 151 in trust for the plaintiff and that the note and deed of trust covering lot 278 would, by a separate instrument, be extended for three years; that escrow instructions were prepared and signed in accordance with the oral agreement indicated, but that the instructions were not followed; that on the contrary, a single note in the sum of $7,120, being the amount of the original loan of $6,500, plus the sum in default, and a deed of trust covering both lots, securing payment of this note, were prepared and presented to the plaintiff who executed the same by signature and delivery to the bank, as trustee; that on June 17, 1933, the plaintiff tendered the sum of $620 to the defendants and demanded the reconveyance of lot 151; that the respondents refused the tender and refused to convey on the ground that both lots were covered by a single deed of trust; that on June 21, 1933, the defendants filed written notice of default and demand for sale by the trustee; that in August, 1933, defendants orally stated to the plaintiff that they would buy both lots at a trustee's sale and would stand prepared to reconvey lot 151 to the plaintiff upon payment of $620 with interest at 7 per cent; that on October 29, 1933, both lots were sold to the defendants; that in June, 1934, plaintiff again tendered the sum of $620 and again demanded reconveyance of lot 151, which was refused; and that defendants have had possession of lot 151 since October, 1933. Plaintiff prays that a trust be declared and that defendants be compelled to convey lot 151 to plaintiff.

To this second amended complaint the defendants demurred both generally and specially and pleaded in bar a number of sections of the Code of Civil Procedure, including section 318, subdivision (4) of section 338, and section 343. The plaintiff contends that when the defendants purchased lot 151 at the trustee's sale they did so as trustees of the plaintiff and therefore held the property as such because of their oral promises as indicated. In view of the application of the bar of the statute of limitations, we quote in full paragraphs XII and XIII of the second amended complaint:

"XII.

"That in pursuance of said oral agreement, and at all times subsequent to October 28th, 1933, plaintiff with confidence relied upon all the statements, promises and representations of defendants, and was lulled to perfect repose and confidence in defendants and all their statements as true, till about the month of June, 1934, plaintiff again offered Six Hundred and Twenty Dollars and all interest accrued on said Lot 151 of McLeods, Figeroa St., Tract No. 5, to defendant Michael Minchin, and requested said defendant to reconvey said Lot 151 in pursuance of said oral agreement and promises herein alleged and agreed to by defendants. At which said time defendant Michael Minchin refused to reconvey the legal title to lot 151 herein alleged to plaintiff and refused to acknowledge that plaintiff had any rights at all to the legal title or possession of lot 151 or either parcel of property alleged herein, and thereby repudiated the said oral agreement and the entire Trust matter, and that plaintiff had any right to the income from said lot 151.

"XIII.

"Plaintiff further alleges that the deceit and fraud connected with this action or a resulting trust, and the facts constituting said action were first discovered by plaintiff in the summer of 1938."

The clerk's transcript discloses that this action was filed February 17, 1939. Section 318 of the Code of Civil Procedure reads: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property" within five years before the commencement of the action.

Section 343 of the Code of Civil Procedure reads: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Keeping in mind the allegation of the second amended complaint that the respondents have had possession of lot 151 since October 28, 1933, we must hold that this action filed in February, 1939, cannot be maintained.

While it is true that the plaintiff alleges that the deceit and fraud in repudiation of the trust was not discovered until the summer of 1938, it is in the paragraph of the pleading immediately preceding such allegation alleged that the defendants repudiated the trust, refused to reconvey, and denied that the plaintiff had any right to the income from lot 151 in June, 1934. The bald statement of the conclusion recited in paragraph XIII of the pleading cannot overcome the plain recitation of ultimate facts set forth in paragraph XII thereof. The statute of limitations runs from the discovery of the fraud or from such time as it could have been discovered had the injured party exercised reasonable diligence. Sec. 338, subd. 4, Code Civ. Proc. If plaintiff's contention that this is primarily an action to establish a trust is correct, then section 343 of the Code of Civil Procedure applies and equally bars the action.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

46 Cal.App.2d 212

PARSELL et al. v. SAN DIEGO CONSOL. GAS & ELECTRIC CO.

Civ. 2809.

District Court of Appeal, Fourth District, California.

July 24, 1941.

Rehearing Denied Aug. 6, 1941.

Hearing Denied Sept. 15, 1941.

1. New trial ⚷72

The trial judge in passing on a motion for new trial is in effect a thirteenth juror, and it is his duty to weigh the evidence and pass independent judgment upon it, and he should not permit a verdict to stand which he does not consider just, even though there be some evidence to support it.

2. Appeal and error ⚷1010(1)

Trial judge's decision on the facts must stand where there is any substantial evidence to support it, regardless of whether reviewing court might think that the decision should have been otherwise.

3. Appeal and error ⚷989

In reviewing judgment for the plaintiff after denial of defendant's motion for a new trial, reviewing court was limited to a consideration of errors of law and their prejudicial effect.

4. Gas ⚷14½

Evidence that small rocks or pieces of concrete which allegedly caused pedestrian to fall and sustain injuries were left on pavement by gas company in filling in an excavation in an alley warranted instruction based on city ordinance to the effect that as soon as the work which had been done in the alley was completed, it was the duty of the gas company to put the excavated portion of the pavement in as good a condition as it was before the work was commenced.

5. Trial ⚷260(1)

The refusal to give requested instruction covered in instructions given was not error.

6. Appeal and error ⚷1068(5)

Where verdict in action for injuries was well within the amount prayed for in the complaint and the reasonableness of that amount was in no way attacked, refusal to give requested instruction to the effect that the damages assessed could not exceed the amount prayed for in the complaint was not error in the absence of showing of prejudice.

7. Appeal and error ⚷1067

An instruction in an action for injuries limiting amount of recovery to amount prayed for in complaint may properly be given, but the refusal to do so is not reversible error in absence of any showing of prejudice in a particular case.

8. Damages ⚷216(1)

Instruction that plaintiff could not recover for prospective damages unless as shown by a preponderance of the evidence there was such a degree of probability of that damage occurring as amounted to a reasonable certainty that it would result from the original injury was not erroneous as authorizing jury to award future damages if it appeared probable that such damages would result without regard to their certainty.

9. Damages ⚷216(1, 7)

Where pedestrian was injured when she stepped on a small piece of stone or broken concrete allegedly left by gas company in filling in an excavation in an alley, and two years after accident pedestrian testified that she had little if any use of her hand and arm, and that she was unable to fasten her clothes or tie her shoestrings, and that she suffered continuously and was still suffering, that she still had pain in her wrist, elbow and shoulder and that she still had to continually change position of her arm in order to ease the pain, evidence was sufficient to authorize instruction covering pedestrian's right to recover for future pain or disability.

10. Trial ⚷18

In action for injuries sustained by pedestrian in fall resulting when she stepped on a small piece of stone or broken concrete allegedly left by gas company in filling an excavation in alley, bringing into courtroom on a hospital stretcher of pedestrian's husband who had been bedridden for some years, and who was called as a witness and gave material testimony relating to what occurred at time when a statement was taken was not prejudicial on the ground that sight of the husband might inspire jury's sympathy.

11. Trial ⚷28(2)

Where nearly two years elapsed after pedestrian was injured in a fall resulting when she stepped on a small piece of stone or broken concrete allegedly left by gas company in filling an excavation in alley, and there was no possible way of having the conditions the same, denial of a motion to have jury view scene of accident was within the court's discretion.

12. Gas ⚿14½

In action for injuries sustained by pedestrian in fall resulting when she stepped on a piece of stone or broken concrete allegedly left by gas company in filling in an excavation in alley, refusal of an instruction to the effect that a higher degree of care was required of a pedestrian who walked along an alley than of one who walks along a sidewalk was not error, since pedestrian was required to exercise reasonable care in view of existing conditions just as she would have had she been walking along a sidewalk constructed especially for pedestrians.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Ellen Parsell and Charles R. Parsell against the San Diego Consolidated Gas & Electric Company for personal injuries sustained by Ellen Parsell. From a judgment for the plaintiffs, defendant appeals.

Affirmed.

Sanders & Kahn, of San Diego, for appellant.

Y. A. Jacques and Charles E. Burch, Jr., both of San Diego, for respondents.

BARNARD, Presiding Justice.

In this action for personal injuries a jury returned a verdict in favor of the plaintiffs. A judgment notwithstanding the verdict which was then entered was reversed by this court (41 Cal.App.2d 382, 106 P.2d 935), on the grounds that while it was weak there was some evidence of negligence on the part of the defendant and that the question of contributory negligence was one of fact rather than one of law, with the suggestion that a new trial could properly be granted. After the going down of the remittitur the defendant presented its motion for a new trial which the court, in effect, denied by not granting the same within the required time. A judgment was then entered in favor of the plaintiffs in accordance with the verdict of the jury and the defendant has appealed.

[1-3] The first point raised is that a "new trial should have been granted". The trial judge, in granting the motion for a judgment notwithstanding the verdict, must have been of the opinion that there was no evidence at all to sustain the verdict. On the former appeal, we were compelled to hold that there was some evidence of negligence, although we pointed out its weak character and suggested the propriety of granting the motion for a new trial. As has been frequently said a trial judge, in passing upon a motion for a new trial, is in effect a thirteenth juror. It is his duty to reweigh the evidence and pass independent judgment upon it, and he should not permit a verdict to stand which he does not consider just even though there be some evidence to support it. In this case the trial judge had recognized the inherent weakness in the evidence and it is difficult to understand how, after a reversal which confirmed that view but pointed out the proper remedy, he could have deemed the same evidence sufficient to justify the denial of a new trial. We agree with the appellant that a new trial ought to have been granted on the ground of the insufficiency of the evidence, but where questions of fact are concerned the rules governing an appellate court are not the same as those that govern a trial court. Under our system a trial judge's decision on the facts must stand, where there is any substantial evidence to support it, regardless of whether or not we think that decision should have been otherwise. It follows that in reviewing this judgment we are limited to a consideration of errors of law and their prejudicial effect.

Appellant's next contention is that there is no evidence of any negligence on its part. This was thoroughly considered and passed upon in the decision on the former appeal, nothing new is presented, and no further consideration is necessary.

[4] It is next contended that the court erred in giving an instruction, based upon a city ordinance, which told the jury that as soon as the work which had been done in this alley was completed it was the duty of the appellant to put the excavated portion of the pavement in as good condition as the same was in before the work was commenced. It is argued that this instruction should not have been given since there was no evidence justifying the inference that the alley was not left in such condition. As pointed out in our former opin-

ion, there was some evidence that small rocks or pieces of concrete were left on the pavement after the excavated portion was filled in. The point now raised is without merit.

[5-7] It is next urged that the court erred in refusing several instructions offered by the appellant on the question of damages. All of the elements of these instructions were covered in other instructions which were given, with one exception. There was included therein an instruction that in no case must the jury assess damages in excess of the amount prayed for in the complaint, which was $14,000. No such instruction was given to the jury at any time. However, the verdict returned was for less than that amount, being for $8,150. No contention is here made that the verdict is excessive but cases are cited in which it has been held that such an instruction might properly be given, and other cases where the refusal to give such an instruction has been held not to be prejudicial since it appeared that no request therefor had been made. No cases in this state are cited, and we have found none, which hold that the refusal to give such an instruction when requested is, in itself, prejudicial error. The appellant argues that prejudices must be presumed because in every case the amount of the verdict "is a compromise between the extremes of 'high' and 'low' which are entertained by the individual jurors"; that if such an instruction be not given those jurors favoring a high amount may start out with $100,000; that the resulting compromise will be proportionately high; and that if the jurors favoring a high amount had been limited to the amount prayed for the resulting verdict would have been correspondingly less. We cannot indulge in any such assumption as that asked for in order to upset a judgment and the fact remains that no prejudice is here shown. The verdict was well within the amount prayed for in the complaint and the reasonableness of that amount is in no way attacked. In many cases it might even be of benefit to a defendant to withhold from the jury the amount prayed for. While, as frequently held, such an instruction may properly be given we are unable to hold that the refusal to do so constitutes reversible error in the absence of any showing of prejudice in a particular case.

[8, 9] It is next contended that an instruction relating to future damages on account of injuries suffered by one of the respondents was erroneous. In that instruction the jury was told "you may not compensate plaintiff for prospective damages, unless, as shown by a preponderance of the evidence, there is such a degree of probability of that damage occurring as amounts to a reasonable certainty that it will result from the original injury". Later, in the same instruction, the jury was told that it might include an allowance "for such pain, discomfort and anxiety, if any, as she is reasonably certain to suffer in the future from the same cause. You are also entitled to compensate her for any permanent damage, if any appears reasonably certain from the evidence, to flow as a proximate result from the accident and injuries". It is first argued that this instruction was incorrect in that it authorized the jury to award future damages if it appeared probable that these would result, without regard to their certainty. This contention is without merit as the instruction plainly limited any such recovery to such future damage as was reasonably certain to be suffered. It is further argued in this connection that there is no evidence, expert or otherwise, that this respondent would suffer any future pain or disability. This case was tried nearly two years after the happening of the accident and this respondent testified that she had little, if any, use of her hand and arm and that she was unable to fasten her clothes or tie her shoestrings. She further testified that she had suffered continuously and was still suffering, that she still had pain in her wrist, elbow and shoulder, and that she still had to continually change the position of her arm in order to ease the pain. We think this evidence was sufficient to justify the giving of the instruction, under the authorities. Oliveira v. Warren, 24 Cal. App.2d 712, 76 P.2d 113; Armstrong v. Ford, 30 Cal.App.2d 347, 86 P.2d 385; Cordiner v. Los Angeles Traction Co., 5 Cal. App. 400, 91 P. 436.

[10] It is next urged that the verdict is the result of passion and prejudice and that the court erred in permitting Charles R. Parsell, one of the respondents, to be brought into court on a hospital stretcher where, it is said, he presented a pitiable sight to the jury. An objection was made and overruled. While the appellant's counsel state "I might be willing to stipulate to what he would say", he made no direct offer to make such a stipulation and none

was made or accepted by the other side. Not only was Mr. Parsell a plaintiff in the case, but he was called as a witness and gave material testimony relating to what occurred at a time when the other respondent's statement was taken, the facts concerning which he testified being directly in dispute. It appears that Mr. Parsell had been bedridden for some years, that this condition had no relation to the accident here in question which resulted in injuries to his wife, and the matter of sympathy which might be inspired in the jury arose only incidentally. This was not sufficient to deprive the respondents of the right to present their evidence and no error appears in this connection.

[11] Error is assigned in the denial of the appellant's motion to have the jury taken to the scene of the accident to view the alley where it occurred and the surrounding conditions. Nearly two years had elapsed since the accident occurred, there was no possible way of having the conditions the same, and the matter was peculiarly within the discretion of the trial court.

[12] The last point raised is that the court erred in refusing instructions requested by the appellant which included the following: "You are instructed that where a person undertakes to walk down a public alley, that is not provided with sidewalks for pedestrians, that the law requires such an individual to exercise a greater degree of care for their own safety and well-being than would be necessary in walking upon a sidewalk constructed and designed for the use of pedestrians." Other portions of these instructions, relating to the degree of care required of a plaintiff in walking along an alley, to knowledge of defects and obstructions, and to necessary precautions in view of existing conditions, were fully covered in other instructions which were given. The only question here is whether the appellant is entitled to an instruction to the effect that a higher degree of care is required of a pedestrian who walks along an alley than of one who walks along a sidewalk. This accident happened in the daytime and no question of darkness or inability to see is involved. The alley was a public way and open to traffic and there can be no question that this respondent had a right to walk through the same. While doing so, she was required to exercise reasonable care in view of existing conditions just as she would have been had she been walking along a sidewalk constructed especially for pedestrians. While the amount of care in either case might depend upon existing conditions, the degree of care which was required would be no higher merely because she was walking through an alley. The appellant was not entitled to the instruction in the form in which it was requested.

We find no error of law which is sufficient to justify a reversal.

The judgment is affirmed.

We concur: MARKS, J., MUNDO, J. pro tem.

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46 Cal.App.2d 195

TULLY et al. v. BAILEY et al.

Civ. 2774.

District Court of Appeal, Fourth District, California.

July 22, 1941.

1. Equity ⇨36

Jurisdiction of the person in the state includes power to compel conveyance and waivers as to interest in lands outside the state, and a decree directing conveyance and waivers does not operate directly on the property nor affect the title, and is made effectual through coercion of parties by directing some action on their part or by enjoining them from doing a certain thing.

2. Equity ⇨39(1)

A court of equity will give such relief as its powers and territorial jurisdiction authorize it to give, and it will not refuse any relief because it cannot give the full relief that plaintiff asks, or because it cannot act directly upon the premises to which the relief relates.

3. Equity ⇨36

A California court, having the power to decree a conveyance of land beyond its jurisdiction, has the power to require a quitclaim or waiver of interests in land outside its jurisdiction, and such court would have to go into the question of ownership in determining whether such an order should be made, and would have to find that the plaintiffs were entitled to the property as against the defendants, but the court would have no jurisdiction to go beyond that and attempt to quiet title to property beyond its territorial limits.

4. Equity ⚷36

In suit by alleged owner of Wisconsin land against California heirs of deceased life tenant to whom owner had allegedly conveyed land only for purpose of facilitating a sale thereof, to cancel deeds to tenant and to restrain heirs from asserting a claim under such deeds, California court properly determined ownership in order to support its judgment requiring heirs to quitclaim to owner, and that portion of judgment determining ownership was not invalid as quieting title to property outside jurisdiction of court.

5. Equity ⚷36

In suit by alleged owner of Wisconsin land against California heirs of deceased life tenant to whom owner had allegedly conveyed land only for purpose of facilitating a sale thereof, to cancel deeds to tenant and to restrain heirs from asserting a claim under such deeds, California court had jurisdiction to determine that alleged owner was the fee owner of the land, to enjoin heirs from asserting a claim to land, to adjudicate that deeds to tenant were void and subject to cancellation, to direct heirs to execute waivers of their claims to land, and to procure a dismissal of an action in the Wisconsin courts involving such land.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action to cancel deeds by Russel A. Tully and others against Herbert L. Bailey and others. From the judgment, the defendants appeal.

Affirmed.

Joseph O. Morris and Morton H. Eddy, both of Pasadena, for appellants.

Ray Howard and W. W. Comstock, both of Los Angeles, for respondents.

MUNDO, Justice pro tem.

This is an action to cancel certain deeds, to restrain defendants from making certain demands and committing certain acts, and to require defendants to execute waivers respecting certain real and personal property, a summer resort at Waupaca, Wisconsin. There are also a few articles of personal property located in California, but there is no real controversy respecting that property. It appears that Russel A. Tully, since 1931, has been the owner of the property; that Maude Downey was in possession thereof under a lease for life; that since her death the plaintiff Russel A. Tully has had exclusive possession of the property. While Maude Downey was in possession of the property she acted as agent for Tully in locating a purchaser of said property and for that purpose it was agreed that Russel A. Tully and his wife Annis Tully should execute a deed to be held by Maude Downey in order to facilitate the sale only, and not to be regarded as conveying any beneficial interest therein to Maude Downey. The deed was executed on September 6, 1935, and delivered to Maude Downey. Prior thereto, on or about March 10, 1931, Russel A. Tully, while a single man, had for the same purpose executed another deed and delivered same to Maude Downey. This deed is the subject matter of the second cause of action. Maude Downey left the deeds with the Scott Abstract Company for the purpose of consummating such intended sale when and if a purchaser thereof could be obtained. The property was not sold and the deeds were never recorded. When Maude Downey died on June 9, 1936, M. B. Scott was appointed administrator of her estate. As such administrator he had no design to claim the deeds as a part of Maude Downey's estate, and would not claim them unless a demand were made upon him by an heir of Maude Downey, in which event he would institute proceedings in the Wisconsin court having jurisdiction of the matter, for instructions, and to take title to the property if so instructed.

The heirs of Maude Downey are Mabel B. Howard and the defendants Herbert L. Bailey and Mary E. Potter, all of whom are within the state of California. The two defendants are asserting a claim under said deeds and are threatening to make a demand on Mr. Scott that he proceed to bring the property into the estate of Maude Downey so that it might be distributed to them.

The court found for the plaintiffs and decreed: (1) That plaintiff Russel A. Tully was, as against the defendants herein and each of them, the owner and entitled to the possession of the real and personal property herein referred to, and that the estate of Maude Downey, and the defendants herein as her heirs, has and have no interest therein, and that neither of the deeds herein referred to was delivered or intended to be delivered to Maude Downey, and that no title passed to her thereunder, and that any apparent title which did pass, and any actual title that might have passed to her, was only as trustee for Russel A. Tully and as his confidential agent, for the purpose of simultaneously conveying such title to a purchaser thereof for the sole account of Russel A. Tully, and that all claims of and acts by said defendants or either of them under either of said deeds constitutes an attempt to violate the confidence so reposed in Maude Downey. (2) That defendants are enjoined from asserting any claim under either of said deeds, either on behalf of said estate of Maude Downey or as her heirs, or making a demand upon M. B. Scott, as administrator of the estate of Maude Downey, deceased. (3) That as against defendants, said deeds are void and should be cancelled and that plaintiff Russel A. Tully was the owner of the personal property which had been removed to California. (4) That defendants are required and ordered to execute waivers of all claims upon all of said real and personal property, and Herbert L. Bailey is required to execute such waivers, stipulations and quitclaim deeds as shall be necessary or convenient for releasing said deeds from the custody of the clerk of the Circuit Court of Waupaca County, Wisconsin, and to procure a decree of said Circuit Court dismissing the action in said Circuit Court entitled Herbert L. Bailey v. Russel A. Tully, commenced on or about October 13, 1937.

Allen W. Scott was appointed as a commissioner of the court without bond for the purpose of doing each of said acts so required of the defendants and with full authority so to do on behalf of the defendants and each of them.

Appellants do not contend that the findings are not supported by the evidence, but that the case is one "basically which seeks to change or directly affect the title to real property beyond the territorial limit of the jurisdiction of this court; that the controversy involved in this case should be judicially determined and settled where admittedly the things and property involved are located where the events occurred and where the larger number of the witnesses reside."

[1] If we were to suppose that Maude Downey in her lifetime claimed the property as her own, there could be no doubt of the California court's right, if Maude Downey were in this state and properly served with process, to enjoin her assertion of title and require a reconveyance. And the same would seem to hold true in the case of appellants who were properly before the California court. Jurisdiction of the person in the state includes power to compel conveyance and waivers as to interests in lands outside the state. McGee v. Sweeney, 84 Cal. 100, 23 P. 1117. Such a decree does not operate directly upon the property nor affect the title. The decree is made effectual through the coercion of the parties by directing some action on their part or by enjoining them from doing a certain thing. Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074.

In Redwood Investment Company v. Exley, 64 Cal.App. 455, 221 P. 973, it was held that the court of a sister state has jurisdiction to entertain a bill in equity to compel specific performance of a contract to convey real property situated in this state where the plaintiff is a resident of such sister state and the defendant files an appearance in such action and makes defense. The court said (page 459 of 64 Cal.App., page 975 of 221 P.):

"There can be no question that real property is exclusively subject to the laws and jurisdiction of the state where located, and that no other laws or courts can affect it by an attempt to create, transfer or vest title thereto. Judgments or decrees, therefore, which are rendered in one state cannot of themselves affect title to lands in another. From the very nature of the property land must be governed by the lex loci rei sitae.

"But this does not mean that a decree directing a conveyance is without its effect per se. It may be pleaded as a basis or cause of action or defense in the courts of the state where the land is situated, and is entitled in such a court to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud."

The Supreme Court of the United States said in Muller v. Dows, 94 U.S. 444, 449, 24 L.Ed. 207: "It is here undoubtedly a recognized doctrine that a court of equity, sitting in a State, and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title."

In Promis v. Duke, 208 Cal. 420, 281 P. 613, the court held that even though the property covered by the deed improperly withdrawn from the escrow holder was situated outside of the state, the court having acquired jurisdiction of the parties had the power to grant the relief sought, namely, to declare a rescission of the contract covering the sale of the property, to have an accounting of the rents and profits received therefrom, and to secure a reconveyance of the property to the plaintiffs. See, also, Peninsular Trading & Fishing Co. v. Pacific Steam Whaling Co., 123 Cal. 689, 56 P. 604.

The rather early and oft-quoted case of Smith v. Davis, 90 Cal. 25, 27 P. 26, 25 Am. St.Rep. 92, held that a court of equity may appoint a trustee to carry out the terms of a trust respecting land in another state. On page 32 of the report in 90 Cal., on page 27 of 27 P. it is stated: "The decrees of courts of equity primarily and properly act in personam, and, at most, collaterally only in rem. If the parties are within the jurisdiction of the court, an injunction will be granted to stay proceedings in a suit in a foreign country. A trust will be enforced pertaining to realty, regardless of the situation of the property. Courts of equity have, as between the parties, reviewed the judgments of foreign courts, and even sales made under those judgments, when fraud or undue advantage was shown. A specific performance of a contract of sale of lands situated in a foreign country will be decreed in equity. * * * A decree to convey land lying in another state does not affect the title; it only operates upon the person who is to make the conveyance, and it is his act in making the deed that affects the title."

[2] A court of equity will give such relief as its powers and territorial jurisdiction authorize it to give. It will not refuse any relief because it cannot give the full relief that plaintiff asks or because it cannot act directly upon the premises to which the relief relates. Hobbs v. Tom Reed Gold Mining Co., 164 Cal. 497, 129 P. 781, 43 L. R.A.,N.S., 1112.

In Cole v. Manning, 79 Cal.App. 55, page 63, 248 P. 1065, page 1068, the court said: "While 'neither the decree nor any conveyance under it except by the party in whom title is vested is of any efficacy beyond the jurisdiction of the court,' and will not operate to change or directly affect the title to property in another state, nevertheless it was within the power of the court to direct a conveyance to be made by the defendant, and for that purpose it became necessary to first adjudicate ownership. The fact that an alternative direction to the clerk of the court to execute the deed was made a part of the decree does not, in our opinion, so far as this appeal is concerned, render the decree or that portion of it void, but, as held in Fall v. Eastin [215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65, 23 L.R.A.,N.S., 924, 17 Ann.Cas. 853], if executed, such deed will have no efficacy beyond the territorial limits of the court's jurisdiction."

[3] If, as we have shown, the court may decree a conveyance of land beyond its jurisdiction, it certainly has the power to require a quitclaim or waiver of interests in land outside its jurisdiction. Before the court would know whether it should make such an order, it necessarily would have to go into the question of ownership; it would have to find that plaintiffs were entitled to the property as against the defendants, but the court would have no jurisdiction to go beyond that and attempt to quiet title to the property beyond its territorial limits.

[4] It was proper for the court to determine ownership in order to support its judgment compelling the defendants to quitclaim, and it cannot be said that paragraph I of the judgment does more than that; it does not purport to quiet title to the property and it cannot be so construed.

[5] The injunctive relief granted by paragraph II of the judgment is within the jurisdiction of the court and proper under the evidence. We find no fault with paragraph III of the judgment. The requirements of paragraph IV of the judgment respecting the execution of waivers are proper and so are the requirements respecting the action in the Wisconsin court, although it might have been better to have required the defendant Bailey in good faith to try to have that action dismissed rather than to have required him to procure a dismissal thereof.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

46 Cal.App.2d 230

PEOPLE v. HART et al.

Cr. 3475.

District Court of Appeal, Second District, Division 1, California.

July 28, 1941.

1. Criminal law ⚷563

Proof beyond a reasonable doubt is not required to establish the corpus delicti, a prima facie showing being sufficient.

2. Gaming ⚷98(1)

Evidence was sufficient to establish the corpus delicti and sustain conviction of receiving, recording and accepting bids on horse races outside the enclosure of a race track. Pen.Code, § 337a, subds. 3, 4, 6.

3. Criminal law ⚷369(2)

In prosecution for receiving, recording and accepting bids on horse races outside the enclosure of a race track, admission of notebooks containing notations relating to records of bets on horse races upon days prior to arrest of accused was not error on ground that notations were evidence of crimes other than offenses with which accused were charged, since such notations tended to prove commission of offense with which accused were charged. Pen.Code, § 337a, subds. 3, 4, 6.

4. Criminal law ⚷369(2)

The rule against the admission of evidence of other crimes does not exclude such evidence when it tends to prove any fact necessary or pertinent to the proof of the crime for which a defendant is being tried.

5. Criminal law ⚷1178

Where no argument was presented with respect to an alleged ground for reversal, alleged ground for reversal was deemed to have been "abandoned."

See Words and Phrases, Permanent Edition, for all other definitions of "Abandoned".

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Jack L. Hart and others were convicted of receiving, recording and accepting bids on horse races outside the enclosure of a race track in violation of subdivisions 3, 4, 6 of section 337a of the Penal Code and they appeal.

Affirmed.

Wyman G. Reynolds, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellants were charged in an information containing three counts with violations of subdivisions 3, 4 and 6 of section 337a of the Penal Code, in that they received, recorded and accepted bids on horse races outside the enclosure of a race track. Trial was had without a jury and upon stipulation the transcript of the testimony taken at the preliminary hearing was considered by the trial judge, who found appellants guilty as charged. Motion for new trial having been denied, appellants were sentenced to the county jail for a term of six months on each count, such sentences to run concurrently. This appeal is prosecuted "from the order of judgment and sentence", upon the grounds: (1) Insufficiency of the evidence to sustain the judgment of conviction; (2) that the judgment is contrary to the law and the evidence; (3) that the court erred in its decisions on questions of law arising during the course of the trial; (4) that the deputy district attorney prejudicially misconducted himself during the trial.

Appellants urge that the evidence is wholly insufficient to establish the corpus delicti of the offenses charged in the information.

As is usual in cases of this character, the only evidence adduced at the trial was the testimony of the arresting officers. Police Officer Betterton testified that on January 15, 1941, while walking near the entrance to the Dome Bowling Alley in the City of Santa Monica, he "observed Jack Hart making a notation, consulting a scratch sheet and accepting the sum of fifty cents in money from a party he was talking to", and, although he heard none of the conversation, he "took Jack Hart into custody and took his notebook and the scratch sheet" from him. Hart was searched and from his pockets were taken two slips of paper containing names of horses, a National Scratch Sheet dated January 15, as well as seven sheets of papers which appeared to have been torn from the notebook and which contained the numbers of horses and notations of the amounts bet after each number. In addition, there was taken from appellant Hart's possession the Los Angeles edition of the official race entries, commonly known as a bootleg scratch sheet. The police officer testified he saw appellant Hart make the notation "344 ½ XX Otto", which he interpreted to mean as follows: "344 is a horse by the name of 'Chaldese' running in the sixth race at Santa Anita * * * ½ means fifty cents to win; * * * (XX) means there was no bet on the place, or no bet on the show. (Otto) would be the name of the party betting." Also, that the number 344 and other numbers recorded on the page of the notebook for January 15, 1941, corresponded with the numbers on the scratch sheet. This officer also testified that "Approximately at 4:10 I went over to * * * the Best Drug Store located at Pier and Speedway. On approaching the soda fountain I noticed the defendant Maser sitting at the counter accepting two one dollar bills and making notations in a notebook. I placed the defendant in custody and took him to Deputy Paxton for searching and further questioning. Upon checking this notebook, the last notations that he was making in his notebook corresponded to the names and numbers of a horse bet by Deputy Bowen immediately before this Maser was taken into custody." Officer Betterton also found in Maser's pockets, in addition to the scratch sheets, another notebook containing records of bets and results on horse races; the scratch sheets containing pencil notations of the results of various horse races.

Officer Bowen, a deputy sheriff, testified that prior to the arrest of appellant Hart, he observed that Hart was being contacted by various people, and that he saw one man pass paper money to Hart; that a minute or two later, said officer saw a man come out of the pool hall, approach Hart and say, "Don't take any more on this one"; whereupon Hart nodded his head in response. Officer Bowen then went into the pool hall, became acquainted with the man who was looking at a racing form and after some conversation with him, the officer gave him a dollar to bet on a horse named "Vain Bo". This man left the pool hall, went across the street to the drug store and gave the dollar to appellant Maser, Officer Bowen following him and observing the transaction. Immediately thereafter, Officer Betterton stepped up and arrested appellant Maser.

Officer Paxton, a deputy sheriff, testified both appellants were turned over to him for searching; that he took them into the pool hall and they laid their possessions on the pool table; that "about that time an elderly man came up to the defendant Hart and said 'I would like to make a bet on the eighth race', and at that time I told this elderly man that it was too late, and I showed him my badge. He says, 'What do you mean it is too late? The eighth race hasn't been run yet', and at that time Hart and Maser started laughing back and forth at each other and said, 'It is all over for today.' At that time the elderly man caught on and left."

In support of their contention that the corpus delicti was not proved, appellants rely upon the case of People v. Newman, 37 Cal.App.2d 627, 99 P.2d 1067. That case is easily distinguishable from the instant cause. In the Newman case there was a complete failure to identify through competent evidence the slips of paper containing betting notations as being the property of or in the possession of the defendant, while in the case at bar the incriminating notations were postively identified as being in the possession of appellants at the time of their arrest. Moreover, Officer Betterton saw appellant Hart make the notation "344 ½ XX Otto", hereinbefore referred to. Likewise said officer saw appellant Maser accept two one dollar bills and make notations in his notebook, and later, when the notebook was checked, it was found that the last notations made therein corresponded to the bet made by Officer Bowen on "Vain Bo" just prior to Maser's arrest.

[1, 2] We are satisfied that the evidence is sufficient to sustain the convictions and that appellants' claim that the corpus delicti was not established is without merit. It is not necessary that proof beyond a reasonable doubt be offered to establish the corpus delicti. All that is required is a prima facie showing. People v. Taylor, 40 Cal.App.2d 324, 104 P.2d 846, and cases therein cited.

[3, 4] In connection with their third point, appellants claim that the "court erred in receiving evidence which reflected that the defendants might have committed other crimes than as here charged." This contention is primarily based upon the introduction into evidence of the notebooks containing notations relating to records of bets on horse races upon days prior to their arrest. The rule against the admission of evidence of other crimes does not exclude

such evidence when it tends to prove any fact necessary or pertinent to the proof of the crime for which a defendant is being tried. People v. Burkhart, 211 Cal. 726, 731, 297 P. 11; see, also, People v. Schwartz, 14 Cal.App. 9, 12, 110 P. 969.

[5] Appellants present no argument with respect to their final point, i. e., misconduct of the deputy district attorney, and therefore, it must be assumed that they decided to abandon it.

The appeal from the sentence is dismissed. The judgments of conviction are affirmed.

We concur: DORAN, J.; WHITE, J.

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46 Cal.App.2d 234

PALM SPRINGS–LA QUINTA DEVELOPMENT CO. v. KIEBERK CORPORATION et al.

KIEBERK CORPORATION v. PALM SPRINGS–LA QUINTA DEVELOPMENT CO. et al.

Civ. 6597.

District Court of Appeal, Third District, California.

July 28, 1941.

Hearing Denied Sept. 25, 1941.

1. Reformation of Instruments 🔑11

Refusal to reform a written contract with respect to ownership and use of index cards and cabinets containing trade information to be used for procuring sales of real estate was proper, where language of contract was too clear and explicit to leave any doubt regarding intention of parties thereto concerning ownership and right of possession or use of cards.

2. Reformation of Instruments 🔑45(2)
Replevin 🔑72

In suit against a corporation to reform a written contract respecting custody and use of "lead cards" and cabinets containing trade information for use in procuring sales of realty, consolidated with action by corporation to replevin cards and cabinets and for damages for appropriation and loss thereof, evidence warranted judgment denying reformation of contract and awarding damages to corporation for conversion of personalty on ground that corporation was sole and exclusive owner of cards and cabinets, and that those against whom judgment was rendered had lost or appropriated part of the cards and had willfully used the cards and information thereon in a manner not designated and agreed upon in contract and in violation thereof.

3. Replevin 🔑82

In suit against a corporation to reform a written contract respecting custody and use of "lead cards" and cabinets containing trade information for use in procuring sales of realty, consolidated with action by corporation to replevin cards and cabinets and for damages for appropriation and loss thereof, an award of damages to corporation in amount of $6,500 for destruction or loss of cards and misuse of index card system contrary to terms of agreement between parties was not excessive under the evidence.

4. Replevin 🔑75

The misuse of "lead cards", which contained trade information to be used for procuring sales of realty, contrary to terms of an agreement between parties, was a proper element to consider in determining amount of damages for misuse of index card system in action to replevin cards and for damages for appropriation and loss thereof.

5. Replevin 🔑82

In suit against a corporation to reform a written contract respecting custody and use of "lead cards" and cabinets containing trade information to be used for procuring sales of realty, consolidated with action by corporation to replevin cards and cabinets and for damages for appropriation and loss thereof, evidence sustained finding that 2,000 master cards had been lost or destroyed by those against whom judgment was rendered and that cards were worth $3.25 a piece, and hence judgment for corporation for $6,500 for destruction or loss of master cards was proper.

6. Contracts 🔑326

An action for damages could be maintained for destroying and appropriating tangible personal property, which consisted of a cabinet of lead cards containing names and valuable information regarding prospective and actual purchasers of real estate, contrary to express terms of a written contract.

7. Damages 🔑71

An allowance of $7,000 as attorneys' fees to successful party in suit for reformation of a written contract respecting personalty, consolidated with an action to replevin personalty, and for damages for appropriation and loss thereof, was not excessive, where contract provided for reasonable attorneys' fees for services rendered in litigation involving the property, and pleadings were lengthy and involved, and settling of issues and trial consumed 45 days of court work, and a high degree of legal skill was necessary on part of successful party's attorney to meet contentions of adverse counsel.

8. Appeal and error 🔑984(5)
Attorney and client 🔑140

A trial court is vested with sound discretion to fix the value of attorneys' fees in litigation pending before it, and its judgment regarding the sum which is deemed to reasonably compensate counsel therefor will not be disturbed, in absence of clear and apparent abuse of discretion.

9. Attorney and client 🔑140

In determining what constitutes a "reasonable attorney's fee", the trial court may take into consideration not only the amount or value of property involved, but also the intricacy and importance of litigation, the labor and necessity for skilled legal training and ability in drawing the pleadings and trying the cause, and the time consumed therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Attorney's Fee".

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Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Suits, consolidated for trial, by the Palm Springs-La Quinta Development Company against the Kieberk Corporation and others for reformation of a contract, wherein the Kieberk Corporation, which was succeeded by the Kiener Corporation, filed an answer and cross-complaint, and by the Kieberk Corporation against the Palm Springs-La Quinta Development Company and others to replevin certain "lead cards" and cabinets, wherein cross-complaints were filed. From an unsatisfactory judgment, the Palm Springs-La Quinta Development Company and others appeal.

Affirmed.

S. W. Newman, of Los Angeles, for plaintiff, cross-defendant and appellant.

Pacht, Pelton, Warne & Black, of Los Angeles (Isaac Pacht, of Los Angeles, of counsel), for defendant, cross-complainant and respondent.

I. B. Kornblum, of Los Angeles, for defendant, cross-complainant and appellant Walter Hast.

THOMPSON, Justice.

This is an appeal from a judgment rendered in two consolidated cases denying reformation of a contract and awarding the Kiener Corporation damages of $6,500 for conversion of personal property, together with attorneys' fees in the sum of $7,000.

The first suit sought to reform a contract with relation to the custody and use of 27,000 "lead cards" and cabinets, together with trade information therein contained to be used for procuring sales of real property. The contract is attached to the complaint and marked Exhibit "A". To that complaint the Kieberk Corporation, which was succeeded by the Kiener Corporation, filed an answer and cross-complaint, seeking possession of the cards, damages for detaining them and counsel fees pursuant to a stipulation contained in the contract.

The second cause of action by the Kieberk Corporation was to replevin the cards and cabinets and for damages for appropriation and loss thereof, together with an application for injunction to prohibit the disposition or use of the cards, and for counsel fees pursuant to the stipulation contained in the contract. Answers and cross-complaints were filed by the interested parties to this proceeding.

The suits were consolidated for trial. The trial of the actions consumed forty-five days. The printed transcript contains 1,333 pages of pleadings, proceedings and evidence. The court adopted findings favorable to the Kieberk Corporation in every material respect. Judgment was rendered accordingly, denying reformation of the contract, determining that the Kiener Corporation is the owner and entitled to possession of the lead cards and cabinets, and awarding it damages in the sum of $6,500 for the appropriation and loss of 2,000 of the master cards, together with $7,000 attorneys' fees. From that judgment this appeal was perfected.

The appellants contend that the findings and judgment are not supported by the evidence; that the court erred in denying reformation of the contract; that the damages awarded for the loss of lead cards is excessive and that the amount allowed as attorneys' fees is also excessive.

From 1925 to January, 1936, Harry Kiener was engaged in promoting the subdivision and sale of several tracts of real property in southern California. He resided in Los Angeles. For that purpose he organized successive corporations. The first corporation was called the Kieberk Corporation, of which he was president, manager and sole owner. Subsequently he organized the Kiener Corporation, which became the successor of the Kieberk Corporation, and the owner of all its property and assets. He also organized certain auxiliary corporations which were conducted as recreational clubs to which large numbers of individuals were induced to join with fishing, hunting, swimming and golfing privileges. They were all conducted under the primary management of Mr. Kiener and his organizations. His object in organizing the recreational clubs was to procure prospective purchasers of acreage and lots of land in the various subdivisions which he was promoting. One of these subdivisions was called the La Quinta Tract near Palm Springs in Riverside county, which was handled by the plaintiff, Palm Springs-La Quinta Development Company, under contract. It sold numerous lots to the customers of the Kiener Corporation by means of the information derived from the card system belonging to the respondent company. These sales were made on installment contracts. In January, 1936, the unpaid installments on those contracts amounted in the aggregate to $350,000. The Palm Springs Company then owed the Kiener Corporation $40,000 as its share of the proceeds of sales.

In the management of the Kiener organizations and in the subdivisions and sales of lots a detailed system of indexed members and prospective purchasers was installed in cabinets, including some 27,000 cards and a similar number of duplicates thereof, with the names, residences, financial standing, prospect of sales and status of contracts of each member. These cabinets were kept in the office of the Kiener Company in the National City Bank building at number 508 South Spring street in Los Angeles.

In January, 1936, Mr. Harry Kiener became ill and contemplated the necessity of retiring from active business. The contract of the Palm Springs-La Quinta Development Company, with respect to the subdivision of land and the sale of lots, together with its realty business, was assigned February 1, 1936, to the defendants Louis N. Berkowitz, Walter Hast, Frank Stone and Edward Glick for a period of ten years, together with the lease to the office above referred to, in which the filing cabinets and index cards were kept. As a part of that transaction and incident thereto the agreement marked Exhibit "D", the construction of which furnishes the chief controversy of this litigation, was executed February 14, 1936, by the respective parties to the previously-mentioned assignment of contract, and by Harry Kiener, as president of the Kieberk Corporation. The agreement of February 14th recites that the 27,000 original index cards and the cabinets in which they are contained in the office at number 508 of the bank building above referred to are not sold or conveyed to the Palm Springs-La Quinta Development Company, but, on the contrary, that it is permitted to use them and the data therein contained only for the limited purpose and in the manner specifically mentioned in the contract. That agreement then provides that: "Said lead cards and cabinets may at any time be removed and taken from your office or any other place where such may happen to be by the Kieberk Corporation, with or without demand; further, that you [the Palm Springs Corporation] agree to keep the lead cards and cabinets free from any destruction or improper use or any use other than above stipulated."

Finally, the agreement stipulates that the Kieberk Corporation shall be entitled to recover "a reasonable attorney's fee for services rendered", together with costs and damages, in any action necessarily maintained with respect to the ownership, title or possession of the index cards and cabinets.

[1] We are entirely satisfied the court did not err in refusing to reform the agreement dated February 14, 1936, with respect to the ownership and use of the index cards and cabinets. The language of that document appears to be too clear and explicit to leave any doubt regarding

the intention of the respective parties thereto concerning the ownership, right of possession or use of the so-called lead cards.

[2] While there is a conflict of testimony regarding the ownership and use of the index cards, there is ample evidence in the record to support the findings and judgment that the Kiener Corporation "is the sole and exclusive owner of * * * lead cards, and entitled to the possession thereof, the information thereon set forth, and the cabinets in which the lead cards were contained". The very agreement, which was signed by all of the appellants, clearly indicates that fact.

[3, 4] We are unable to say the award of damages in the sum of $6,500 for the destruction or loss of 2000 master lead cards and the misuse of the index card system contrary to the terms of the agreement of February 14, 1936, is excessive. The contract restricts the use of information derived from the lead cards to sales of real property to "members of the Peter Pan Woodland Club", or to "sell properties at La Quinta" belonging to the Palm Springs Land and Irrigation Company or to the Big Bear Land and Water Company. This limitation of the use of the cards was specified in the contract for the reason that the Palm Springs Company was then indebted to the Kiener Corporation in the sum of $40,000 and it was interested in the consummation of sales of those particular properties. That card system had been perfected by Mr. Kiener and his corporation at great expense in a long period of time. The sales of lots or the use of the information contained in the cards for the benefit of other realty firms, or for the disposition of other properties, would naturally diminish the chance of selling or consummating sales of the particular properties to members of the organizations represented by the index card system. That misuse of the cards contrary to the terms of the agreement was a proper element to consider in determining the amount of damages. The court not only found that the appellants had lost, destroyed or appropriated 2,000 master cards and 15,500 duplicate cards, but also that they knowingly and wilfully "have used and continue to use, the lead cards and the information thereon contained in a manner not designated and agreed upon in said agreement, and in violation thereof". There is substantial evidence to support those findings.

[5] It satisfactorily appears that the system of index cards was acquired by the respondent at a very great expense during a long period of time by organizing and securing thousands of members of different recreational clubs. The names of members of the various clubs, together with valuable information regarding sales of lots or prospects for such sales, their financial standing, the names of agents and the dates of interviewing members and status of contracts were recorded on separate master cards, which were alphabetically arranged in appropriate cabinets. Duplicate cards were also kept in other cabinets. There is ample evidence that the Kieberk Corporation expended thousands of dollars in procuring the information from which these cards were made. They furnished the information from which sales and contracts for installment sales of lots were made, aggregating a sum approximating a million dollars. Large numbers of these conditional sales are incomplete. Some of the purchasers were in default of stipulated payments. Many of the cards contained names of members of clubs to whom no property had been sold. Access to the cards and the information therein contained is most valuable and necessary to complete contracts of sales as well as to furnish information for other good prospects for sales. There is ample evidence from which it may be estimated the preparation of the master cards cost the Kieberk Corporation in excess of $3.25 per card, and that they are reasonably worth that sum of money. The court found that 2,000 of those master cards had been lost or destroyed by the appellants and that the respondent was damaged thereby in the sum of $6,500. No damages were allowed for the loss of some 15,000 duplicate cards. The damages allowed for the loss of the master cards amounts to only $3.25 apiece. We are of the opinion there is ample evidence to support that finding and award.

In support of their contention that damages will not lie for the appropriation, loss or conversion of a list of customers, together with information which may constitute such individuals valuable prospects for sales of real property, they rely on the case of Olschewski v. Hudson, 87 Cal.

App. 282, 262 P. 43, 44. It was a suit for damages against an agent of a laundry company, founded on an alleged conversion of a laundry route by a purported sale of a specified district in San Francisco to a competing laundry company. The trial court held that the complaint failed to state a cause of action. The plaintiff refused to amend his complaint after a demurrer thereto had been sustained. The appellate court sustained the judgment which was accordingly rendered. The court merely held that while the property rights of a laundry company to trade knowledge possessed by its agent would be protected in an appropriate proceeding, a mere laundry district in a specified locality does not constitute such tangible property rights as may be subject to an action in trover or conversion. No cabinet of index cards or specific list of customers was involved in that action. The court said in that regard: "It is not affirmatively alleged that he had a list or memorandum of the names of customers, either written or otherwise, or that he had access to any such list."

The defendant in that case was not charged with converting an index list of customers. He was charged with selling the good-will of a business in a specified district. This court merely held that was an intangible property right which is not susceptible of conversion.

[6] In the present case the appellants were charged with damages for destroying and appropriating tangible personal property consisting of a cabinet of lead cards containing the names and valuable information regarding prospective and actual purchasers of real property, contrary to the express terms of a written contract. There is a clear distinction between these cases. The Olschewski case is not in point.

[7, 8] We may not hold, under the circumstances of this case, that the trial court abused its discretion in allowing the respondent $7,000 as attorneys' fees for defending the action. The contract of February 14, 1936, which is attached to the complaint and marked Exhibit "D", stipulates to "a reasonable attorney's fee for services" rendered in any litigation involving the property in question. The pleadings in the action to replevin the "lead cards" and cabinets, and in the suit involving the construction of the contract above referred to are unusually lengthy and involved. A temporary restraining order was also issued. The chief issue was the ownership and right of possession of those cards and cabinets. The settling of the issues and the trial of the cause consumed about forty-five days of actual court work. The printed transcript on appeal contains 1,333 pages. Numerous counsel represented various parties to the actions. The cause was strenuously contested. The record indicates that the legal services in question must have been reasonably worth the sum allowed by the court. The rule is thoroughly established that a trial court is vested with sound discretion to fix the value of attorneys' fees in litigation pending before it, and that its judgment regarding the sum which is deemed to reasonably compensate counsel therefor will not be disturbed in the absence of clear and apparent abuse of discretion. Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal.App. 268, 274, 25 P.2d 224; Hedden v. Waldeck, 9 Cal.2d 631, 639, 72 P.2d 114.

[9] In determining what constitutes a reasonable attorney's fee the court may take into consideration not only the amount or value of the property involved, but also the intricacy and importance of the litigation, the labor and necessity for skilled legal training and ability in drawing the pleadings and trying the cause and the time consumed therein. 3 Cal.Jur. 697, sec. 96. In the present case it is evident that a high degree of legal skill was necessary on the part of respondent's attorney to meet the contentions of numerous adverse counsel. The quality of the legal services which were rendered and the unusual length of time consumed in the litigation certainly merit the allowance of a considerable sum of money as attorneys' fees. We are of the opinion the sum which was allowed is not excessive.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

46 Cal.App.2d 129

CHRISMAN et al. v. CULINARY WORKERS' LOCAL UNION NO. 62, et al.

Civ. 2594.

District Court of Appeal, Fourth District, California.

July 18, 1941.

Hearing Denied Sept. 15, 1941.

1. Injunction 🔑101(1, 3)

Peaceful picketing is lawful and may not be enjoined even though there is no dispute over conditions of employment between an employer and his employees; however, picketing which is not peaceful is unlawful and may be enjoined.

2. Constitutional law 🔑90

The right of labor unions to peacefully picket finds its support in the right of free speech which is but one of constitutional personal liberties guaranteed in the Bill of Rights.

3. Constitutional law 🔑82

The personal liberties guaranteed in the Bill of Rights are not absolute in themselves, but each must be measured by public welfare and must be limited by it.

4. Injunction 🔑101(1)

Where evidence supported finding that pickets shouted in unison in a loud and boisterous manner and disturbed peace and quiet of neighborhood and thereby interfered with peaceful enjoyment of owners of soda fountains of their properties, owners were entitled to injunction against such conduct. Pen.Code, § 415.

5. Injunction 🔑34

The courts will protect, by injunction, the right of a property owner to quiet and peaceful enjoyment of his property free from the unlawful invasion of such right by another.

6. Constitutional law 🔑90
Injunction 🔑101(1)

Members of union picketing soda fountains of owners who refused to execute contract with union were required to exercise their right of free speech in such a manner that they would not invade owners' right to quiet and peaceful enjoyment of their properties, and acts of members invading such rights would be enjoined.

7. Injunction 🔑101(1)

Members of union picketing soda fountains of owners who refused to execute contract with union had no right to obstruct driveways leading into owners' properties or interfere with right of ingress and egress of patrons, and, if evidence established that members engaged in such acts, owners would be entitled to an injunction against such acts.

8. Injunction 🔑128

Evidence, consisting only of testimony of one of owners of soda fountains, which were being picketed by members of union with which owners refused to execute a contract, was insufficient to support finding that members were obstructing driveways leading to owners' properties and interfering with right of ingress and egress of patrons, so as to warrant an injunction enjoining such acts.

9. Injunction 🔑128

Evidence was insufficient to support finding that members of union picketing soda fountains of owners who refused to execute contract with union frequently trespassed on owners' properties, looked through windows and annoyed and harassed the guests, so as to warrant an injunction enjoining such acts.

◆

Appeal from Superior Court, Fresno County; Frank Lamberson, Judge.

Suit by Lloyd D. Chrisman and another against the Culinary Workers' Local Union No. 62, etc., and others to enjoin defendants from picketing plaintiffs' premises, wherein plaintiffs' employees filed a complaint in intervention wherein they joined with plaintiffs in seeking to have the picketing enjoined. From a judgment enjoining defendants from picketing plaintiffs' premises, the defendants appeal.

Reversed and remanded for new trial.

Clarence E. Todd, of San Francisco, and B. M. Benson and Glenn M. DeVore, both of Fresno, for appellants.

Strother P. Walton and Lawrence Kennedy, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment which enjoined defendants from maintaining a picket around the premises of plaintiffs. In fairness to all parties it should be observed that the complaint was filed on August 15, 1937; the cause was tried on October 18, 1937, and the judgment was filed on February 24, 1938, over two years before the decisions by the Supreme Court of the six cases we will hereafter cite.

It is alleged in the complaint that Culinary Workers' Local Union No. 62 (hereafter referred to as the Union), was an unincorporated labor union composed of cooks, waiters and other culinary workers in and about the city of Fresno; that George Rollis was the president, Helen L. Mallory the secretary, and Jack R. Racovich the business agent of the Union.

It is alleged and not denied that for thirteen years plaintiffs had owned and operated a drug store and soda fountain at 2448 Stanislaus street, in the city of Fresno, under the name of "Chrisman's Pharmacy"; that since September 26, 1936, they also owned and operated a restaurant and soda fountain at 1035 Olive avenue, in the city of Fresno, under the name of "Chrisman's Drive-In Restaurant and Soda Fountain"; that in the operation of these businesses they regularly employed not less than thirty-six persons.

It is further alleged that for several months prior to May, 1937, the Union, through its officers and agents, tried to get the plaintiffs to execute a contract with the Union whereby plaintiffs would be bound by union rules in the operation of their two places of business, and, in the event of the refusal of plaintiffs to sign the contract, threatened to take such retaliatory measures as would render such businesses unprofitable; that plaintiffs refused to sign the contract; that as a result defendants have continuously employed pickets to picket the two places of business; that the pickets walk up and down the sidewalks adjoining the premises displaying special editions of the Tri-County Labor News which are not offered for sale; that the papers carry large headlines reading "Chrisman's Unfair"; that the picket is maintained daily at the Olive street place from 5 to 9 o'clock each afternoon by between three and thirty-five pickets; that the pickets shout the headlines of the paper in such loud tones of voice that they can be heard several hundred feet, disturbing the quiet of the neighborhood and giving the impression that fights and brawls are in progress so that prospective patrons have avoided and refused to enter the places of business; that the pickets frequently leave the sidewalks and trespass upon the property of plaintiffs although requested not to do so; that they look through the windows and thus annoy and harass the patrons; that the Olive street place has a parking space on the plaintiffs' property which is reached by driveways from the abutting streets; that the pickets make a practice of standing in the driveways, thus obstructing them, making it difficult for patrons to use them; that all of these practices have been done and carried on continuously and constantly since May 15, 1937.

It is further alleged that none of the employees of plaintiffs are members of the Union and that they do not desire to become such members nor do they desire plaintiffs to execute the contract with the Union; that there is no controversy of any kind between plaintiffs and their employees; that the acts of defendants have seriously damaged plaintiffs in their businesses.

Thirty-nine of the plaintiffs' employees, being all of them at that time, filed a complaint in intervention wherein they joined with plaintiffs in seeking to have the picket enjoined. Their pleadings follow closely the allegations of the complaint, with additions to the effect that the interpleaders do not desire to have the Chrismans sign the Union contract as such contract will compel their discharge from their employment.

Defendants admitted their maintenance of the picket but denied all acts coming without the usual definition of peaceful picketing.

A brief trial was had. The trial court found all facts in favor of plaintiffs and in accordance with those facts which we have outlined, and enjoined the picket. This appeal followed.

[1] It is now settled in California that peaceful picketing is lawful and may not be enjoined even though there is no dispute over conditions of employment between an employer and his employees. Lisse v. Local Union No. 31, 2 Cal.2d 312, 41 P.2d 314; McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; Lund v. Auto Mechanics' Union No. 1414, 16 Cal.2d 374, 106 P.2d 408; Renzel Co. v. Warehousemen's Union I. L. A. 38-44, 16 Cal.2d 369, 106 P.2d 1; Shafer v. Registered Pharmacists Union Local 1172, 16 Cal.2d 379, 106 P.2d 403; Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414; In re Lyons, 27 Cal.App.2d 293, 31 P.2d 190.

It is equally well settled by these cases and the many others relied upon to support the conclusions there reached, that picketing which is not peaceful is unlawful and may be enjoined.

It would be of no particular value to anyone to review here the long opinions filed in the cases just cited. They establish the interpretation of the law on peaceful picketing in California which must be followed by all inferior courts. Only the Supreme Court can modify such interpretation unless the legislature acts. Therefore, the task presented here is to apply those rules, as we understand them, to the facts of the instant case.

[2, 3] The right to peacefully picket is said to find its support in the right of free speech which is but one of the constitutional personal liberties guaranteed in the Bill of Rights. The courts have very generally placed freedom of worship and freedom of speech at the head of the list of these civil liberties and perhaps rightly so. However, none of those liberties is absolute in itself. Each must be measured by the public welfare and must be limited by it. These constitutional guarantees of personal liberties must be correlated if any are to live, for if one becomes predominant it will destroy the others and the one will then be consumed by fire generated by its own power.

It is clear that the judgment in this case is too broad and enjoins acts that are now regarded as lawful. There are but three classes of acts alleged and found that now may be enjoined. We will devote our attention to them.

[4] It is alleged and found that the pickets shouted in unison in a loud and boisterous manner and disturbed the peace and quiet of the neighborhood and thereby interfered with plaintiffs' peaceful enjoyment of their properties. Such conduct is unlawful. 28 Am.Jur. 339; sec. 415, Pen. Code. There is evidence supporting this finding.

[5, 6] Ever since the famous church bells case in England, the courts of that country and of the United States have protected, by injunction, the right of a property owner to the quiet and peaceful enjoyment of his property free from the unlawful invasion of that right by another. Defendants must exercise their right of free speech in such a manner that they will not invade the right of plaintiffs to the quiet and peaceful enjoyment of their properties. Their acts invading these rights may be and were rightly enjoined.

[7] It is alleged, and the trial court found, that the pickets gathered upon and obstructed the driveways leading into plaintiffs' Olive street property and interfered with the right of ingress and egress of patrons. The pickets had no lawful right to do this, for, as said by the Supreme Court in Lisse v. Local Union No. 31, supra, 2 Cal.2d at page 321, 41 P.2d at page 318, "if it appears that the object of the picketing is to interfere with those passing in or out by other than persuasive means, it is illegal; but that, if the design of the picketing is to see who can be the subject of persuasive inducement, such picketing is legal".

[8] The only evidence in the record tending to support the finding of obstruction of the driveways is the following in the testimony of Mr. Chrisman: "We have two entrances, one on Olive Avenue and one on our own property. These entrances are places possible for customers to walk in to get into the place of business. Besides, we have entrances where they drive in. I have alleged in my complaint that the pickets from time to time walked across the sidewalk in a way as to interfere with persons driving in." This evidence is not sufficient to support the finding that the pickets obstructed the free use of the driveways so this portion of the injunction cannot be sustained.

[9] It is alleged and found that the pickets frequently trespassed on plaintiffs' property, looked through the windows of the restaurant and annoyed and harassed the guests. Plaintiffs are entitled to the quiet and peaceful enjoyment and use of their property. If the alleged acts interfered with this right and caused them injury, they may be enjoined. Gilly v. Hirsh, 122 La. 966, 48 So. 422, 20 L.R.A.N.S., 972.

The only evidence supporting the finding is in the following testimony of Mr. Chrisman: "They (the pickets) would step over on to my property, and if the people were sitting on my property in their cars getting orders filled for food and milk shakes, the pickets would come over and talk to them in loud voices." There is no evidence concerning the pickets looking through the windows of the restaurant and harassing the guests, which was found, so the evidence offered does not support the finding.

As many acts are enjoined which must now be regarded as lawful, and as portions of the judgment which enjoins unlawful acts are not supported by any sufficient evidence, the judgment may not be supported here. Plaintiffs should be permitted to file an amended complaint if they desire to do so.

The judgment is reversed and the case is remanded for a new trial.

We concur: BARNARD, P. J.; GRIFFIN, J.

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46 Cal.App.2d 189

JORGENSEN et al. v. EAST BAY TRANSIT CO.

Civ. 11535.

District Court of Appeal, First District, Division 2, California.

July 22, 1941.

Rehearing Denied Aug. 21, 1941.

Hearing Denied Sept. 15, 1941.

1. Trial 🔑260(8)

In action against bus company for death of passenger from injuries allegedly sustained on bus, refusal to give plaintiffs' requested instruction making bus company liable for acts caused by sudden starting of bus by ordinary motions or otherwise was not error, where subject matter of such instruction was correctly set forth in instructions clearly delineating the difference between jerking motions caused by ordinary movements and by such motions caused by negligent operation of bus.

2. Negligence 🔑121(2)

The presumption or inference arising from doctrine of "res ipsa loquitur" cannot be availed of, or is overcome, where plaintiff has full knowledge and testifies as to the specific act of negligence which is the cause of the injury complained of, or where there is direct evidence as to the precise cause of the accident and all the facts and circumstances attendant upon the occurrence clearly appear.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

3. Carriers 🔑321(23)

In action against bus company for death of passenger from injuries allegedly sustained on bus, refusal to give plaintiffs' requested instruction that a showing that passenger was injured on bus established prima facie case for plaintiffs and created prima facie inference of negligence which threw on bus company the burden of showing that the injuries were sustained without negligence on part of bus company was not error, where bus company's witnesses testified positively that there was no violent or unusual jerk of the bus.

4. Trial 🔑244(4)

In death action wherein certified copies of deceased's death certificate were offered in evidence and used by both parties, refusal to give plaintiffs' requested instruction quoting provisions of Code of Civil Procedure defining prima facie evidence and inferences, and instruction quoting provisions of Health and Safety Code defining evidentiary effect of death certificate was not error, since plaintiffs were not entitled to have the trial court stress a specific part of the evidence. Code Civ.Proc. §§ 1833, 1958; St.1939, p. 751, § 10551.

5. Trial 🔑260(8)

In action against bus company for death of passenger from injuries allegedly sustained on bus, refusal to give plaintiffs' instructions presenting two alternative theories to show that alleged accident caused death of passenger was not error, where plaintiffs' other instructions which were given fully covered both theories.

◆

Appeal from Superior Court, Alameda County, Leon E. Gray, Judge.

Action by Nannie S. Jorgensen and others against the East Bay Transit Company for damages for the death of the named plaintiff's husband from an injury allegedly sustained while a passenger on one of defendant's busses. From a judgment for the defendant, the plaintiffs appeal.

Affirmed.

Nathan G. Gray, of Berkeley, for appellants.

Donahue, Richards & Hamlin, of Oakland, for respondent.

STURTEVANT, Justice.

While riding in one of the passenger busses of the defendant, Frederick C. Jorgensen fell or was thrown against the back of a seat. He suffered an injury at the time. About three months later he died.

Nannie S. Jorgensen, his widow, and four adult children, commenced this action to recover damages alleging that the injury exacerbated a pre-existing ailment and caused the death of the decedent. The jury returned a verdict in favor of the defendant and from the judgment entered thereon the plaintiffs have appealed. They contend that the trial court committed prejudicial errors in refusing to give several instructions which the plaintiffs asked.

The transcript sets forth the charge of the court and the instructions which were given by the court acting upon the request of the plaintiffs or the request of the defendant. The jury was instructed with most meticulous care on every point of law except as will hereinafter be noted. Before we proceed it should also be mentioned that at the end of the plaintiffs' case the defendant immediately proceeded to take up the proof; and, if we understand the record correctly, it produced every one of its employees who might have been driving the bus in which the alleged injury was caused.

[1] In defendant's instruction No. 2, which was given by the trial court, the difference between jerking motions caused by ordinary movements and by such motions caused by negligent operation of cars was clearly delineated. Plaintiffs' instruction No. 1, which was not given, was as follows: "In order to make out a prima facie case against the defendant East Bay Transit Company, a corporation, in this action, it is sufficient for the plaintiffs to show that the decedent, Frederick C. Jorgensen, received an injury that was one of the proximate causes of his death, and that such injury, if any, was sustained by the decedent while he was a passenger upon one of the automobile coaches of, and being operated by the defendant on Sacramento Street, in the City of Berkeley, and that said injury, if any, was sustained by decedent by reason of his being thrown against a seat in the interior of said automobile coach by the sudden starting of said coach by said defendant, East Bay Transit Company, a corporation, after said coach had been stopped for the purpose of enabling the decedent to board it. The law does not impose upon the plaintiffs the duty of showing that at the time of said accident the decedent was free from fault, or did not contribute by his own negligence to the injury, if any, that is referred to in the complaint." It will be noted at once that it, in effect, would hold that the defendant would be liable for acts caused by the sudden starting of the coach whether by its ordinary movements or otherwise. The subject matter was correctly set forth in defendant's instruction No. 2 and plaintiffs' instruction No. 4, which were given, and the court did not err in refusing to give plaintiffs' instruction No. 1.

[2, 3] Plaintiffs' instruction No. 12, which the trial court refused to give, was as follows: "A prima facie case for the plaintiffs is established when the plaintiffs show that the decedent was injured while being carried as a passenger by the defendant, East Bay Transit Company, a corporation, and that said injury, if any, was one of the proximate causes of the death of the decedent, and that such injury, if any, was caused by the act of the defendant in the exclusive control of the movement of the coach used in its business. In such cases there is a prima facie inference of negligence which throws upon the defendant the burden of showing that the injury, if any, was sustained without negligence on its part." As shown above the plaintiffs had introduced evidence to the effect that when the decedent was taking his seat he fell or was thrown back against the seat just as the car was starting up. The defendant's witnesses had testified that at the time and place mentioned in the complaint the defendant's coach did not start with any unusual jerk or motion. When the record so stood said instruction was asked. Before we proceed it is proper to state the condition of the record as it stood at that time. The plaintiffs had called as their witness Charles Garlinghouse. He and Frederick C. Jorgensen, the deceased, were fellow employees working for the Albers Company at the mole in Oakland. Both were working night shifts, both resided in Berkeley, and both rode at times on the busses. At the time of the accident complained of Mr. Garlinghouse had boarded the bus and was in his seat when the defendant entered the bus and took his seat. No other passengers were in the bus. Mr. Garlinghouse testified that it was at ten minutes after ten in the evening. Speaking of the movements of the car, in substance, he testified: "Well, to tell you the truth at the time I didn't think anything about it. I was sitting alongside the window. The bus started with a jerk and threw him back against the seat. I don't know how to describe it any more

than that the bus started with a jerk. I cannot recall now whether I felt the jerk. It is hard to tell. You feel most all of the jerks on the bus. He was just sitting down when the bus started and threw him back, you see. I cannot say whether he had started to bend his knees to sit before the accident occurred. My best recollection is, though, he was in the act of sitting down." No complaint was made of an accident until six weeks later. At the time of the trial the defendant called as witnesses W. B. James, L. L. Barker, and W. B. Basserman. Each was one of the bus drivers on the night of the accident. Mr. James drove the bus which left the junction of Sacramento street and Virginia street at ten minutes past ten. He testified directly and positively that there were no unusual jerks or motions of the bus. Mr. Barker drove the bus leaving at 9:50, and testified positively that there was nothing unusual in starting or stopping the bus. Mr. Basserman testified that he drove the bus leaving at 10:30 and that he did not stop at the above-mentioned point. The uncontradicted evidence was that the deceased was a passenger on one of the busses being operated at the time and place alleged in the complaint of the plaintiffs; that he fell back against the back of the seat he was about to occupy; and that his act was caused by the movement of the bus. The sole fact to be tried was whether there was an unusual or violent movement or jerk of the bus. McIntosh v. Los Angeles Ry. Corp., 7 Cal.2d 90, 59 P.2d 959. As to that fact it will be noted there was no conflict in the evidence. Plaintiffs' witness did not testify directly nor in effect that there was a violent or unusual jerk. Defendant's witnesses testified positively that there was not. Both sides had given direct evidence on the subject. In 45 C.J. 1206, the general rule is stated as follows: "Hence the presumption or inference arising from the doctrine cannot be availed of, or is overcome, where plaintiff has full knowledge and testifies as to the specific act of negligence which is the cause of the injury complained of, or where there is direct evidence as to the precise cause of the accident and all the facts and circumstances attendant upon the occurrence clearly appear." The rule so stated obtains in this state. Connor v. Atchison, etc., R. Co., 189 Cal. 1, 5, 6, 207 P. 378, 26 A.L.R. 462; Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Carlsen v. Diehl, 57 Cal.App. 731, 737, 208 P. 150.

[4] Plaintiffs' decedent died October 12, 1939. Until shortly prior to his death he had been cared for at the county hospital in Alameda county. After his death Dr. G. V. Mason, the autopsy surgeon, executed and caused to be recorded a death certificate. During the trial both the plaintiffs and the defendant produced certified copies of that death certificate. The plaintiffs offered their copy in evidence. It was received without objection, was used by both parties, and moreover, after the jury had retired to deliberate on their verdict they sent for the death certificate and the court promptly ordered it sent to the jury room. The plaintiffs asked an instruction quoting the provisions of the Code of Civil Procedure, section 1833, defining prima facie evidence, another quoting the provisions of section 1958, defining inferences, and another quoting the provisions of section 10551 of the Health and Safety Code, St.1939, p. 751, which defines the evidentiary effect of a death certificate. All three instructions were refused. Such refusal did not constitute error. All three of the proposed instructions were addressed to one specific piece of evidence—the said death certificate. The plaintiffs were not entitled to have the trial court stress a specific part of the evidence". Jesse v. Giguiere, 24 Cal. App.2d 160, 165, 74 P.2d 310, 313, and authorities there cited.

[5] During the trial the plaintiffs attempted to present two alternative theories to show that the alleged accident caused the death of decedent. The first theory recognized the fact that the deceased suffered from a cancer of long standing which caused his death, but attempted to establish the theory that the trauma, which decedent was alleged to have received, exacerbated its growth and hastened his death. As a second and alternative theory plaintiffs attempted to show that the alleged trauma caused an abscess which caused or contributed to Mr. Jorgensen's death. Their proposed instructions 7 and 13 were addressed to their theories. They complain because neither one was given. It is sufficient to state that plaintiffs' instruction No. 5, which was given, fully covered the first theory, and plaintiffs' instruction No. 4, which was given, fully covered the second theory.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

46 Cal.App.2d 163

PEOPLE v. VIVIAN.

Cr. 2171.

District Court of Appeal, First District,
Division 2, California.
July 21, 1941.

Rehearing Denied Aug. 5, 1941.
Hearing Denied Aug. 18, 1941.

1. Criminal law 🔑1023(12)

An order made after judgment is not appealable where the motion merely asks the court to repeal or overrule the former ruling on the same facts. Pen.Code, § 1237, subd. 3.

2. Criminal law 🔑1023(12)

Appeals from orders denying defendant's written application for writ of error coram nobis, for motion to set aside guilty plea, and for motion for order to set aside judgment and sentence, would be dismissed, where such application was but a repetition of an earlier oral application which had been denied. Pen.Code, § 1237, subd. 3.

3. Criminal law 🔑1023(12)

Orders denying defendant's application for a writ of error coram nobis, and to set aside plea of guilty, and denying defendant's motion for order to set aside judgment and sentence and motion to withdraw plea for probation, were not appealable.

4. Criminal law 🔑997

A defendant entering plea of guilty could not apply for writ of error coram nobis before pronouncement of judgment.

5. Criminal law 🔑273

Evidence was insufficient to show that defendant's plea of guilty to charge of forgery of bank check was obtained by fraud of arresting officers. Civ.Code, § 1569.

6. Criminal law 🔑1141(2)

A defendant making no showing as to what material fact was not stated in complaint charging the forgery of a bank check, could not complain that the complaint did not state facts sufficient to state a public offense.

7. Criminal law 🔑1111(1)

A defendant who was arraigned before municipal court and who entered a plea of guilty to forgery charge and who was brought before superior court for pronouncement of judgment, could not complain that the record in the municipal court did not show that he entered a plea, where he had earnestly contended throughout the proceedings that he should be allowed to withdraw his plea of guilty entered in the municipal court, and the certified copy of the record sent up to the superior court by the municipal court showed on its face that the plea was entered.

8. Indictment and information 🔑173

Where complaint charged that the offense was committed by "John Millington", whose real name was unknown to the complainant, and the proceedings were conducted under name of "Homer Vivian", which the defendant stated to be his true name when he was arraigned, such procedure was in compliance with the Penal Code. Pen.Code, §§ 953, 989.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Homer Vivian was charged with the forgery of a bank check, and from a judgment of conviction and from an order denying his motion to set aside his plea of guilty, he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

On August 14, 1940, a complaint was filed in the municipal court against defendant under the name of John Millington, charging him with forgery of a bank check in the sum of $12.50. Defendant was arrested in a department store and was taken to a police station; after the policemen had talked to him the defendant led them to his apartment where they found a fifteen-year-old girl who had been living with defendant. On August 15, 1940, defendant was arraigned before the municipal court where he answered under his true name and entered a plea of guilty to the forgery charge. He was represented by the public defender. Defendant was brought before the superior court for pronouncement of judgment on August 19, 1940, at which time the public defender made a motion for probation; the matter was continued to September 12, 1940. On the latter date defendant's present attorney was substituted for the public defender; he moved to withdraw the motion for probation and the plea of guilty entered in the municipal court and to have defendant returned to the latter court for an examination on the merits of the case under a plea of not guilty. The motions were based on the ground defendant was induced to plead guilty by the arresting officers who agreed that they would place no further charges against him and would see that his sentence would not exceed one year in jail. The defendant's motions were oral and were not supported by any affidavit or other evidence than the recitals contained in the documents sent up by the municipal court. On October 18, 1940, the court denied defendant's motions and entered a judgment sentencing him to Folsom Penitentiary for the period of time prescribed by law. On October 29, 1940, without first obtaining permission to renew his applications (Code Civ.Proc. § 1008), defendant presented a written motion for a writ of error coram nobis, a motion to set aside the motion for probation, a motion to withdraw the plea of guilty, and a motion to set aside the judgment and sentence entered on October 18, 1940. Each motion was denied. The defendant did not offer any affidavit or any other evidence in support of his applications made on October 29, 1940. However, on November 2, 1940, Raine Ewell executed a purported affidavit and filed the same in said court. Nevertheless the record does not show that said purported affidavit was ever called to the attention of the trial court.

On October 18, 1940, the trial court in open court made the following orders: (1) Denying the application for a writ of coram nobis; (2) denying the application to set aside the plea of guilty; (3) denying the motion for an order to set aside the judgment and sentence entered on October 18, 1940; (4) denying the motion to withdraw the plea for probation; and (5) and sentenced the defendant. Thereupon in open court counsel for the defendant orally appealed (1) from the judgment of the court; and (2) from the order denying the motion of the defendant to set aside the plea of guilty.

[1, 2] On October 29, 1940, the defendant made the same applications, the only difference being they were in writing. The court made the following orders: (1) Denying the application for a writ of error coram nobis; (2) denying the application for a motion to set aside the plea of guilty; and (3) denying the motion for an order to set aside the judgment and sentence made on October 18, 1940. Thereupon, in open court, counsel for the defendant appealed from the order of the court denying each application of the defendant. The application made on October 29, 1940, was but a repetition of the application made on October 18, 1940. It differed in no respect except that it was in writing. In the trial court the defendant's attorney admitted such was the case and the trial court so held. In People v. Brattingham, 91 Cal.App. 527, at page 528, 267 P. 120, at page 121, the court said: "Appellant contends that an appeal is authorized by subdivision 3 of section 1237 of the Penal Code, which provides that an appeal may be taken from an order after judgment affecting the substantial rights of the defendant. It is also said that the court has inherent power at any time to vacate a void judgment. Generally this is true, but the rule is well established that an order made after judgment is not appealable where the motion merely asks the court to repeat or overrule the former ruling on the same facts." See, also, People v. Simms, 41 Cal.App.2d 466, 469, 107 P.2d 86. It follows that the appeals last discussed should be and they are dismissed.

[3] As to the orders made October 18, 1940, the one from the judgment appears to be regular. The other orders were not appealable. People v. Superior Court, 4 Cal.2d 136, 149, 47 P.2d 724; People v. Morgan, 9 Cal.App.2d 612, 617, 50 P.2d 1061. Each of the purported appeals, taken on October 18, 1940, except the appeal from the judgment, is dismissed.

[4] We come now to a consideration of the appeal from the judgment. The defendant claims he was entitled to apply for a writ of error coram nobis. People v. Campos, 3 Cal.2d 15, 43 P.2d 274. The case is not in point. Campos was charged with the crime of murder. He entered a plea of guilty and judgment was pronounced against him. After judgment had been pronounced he applied for a writ of error coram nobis. In the instant case the application of this defendant was made before judgment was pronounced. The right to apply for such a writ does not ob-

tain under such facts. 16 C.J. 1326; 24 C.J.S., Criminal Law, § 1606; Sanders v. State, 85 Ind. 318, 44 Am.Rep. 29, 37.

[5] The defendant claims his plea of guilty was obtained by duress. The record contains no evidence whatever of duress. Civ.Code, § 1569. Specifically he contends that he was induced to plead guilty by the arresting officers who promised that if he did plead guilty they would see that his sentence would not exceed one year in jail. To sustain that contention the defendant offered no evidence whatever. However, the district attorney called as a witness Maurice Reardon, a lieutenant in the police department. Thereupon substantially the following proceedings were had:

"Mr. Garry: (Deputy District Attorney) Mr. Ewell's contention is that at the time of the plea of the defendant in the municipal court * * * that Lieutenant Reardon told this defendant that he had better plead guilty, and that he would get no more than six months by the Judge in the county jail.

"The Witness: I never told him any such thing. I participated in the original arrest of this defendant. Defendant was arrested in the City of Paris for passing a bad check. Four officers participated. A traffic officer and two men, I think, came up from the bureau. They brought him (the defendant) to Room 407, my office. That was the last time we talked to him. That was the same day of the arrest, not in court or anything else. * * * This boy passed some checks on several department stores in San Francisco, and he got some property on the checks. When we got up there I said to him, 'You might as well come clean and we will give you some kind of a break.' He said he had done two jolts before in the penitentiary; he wanted to come clean; he did not want to go to the big house if he could help it; out in his room there was some stuff that he had, and he had had some more stuff which he gave to another party. We went out that night and got the stuff. There was this girl in his room. Afterwards when I found out that he was mixed up with a fifteen year old girl, living there with her, I wiped my hands out of the picture. * * * I told him up there that night we don't try to hang anybody in court on checks; because we know it is a collection agency, they are not fooling me. Everybody just wants their dough. When prisoners come up we get them for one or two checks. So if they come and tell us we try to go along with them. If they will make restitution, we try to help them; because they have been in jail. I told him that. But when I found out he was living with a fifteen year old girl (not his wife), naturally I am not going to the bat for a guy like that. We wanted to play ball with him. They got the most of the property back. * * *

"Mr. Ewell: Let me say this. These officers knew all that at the time they talked to him and said they would help him out and get him a year in the county jail.

"Mr. Reardon: We brought the guy in. He told me he had been in one place, Leavenworth, and I wanted to help him out. I want to help him now. I don't go back on my word. Why are you saying that I knew he had a record like that? I did not know no such thing."

By denying the defendant's motions the trial court held in effect that no fraud had been perpetrated on the defendant. We may not say the court erred. Conceding that Lieutenant Reardon, at the beginning of his interviews with the defendant, may have made a tentative promise, the facts do not show he did not keep it. Nor do the facts show the defendant acted or relied on the promise. Nor do the facts show the promise was false in any respect.

[6] The defendant contends the complaint filed in the municipal court did not state facts sufficient to state a public offense. He makes no showing as to what material fact was not stated. He cites no authority sustaining his contention, and we find no merit in it. People v. Peterson, 17 Cal.App. 734, 121 P. 703.

[7] He also contends the record in the municipal court did not show he entered a plea. There are two answers. The first one is that throughout these proceedings he has earnestly contended that he should be allowed to withdraw his plea of guilty entered in the municipal court. That fact contradicts his present contention. Furthermore, the municipal court sent up to the superior court a certified copy of the record. On its face it shows the plea was entered.

[8] Finally, defendant contends there was error in convicting him on a complaint charging that John Millington com-

mitted the offense. But that is not all of the record. The complaint charged the offense "was committed by John Millington (whose real name is unknown to this complainant) * * *". When the defendant was arraigned he stated his true name was Homer Vivian. Thereafter all proceedings were conducted under that name. Such procedure was in compliance with the provisions of Penal Code, §§ 989 and 953.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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46 Cal.App.2d 242

LO VASCO v. LO VASCO.

Civ. 2766.

District Court of Appeal, Fourth District, California.

July 28, 1941.

1. Divorce 🔑130

Evidence, though conflicting, supported granting of interlocutory judgment of divorce to wife on ground of cruelty.

2. Divorce 🔑184(12)

Where there was ample evidence properly before the court to support interlocutory judgment of divorce, admission of testimony regarding conversations taking place after action was filed was not prejudicial.

3. Husband and wife 🔑279(3)

In divorce action, evidence that 10 years earlier the parties had separated for 19 days and had then executed a property settlement agreement, but that their differences were thereafter adjusted and that agreement was not carried out but was destroyed established a rescission of the separation agreement.

4. Divorce 🔑287

The District Court of Appeal could modify interlocutory judgment of divorce which purported to make a present award of property to the respective parties and could affirm the judgment as modified, but would not do so where it appeared that trial judge intended merely to provide for a disposition which should become effective only on entry of a final decree, and the District Court of Appeal would instead affirm judgment with direction that on entry of final decree the trial court should dispose of the property in accordance with determination expressed in interlocutory judgment.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Francesca Lo Vasco against Carmelo Lo Vasco for divorce on ground of extreme cruelty, wherein defendant filed a cross-complaint. From an interlocutory judgment of divorce in favor of plaintiff, the defendant appeals.

Affirmed, with directions.

Canepa & Castruccio, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellant.

A. P. Coviello, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an interlocutory judgment of divorce.

The complaint alleged a cause of action based upon extreme cruelty, including a specific reference to a number of particulars and circumstances. It was also alleged that certain property, consisting of a home, household furniture, some barber shop equipment and a balance due on a promissory note, was community property. The defendant's answer denied that there was any community property belonging to the parties and alleged that all of the property mentioned in the complaint was his separate property. He also filed a cross-complaint seeking a divorce on the ground of cruelty.

The court found in favor of the plaintiff, finding, among other things, that all of the property mentioned in the complaint was community property; that an undivided one-half interest in the home and in the household furniture should be awarded to each of the parties; that the balance due on the promissory note amounting to $425.56 should be awarded to the plaintiff; and that the barber shop equipment should be awarded to the defendant. An interlocutory decree was accordingly entered and the defendant has appealed.

[1] The appellant first contends that the court's findings with respect to the allegations of cruelty are not sustained by the evidence and that it follows that the decree is without lawful support. Some half dozen specific acts of cruelty are found by the court to have been committed by the appellant, any one of which would be sufficient to support the judgment. It would serve no useful purpose to set forth the evidence in this connection, which takes up nearly 100 pages of the transcript and to a review of which the appellant devotes some 40 pages of his opening brief. The effect of the argument now made is that other portions of the evidence were more worthy of belief than those accepted by the trial court and that other inferences should have been drawn from certain of the evidence. While the evidence is conflicting, there is no possible question that the material findings in this regard are supported by the evidence and the familiar rule applies.

[2] It is further argued that the court erred in admitting the testimony of two witnesses since they testified with respect to conversations which took place after this action was filed. A part of this testimony related to admissions made by the appellant, and while portions thereof may have been subject to this objection it appears that the trial court had this definitely in mind, and in view of the ample evidence which was properly before the court it cannot be held that the result was affected by such evidence, or that any possible error in this connection had any prejudicial effect.

[3] Appellant's main contention is that the court erred in "failing to find specifically upon the issue of a property settlement between the parties" and that the evidence does not support the finding that the property described in the complaint was community property. With respect to this matter it appears that these parties, who were married in 1901, separated for a period of nineteen days in 1928, after which they were reconciled and lived together as husband and wife until 1938, when this action was begun. In her answer to the cross-complaint the respondent alleged that she had been informed that the appellant intended to rely upon a purported property settlement agreement which the parties had executed at the time of their separation in 1928, and further alleged that the parties had rescinded, abrogated and cancelled this purported property settlement agreement and at all times since 1928 had mutually understood that any and all property they then had or now have was to be community property. While the court did not specifically find that this purported property settlement had been rescinded or cancelled the matter was sufficiently covered in the general finding that the property in question was now the community property of the parties.

An agreement dated October 26, 1928, was introduced into evidence which recites that unhappy differences have arisen between the parties, that the parties are living separate and apart, and that they desire to settle their property rights. The agreement then provides that the home place is to be deeded to the appellant, that another piece of real property is to be deeded to the respondent, that the appellant will pay a certain debt of $600, that the household furniture is to be divided between them, that the appellant is to have a certain automobile and a certain barber shop with its equipment, and that the appellant will pay the respondent $15 a month until a certain child reaches her majority. It appears that the home which was to be deeded to the appellant was of considerable more value than the other real property which was to be deeded to the respondent. Deeds to these respective pieces of real property, in accordance with the contract, were executed and recorded.

The respondent testified that she did not see an attorney during the nineteen-day separation in 1928; that a friend of her husband's took her to a man named Morrissey; that she did not know whether or not Morrissey was a notary public; that Morrissey prepared some papers but did not explain them to her; that he told her she had to sign them; and that she signed something but did not know what it was. She further testified that she could not read; that she "didn't understand"; that she did not know what was in the papers because "I didn't know how to read"; and that she thought she was signing "papers of the division". When asked who told her this she replied: "Nobody was speaking to me alone because we were there for a divorce." She further testified that at the end of the nineteen days her husband begged her to return, which she did, and that "the papers that were made about separating and everything, they were destroyed". A confidential relationship existed between these parties and the deeds which were executed and delivered should be considered a part of the agreement. It appears that the respondent was an uneducated woman with little knowledge of the English language and it is not surprising that she would not understand that the physical destruction of the papers was not all that should be done. Her testimony in connection with the execution and subsequent destruction of these papers is not denied and it justifies the inference that there was an intent to rescind and cancel the agreement and deeds.

Moreover, there is other evidence which supports this inference and indicates that the appellant himself did not consider the agreement and property division as still in force. The parties went back together and lived as husband and wife for ten years. Almost immediately after they were reconciled they borrowed $6,000 on the home place and both signed the trust deed. Payments on this debt were made from family earnings and when this action was begun the debt was all paid except $240. There is evidence that the monthly payments on this loan were taken to the loan company by the respondent or her daughter. During the ten years they were living together the appellant sold the other piece of real property which he had conveyed to the respondent and the cash proceeds from that sale were paid upon the indebtedness upon the home place. A note for $600, payable to both parties hereto, was taken from the purchaser of that other property and as payments thereon were made they were either paid upon the mortgage on the home place or were deposited in the appellant's bank account and mingled with his earnings. It is not without significance that the appellant did not carry out his part of the separation agreement made in 1928 other than to execute the deed to the respondent, which was done as a part of the execution of the agreement. He did not pay the $600 debt which he had agreed to pay and he did not pay the respondent $15 a month as he had agreed to do. Moreover, in the present action he claimed to be the owner of the note received in part payment for the real property which he had conveyed to his wife.

The evidence and the conduct of the parties rather conclusively show a rescission and cancellation of the separation agreement in question. In Estate of Boeson, 201 Cal. 36, 255 P. 800, 802, the court said: "Property settlements entered into by the spouses, it is true, should be set aside in cases where the acts, conduct and relations of the parties thereafter are of such a character as to justify the conclusion that they intended and agreed orally to abrogate the same." In Brown v. Brown, 170 Cal. 1, 147 P. 1168, 1171, it is said:

"With regard to the separation agreement made by Brown and wife in 1906, which purported to release her rights in the community and to declare subsequently acquired property the separate property of the person acquiring it, and which it is claimed bars the present action of plaintiff, we need only say that the findings declare that some four months after its execution the parties agreed to become, and were, reconciled; that they thenceforth for several months lived and cohabited together as husband and wife; and that, in pursuance of the agreement to so live, they further orally agreed to, and did, set aside and annul said agreement. This was an executed oral agreement, and it was a sufficient cancellation of the previous written agreement of separation."

The facts of the instant case, including the physical destruction of the contract and deeds and the continuance of the marriage relationship for the period of ten years, clearly bring this case within the principles just referred to. Peters v. Peters, 16 Cal. App.2d 383, 60 P.2d 313; Mundt v. Connecticut Gen. Life Ins. Co., 35 Cal.App.2d 416, 95 P.2d 966.

It is also urged that the court abused its discretion in denying appellant's motion for a new trial. The only argument presented in this connection is that the evidence is not sufficient to sustain the findings. This has been sufficiently covered in our consideration of other points.

[4] Finally, it is contended that the interlocutory decree is erroneous and in excess of the court's jurisdiction in that it undertakes to make a present award of property to the respective parties. While the court found as a fact that various property interests should be awarded to the respective parties the interlocutory decree uses such expressions as "are awarded" and "is awarded" in providing how the property is to be divided. It clearly appears that the trial judge intended to provide that the property should be divided and assigned to the respective parties in a particular manner but that this should be effective only upon the entry of a final de-

cree. The interlocutory decree specifically provides that at the time of entering the final decree "the court shall grant such other and further relief as may be necessary to a complete disposition of this action". While this court could modify the interlocutory decree and affirm it as modified (Remley v. Remley, 49 Cal.App. 489, 193 P. 604; Strupelle v. Strupelle, 59 Cal. App. 526, 211 P. 248), it is not necessary to take this action under the circumstances here appearing. Webster v. Webster, 216 Cal. 485, 14 P.2d 522. The facts in the instant case are exactly similar to those in the case just cited in the respects here in question and the language used by the Supreme Court, appearing on page 493 of 216 Cal., 14 P.2d on page 525, of that decision, aptly covers the situation now before us.

The judgment is affirmed. Upon entering its final decree of divorce, the trial court will assign and dispose of the property in accordance with the determination expressed in the interlocutory decree.

We concur: MARKS, J.; GRIFFIN, J.

WEST KEY NUMBER SYSTEM

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46 Cal.App.2d 201

HERNANDEZ v. MURPHY et al.

Civ. 11538.

District Court of Appeal, First District, Division 1, California.

July 23, 1941.

1. Appeal and error 🔑930(1)

In reviewing conflicting evidence on defendants' appeal after verdict and judgment for plaintiff, the District Court of Appeal was bound to resolve all conflicts in favor of plaintiff and to indulge in all legitimate and reasonable inferences to uphold the verdict, if possible.

2. Appeal and error 🔑989

When a verdict is attacked on appeal as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury, and when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

3. Appeal and error 🔑1003

To establish the defense of contributory negligence as against the verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference which points unerringly to the negligence of plaintiff proximately contributing to his injury.

4. Trial 🔑143

Conflicts in testimony were for jury.

5. Evidence 🔑590

In weighing testimony of defendants' witnesses in action for death of plaintiff's minor son, jury could consider that witnesses were children whose parents were employed at defendants' ranch.

6. Automobiles 🔑244(20, 56)

In action against plaintiff's employer and driver of employer's truck, which was used to convey children to school, for death of plaintiff's 15 year old son who died from injuries sustained when he fell from truck after driver suddenly increased speed while the son was standing up in rear of truck, evidence supported implied finding that defendants were guilty of negligence and that the son was free from contributory negligence, and hence judgment for plaintiff was proper.

7. Negligence 🔑7

A child of immature years is expected to exercise only such care as pertains to childhood, and persons dealing with such a child are chargeable with such knowledge, and hence one dealing with children is bound to exercise a greater amount of caution than he would were he dealing with an adult.

8. Automobiles 🔑245(24)

In action for death of plaintiff's 15 year old son who died from injuries sustained when he fell from a truck used in hauling school children after driver suddenly increased speed while the son, who had caught the truck while it was in motion, was standing up in rear of truck, whether the driver's act in slowing down constituted an invitation to the son to get on truck was for jury.

9. Automobiles 🔑181(1)

After plaintiff's 15 year old son got on a truck used to convey school children and the driver was aware thereof, the driver owed the son a duty of reasonable care, and speeding up the truck without giving the son warning, and before the son was seated, under circumstances disclosed by record was a violation of such duty, as regards liability of driver and his employers for death of son who died from injuries sustained in falling from truck.

10. Automobiles ⚷245(87)

In action for death of plaintiff's 15 year old son who died from injuries sustained when he fell from a truck used in hauling school children after driver suddenly increased speed while the son, who caught the truck while it was in motion, was standing up in rear of truck, whether the son was guilty of contributory negligence was for jury.

11. Automobiles ⚷245(87)

Whether a person who attempts to board a moving automobile while it is in motion is guilty of contributory negligence is generally a question of fact.

12. Negligence ⚷136(25)

Proximate cause normally is a question of fact for the jury.

13. Automobiles ⚷240(1, 2)

Inadequacy of equipment of an automobile can be established and is in issue under a general allegation of negligent operation.

14. Appeal and error ⚷1066

In action for death of plaintiff's 15 year old son who fell from rear of moving truck used to convey school children, where truck was not equipped with a rearview mirror and defendants were charged with negligence with respect to operation of truck, an instruction in language of statute respecting mirrors on automobiles and stating that failure to use reasonable care to comply with statute would be negligence as a matter of law was not reversible error, although absence of mirror was not expressly made an issue in pleadings. Vehicle Code, § 674, St. 1935, p. 223.

15. Trial ⚷241

In action for death of plaintiff's 15 year old son who fell from rear of moving truck used to convey school children after catching truck while it was in motion, an instruction in language of statute respecting mirrors on automobiles was not objectionable on ground that there was no evidence that truck was so constructed or loaded as to obstruct driver's view to rear, and that statute was not passed for benefit of those riding in automobiles, where jury was taken to view truck, and instruction was submitted on theory that if truck had been equipped with a mirror and driver had been exercising required degree of care he would have seen children chasing truck. Vehicle Code, § 674, St.1935, p. 223.

16. Trial ⚷191(7)

In action for death of plaintiff's 15 year old boy who died from injuries sustained when he fell from rear of a truck used in hauling school children after he had caught the truck while it was in motion, an instruction containing a statement of the general rule applicable to the duty of an adult toward a child and telling jury that it was driver's duty to anticipate such conduct as was normal from children of the boy's age was not objectionable as erroneously assuming that the boy did not possess mature faculties, and that his conduct was thoughtless and impulsive.

17. Appeal and error ⚷882(12)

Defendants' objections to instructions on contributory negligence were unavailing where instructions were identical in legal effect to instruction given at defendants' request, and all instructions correctly stated the law.

◆

Appeal from Superior Court, San Benito County; Maurice T. Dooling, Jr., Judge.

Action by Phillip B. Hernandez against Walter P. Murphy and others for the death of plaintiff's 15 year old son. From a judgment for $5,000 for plaintiff, defendants appeal.

Affirmed.

Charles V. Barfield, of San Francisco, for appellants.

Louis Oneal, Maurice J. Rankin, and Duncan Oneal, all of San Jose, for respondent.

PETERS, Presiding Justice.

Defendants appeal from a judgment for $5,000 in favor of plaintiff, rendered in an action brought by plaintiff for the death of his fifteen-year-old son, Jackie Hernandez, alleged to have been caused by the negligence of defendants. Defendants urge that the evidence is insufficient, as a matter of law, to show that they were negligent; that the evidence shows, as a matter of law, that Jackie was guilty of contributory negligence; and that the trial court erred in the giving of certain instructions.

[1-3] So far as the questions of defendants' negligence and Jackie's contributory negligence are concerned, there was a direct conflict in the evidence. Under such circumstances, in reviewing the evidence, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict, if possible. As was said in Crawford v. Southern Pacific Co., 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184: "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483. To establish the defense of contributory negligence as against the verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury." See, also, Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660.

Keeping these well-settled rules in mind, we turn to a review of the evidence.

The accident in which Jackie met his death occurred on the afternoon of December 6, 1938, in front of the Willow Grove Grammar School in San Benito county. Plaintiff, the father of Jackie, was employed as foreman on the Paicines Ranch, which is located about two miles from the school. The ranch is owned by defendant Paicines Company, and its stock is entirely owned by defendant Walter P. Murphy. Defendant Lester Wilson was, on December 6, 1938, an employee of defendants.

Plaintiff testified that when he was employed by John Sutton, superintendent of the ranch, in November, 1937, one of the terms of his contract of employment was that the ranch company was to furnish transportation to convey the children of the employees to school. Defendant Murphy denied that such transportation was furnished as part of the contract of employment, contending that it was a mere accommodation to the employees. This, as well as all other conflicts, must be resolved in favor of respondent. It is conceded that the ranch company did provide a 1924 or 1925 Ford truck for the purpose of transporting the children to the school. This automobile is a truck model with a covered body, with benches placed lengthwise in the body of the truck designed as seats for the children. There was a tailgate at the rear of the truck body, and outside the body at the rear was one step used by the children in boarding the bus. The truck was also used for general ranch purposes, and had no connection with the school authorities. Defendant Lester Wilson customarily drove the children to school and called for them after school.

On the day in question, Wilson drove the truck to the schoolhouse for the purpose of picking up the children. One child was already in the truck, having been picked up at the store some distance from the school. Jackie attempted to board the bus while it was in motion. Although there is a direct conflict in the evidence, there is substantial evidence to the effect that, just before Jackie boarded the bus, the driver slowed down; that Jackie succeeded in getting into the body of the truck; that he was standing upright holding to the brackets which support the top, when the driver looked back and speeded up; that the resulting jerk threw Jackie backwards so that his feet hit the tailboard, which was up, with the result that he was catapulted to the ground. He sustained a basal fracture of the skull, from which he died within a few hours.

[4] Defendants argue that there was no evidence at all that the bus was operated in a negligent fashion at the time of the injury. This argument is predicated on the basic premise that the evidence, reasonably interpreted, will bear no other construction but that defendant Wilson was driving along at ten miles an hour and was not aware of the fact that Jackie was running after the bus, or that Jackie had in fact boarded it. An examination of the record demonstrates that this basic premise is contrary to the evidence. It is true that de-

fendant Wilson denied unequivocally that he saw Jackie and another boy, Peter Gomez, chasing the bus, and that he was equally positive in his denial that he knew that decedent had reached the bus and had succeeded in getting on it. He testified that, as he was proceeding down the road near the schoolhouse, Jackie called to him to come over to pick him up;, that he did not see Jackie and Peter Gomez chase the bus; that he at no time turned his head to look back through the body of the truck; that he did not speed up when he passed the two boys; that he was driving at ten miles an hour and never changed his speed. It should also be noted that he was asked whether the bus was equipped with a rear-view mirror, and that he stated that it was not, and that no objection was made by appellants to that question. He was also asked as to whether, before the accident, he "had had some difficulty in keeping the children from getting on and off before the car stopped", to which he replied, "At times they was a little reckless on it. Not so bad as you would think—a bunch of children, you know—of course, they had been in school all day and they would be naturally a little bit reckless when they would get out but I never had any trouble with the children at all." He was then asked: "And the children sometimes would get on the bus before you would stop?", to which he answered: "Yes, sir." He then attempted to qualify his answer by stating that on prior occasions the bus was "just barely moving if they ever did get on before"; that the children had not boarded the bus while he was "going at any dangerous speed"; that if they had boarded the bus on prior occasions while the bus was in motion "it was going very slow", and finally stated that he could not "remember" that the children, on prior occasions, had boarded the bus while it was in motion. The jury was entitled to pass upon this conflict in the witness' testimony. It should also be mentioned that the superintendent of the ranch, John Sutton, testified that prior to the date of the accident he had reprimanded the driver of the bus for permitting the children to alight therefrom while it was in motion, and that he had also suggested that a door should be put on the back of the bus to protect the children, but that this was not done. Wilson denied that he had ever participated in such a conversation with Sutton.

On behalf of plaintiff, various eyewitnesses of the accident were called. They flatly contradicted Wilson in many respects. Peter Gomez, who was with Jackie just before the accident, testified that they were on the opposite of the road from that testified to by Wilson; that when the bus passed he yelled at the driver; that the driver slowed up; that he and Jackie ran after the bus; that Jackie could run faster than he could and caught the bus after running about thirty feet; that Jackie got inside the bus and was standing up holding to the top when the driver started up faster; that the tailboard was up (Wilson had testified it was down); that when the bus started up Jackie tripped over the tailboard and was thrown out. It is true that there are some conflicts in this witness' testimony, and that part of his testimony is in conflict with a statement written by a representative of the appellants and signed by Peter, but those conflicts were for the jury.

[5] Henrietta Valdez was another student who saw the accident. She testified that Jackie and Peter ran after the bus and that "Jackie got on it and he was holding on the top when the bus driver looked back, like that, and then he speeded up * * * and Jackie fell off * * *". On cross-examination she was very positive that Jackie succeeded in boarding the bus, and estimated that, before Jackie was thrown out, the bus traveled about twelve feet. She repeated her testimony that, just before he fell, Jackie was standing in the body of the bus holding onto the roof of the bus, and was then asked: "Was that when the bus driver looked around?" She replied: "Yes, that's when Mr. Wilson looked around, like that, like he was going to play with him and that's when he speeded up." Other evidence of the same nature on the same general subject matter was introduced. It is true that other eyewitnesses produced by defendants did not notice the driver speed up, did not notice Wilson turn around, and testified that Jackie fell trying to get onto the step and that he did not get into the bus. Most of these witnesses were children whose parents were employed at the Paicines Ranch, a factor the jury could consider in weighing their testimony. All of these conflicts were for the jury.

[6-9] From the evidence and reasonable inferences therefrom the jury was entitled to believe that the driver Wilson knew that the children customarily chased the bus and boarded it while it was in motion; that he saw Jackie and Peter on the day in ques-

tion; that he knew, or should have known, that the two boys were chasing the bus; that he slowed down; that Jackie succeeded in boarding the bus and was standing up inside the body facing the driver and holding to the brackets on the roof; that Wilson turned around and saw Jackie standing there and playfully speeded up; that as a result Jackie was thrown backward and stumbled over the tailgate and was killed. On such a statement of facts it hardly seems necessary to cite authority that the implied findings of the jury to the effect that defendants were guilty of negligence and Jackie was free from contributory negligence are amply supported by the evidence. It must be remembered that in this case we are dealing with a fifteen-year-old grammar school boy, and not with an adult. A child of immature years is expected to exercise only such care as pertains to childhood, and all persons dealing with such a child are chargeable with such knowledge. As a result, one dealing with children is bound to exercise a greater amount of caution than he would were he dealing with an adult. See cases collected 19 Cal.Jur. p. 623; 45 Corpus Jur. p. 702. The failure to exercise due care in the present case is obvious. In the first place, whether the driver's slowing down constituted an invitation to Jackie to get on the bus was a question of fact for the jury. Starkey v. Market Street Ry. Co., 90 Cal.App. 249, 265 P. 839; Morrissey v. San Francisco, 104 Cal.App. 536, 286 P. 433; Hart v. Fresno Traction Co., 175 Cal. 489, 167 P. 885. In the second place, whatever Wilson's duty toward Jackie may have been prior to the time he got on the bus, whether or not he knew or should have known or anticipated that Jackie would attempt to board the moving bus, there can be no doubt that after Jackie got on the bus and the driver knew it, he owed Jackie a duty of reasonable care. To speed up without giving the boy warning, and before the boy was seated, under the circumstances disclosed by the record, was clearly a violation of that duty. See, generally, Shannon v. Central-Gaither U. School Dist., 133 Cal.App. 124, 23 P.2d 769; Brizzolari v. Market St. Ry. Co., 7 Cal.App.2d 246, 46 P.2d 783; Anderson v. Walters, 135 Cal.App. 380, 27 P.2d 100; Wynn v. Gandy, 170 Va. 590, 197 S.E. 527; Vest v. Chesapeake & O. Ry. Co., 117 W. Va. 457, 187 S.E. 358.

[10-12] It is also quite clear that whether Jackie was guilty of contributory negligence was a question of fact for the jury. Certainly, it cannot be said that just because he boarded a moving bus that he was guilty of contributory negligence as a matter of law. The cases are quite uniform to the effect that whether a person, even an adult, who attempts to board a moving vehicle while it is in motion is guilty of contributory negligence is generally a question of fact. Hart v. Fresno Traction Co., supra; Morrissey v. San Francisco, supra. In the present case, there was evidence that Jackie had succeeded in getting on the bus before he fell. Even if it were contributory negligence to attempt to board the bus while it was in motion, the jury could have determined that such negligence was not the proximate cause of the injury. Proximate cause normally is a question of fact for the jury.

Defendants next object to four instructions given by the trial court. The first of these is designated as instruction 23 and is as follows: "Section 674 of the Vehicle Code [St. 1935, p. 223], in effect at the time of this accident, provided as follows: 'Mirrors. Any motor vehicle which is so constructed or loaded as to obstruct the driver's view to the rear thereof from the driver's position, shall be equipped with a mirror so located as to reflect to the driver a view of the highway for a distance of at least two hundred feet to the rear of such vehicle.'

"I instruct you that the failure to use reasonable care to comply with this provision of the law would be negligence as a matter of law. (Requested by plaintiff and given by the Court as modified.)"

[13, 14] Defendants concede that the bus was not equipped with a rearview mirror. Both Sutton, the ranch superintendent, and defendant Wilson so testified without objection. Their main objection to the instruction is, that it was improper to instruct on that subject because the absence of the mirror was not expressly made an issue in the pleadings. It is well-settled that inadequacy of equipment of a motor vehicle can be established and is in issue under a general allegation of negligent operation. Carnahan v. Motor Transit Co., 65 Cal.App. 402, 224 P. 143; Henry v. Lingsweiler, 81 Cal.App. 142, 253 P. 357; Vedder v. Bireley, 92 Cal.App. 52, 267 P. 724. In DelCarlo v. Oberti, 2 Cal.App.2d 304, 37 P.2d 1050, relied upon by defendants, the court held that the giving of a similar instruction was not reversible error.

In the Oberti case the above three cases were not mentioned, nor was the well-settled principle set forth therein discussed by the court.

It will be noted that the instruction does not state that such negligence must have been a proximate cause of the injury before the jury could base its verdict thereon. Defendants do not object to the instruction on this ground, doubtless because this was covered in detail by several other instructions.

[15] Defendants also contend that, under the facts, the instruction was not applicable because there is no evidence that the truck was so constructed or loaded as to obstruct the driver's view to the rear, and, secondly, that in no event was the statute passed for the benefit of those riding in a motor vehicle. These contentions are without merit. The jury was taken to view the bus. They could ascertain for themselves whether a rearview mirror was reasonably necessary. If the driver's view was not obstructed, as defined in the instruction, we must assume that the jury followed the instruction and found it inapplicable. The instruction quoted the Code section verbatim. It expressly told the jury that such mirror was required so as "to reflect to the driver a view of the highway for the distance of at least two hundred feet to the rear of such vehicle". The jury was not told that the mirror was required for the benefit of anyone in the body of the bus. Obviously, the instruction was submitted on the theory that, had the bus been equipped with a mirror, and had Wilson been exercising that degree of care required under the circumstances, he would have seen Jackie and Peter chasing the bus. On this theory the instruction was properly given.

The defendants also object to instruction 18 which reads as follows: "I instruct you that it is ordinarily necessary to exercise a greater amount of care for the protection and safety of young children than for an adult person who possesses normal and mature faculties. One should anticipate thoughtlessness and impulsiveness in the conduct of a young child. Hence, I instruct you that it was the duty of the driver of this school bus to exercise a greater amount of care for the protection and safety of the children whom he undertook to carry, than he would have been required to exercise if he had been carrying adult persons of normal and mature faculties. It was the duty of the defendant, Lester Wilson, as the driver of such bus, to anticipate such thoughtlessness and impulsiveness in the conduct of the children, as is customary with normal children of the same age, including said Jackie Hernandez. (Requested by plaintiff and given by the Court as modified.)"

[16] Defendants contend that the instruction erroneously assumes that Jackie did not possess mature faculties, and that his conduct was thoughtless and impulsive. These criticisms are unwarranted. The instruction contained a statement of the general rule applicable to the duty of an adult toward a child. Reasonably interpreted, the instruction did not tell the jury that Jackie did not possess normal faculties or that he was impulsive and thoughtless. It simply told the jury that it was the driver's duty to anticipate such conduct as is normal from children of the age of Jackie. That is a correct statement of the law. Brizzolari v. Market St. Ry. Co., supra; see, also, cases collected 19 Cal.Jur. p. 623. The jury was several times instructed that Jackie was required to exercise that degree of care which is ordinarily exercised by children of his age, mental capacity and discretion.

Defendants also object to two instructions on contributory negligence, designated as instructions 32 and 33. They read as follows:

"Children, the same as adults, are required to exercise ordinary care, but the ordinary care which a child of limited judgment and experience is called upon to exercise in a given situation, is not the quantum of care required of an adult under the same circumstances. A child is required to exercise only that measure of care which a child of the same age and under similar circumstances ordinarily exercises.

"Hence, I instruct you that Jackie Hernandez was only required to exercise the same amount of care that an ordinary boy of his age would have exercised under similar circumstances. (Requested by plaintiff and given by the court as modified.)"

"I instruct you that a boy of fifteen years of age would not be expected to use that amount of judgment and discretion which would be expected and required of an adult. (Requested by plaintiff and given by the court as modified.)"

[17] These instructions are identical in legal effect to instruction 35 given at the request of defendants. Moreover, all three instructions correctly state the law. In addition to cases already cited, see Bowdoin v. Southern Pacific Co., 178 Cal. 634, 174 P. 664; Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

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46 Cal.App.2d 95

SCHUMACKER et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11625.

District Court of Appeal, First District, Division 2, California.

July 17, 1941.

Hearing Denied Sept. 11, 1941.

1. Workmen's compensation 🔑1103

Where employee's administratrix, suing employer and others in state superior court under Federal Employers' Liability Act for death of employee, alleged that employee was employed in interstate commerce and defendants admitted such allegation by not denying it, such allegation was not adjudicated or determined, and hence judgment for defendants based on failure to prove negligence was not "res judicata" that employee was engaged in interstate commerce, so as to bar recovery of workmen's compensation. Federal Employers' Liability Act 45 U.S.C.A. § 51 et seq.; St.1917, p. 831; Code Civ.Proc. § 1911.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Judgment 🔑720

In order for a judgment to be conclusive in another suit, it must appear either upon face of the record or by extrinsic evidence, that the precise question was raised and determined in the former suit.

3. Judgment 🔑725(1)

If fact involved in former suit was one with which neither court nor jury could concern itself, judgment therein did not conclude it except so far as it was necessary to uphold the judgment.

4. Workmen's compensation 🔑1103

In absence of contrary showing on face of record, it must be presumed that judgment for defendants decided every allegation in plaintiffs' complaint against them and in favor of defendants, in determining effect of judgment in subsequent workmen's compensation proceeding against defendants on issue of employee's employment in interstate commerce, as alleged by plaintiffs in the former suit and not denied by defendants.

5. Workmen's compensation 🔑1103

Where administratrix, suing employer and others in state superior court under Federal Employers' Liability Act for employee's death, alleged that employee was employed in interstate commerce, and such allegation was not denied, but judgment was rendered for employer and others on ground that negligence was not shown, there was no "estoppel" against administratrix from contending in subsequent workmen's compensation proceeding that employee was employed in intrastate commerce.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

6. Workmen's compensation 🔑1937

Where pleadings in action against employer under Federal Employers' Liability Act admitted that employee was employed in interstate commerce, stipulation of counsel in such action, that accident occurred while engaged in interstate commerce, was merely "cumulative" with respect to its admissibility in subsequent workmen's compensation proceeding, wherein the judgment in such action had already been received in evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Cumulative".

7. Workmen's compensation 🔑1937

Alleged error in workmen's compensation proceeding, in excluding stipulation of counsel in prior suit under Federal Employers' Liability Act to the effect that deceased employee was engaged in interstate commerce, would not support a judgment of annulment of award of compensation where compensation commission had already received in evidence the judgment in the prior action, in which pleadings had admitted that employee was engaged in interstate commerce.

8. Workmen's compensation ⚿1424

Evidence *held* to support finding in compensation proceeding that deceased railroad employee was engaged in intrastate commerce at time of accident. St.1917, p. 831.

9. Workmen's compensation ⚿1340

Where evidence in compensation proceeding clearly showed that accident causing death of railroad employee happened in railroad yards within the state, it would be presumed in absence of contrary showing that the accident happened in intrastate commerce. St.1917, p. 831.

10. Workmen's compensation ⚿1939

Reviewing court may not annul a compensation award merely because the evidence is conflicting.

◆

Petition by Thomas Schumacker and others against the Industrial Accident Commission and others for a writ of review to review an award of the Industrial Accident Commission granting compensation to Carrie Katberg and others for the death of James Katberg.

Award affirmed.

Neumiller & Ditz and R. L. Beardslee, all of Stockton, for petitioners.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Rutherford, Jacobs, Cavalero & Dietrich and Richard W. Dickenson, all of Stockton, for respondents Katberg.

STURTEVANT, Justice.

Petition for a writ of review.

James Katberg was employed by petitioners, trustees of the Western Pacific Railroad Company, as a car inspector in their Stockton freight yards. On March 7, 1936, while Katberg was working in the yards he was run over and killed by a railroad car. No one knows exactly how the death occurred because there were no witnesses to the accident. Decedent was survived by a wife, Carrie, and seven children. Eva, one of the children, was a minor, eighteen years of age. All of the other children were adults. The surviving widow and the daughter Eva were wholly dependent on the decedent. The record does not show that any of the other children were dependent on deceased or that they had ever received any contributions from him, or had any expectations of such contributions. On December 11, 1936, Carrie Katberg, as administratrix of the decedent's estate, and for the benefit of herself and her children, commenced an action, No. 27882, in the superior court, under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover for the death of her husband from petitioners and other defendants. On March 3, 1937, she filed an amended complaint alleging on information and belief that the decedent and his employers were engaged in interstate commerce at the time of the accident. Petitioners' answer did not deny the allegation of interstate commerce but denied that they were negligent. The action was tried before a jury which returned a general verdict in favor of defendants, petitioners herein, on November 4, 1937. A judgment was entered upon the verdict, and no appeal was ever taken from the judgment.

On March 3, 1937, the day after Carrie Katberg filed her amended complaint in the superior court, she filed a claim with the Industrial Accident Commission. The hearing was set for March 18, 1937, but was postponed at her request without petitioners' consent. The hearing was finally had on November 20, 1939. It was stipulated that the death arose out of the employment while decedent was working in the yards, that he worked six or seven full days a week earning 72 cents per hour and that Carrie expended $150 on the funeral. The applicant testified she was the wife of the decedent, and that the decedent worked full time. She presented a typewritten statement of his earnings for the past several years. Petitioners introduced in evidence the judgment roll of the superior court action and several stipulations, including one that prior court action had become final. On September 23, 1940, the Industrial Accident Commission found that the death resulted from an industrial injury; that the parties were subject to the Workmen's Compensation Act, St.1917, p. 831, that applicants were wholly dependent upon decedent and entitled to a death benefit, and that decedent was engaged in intrastate commerce and the Industrial Accident Commission had jurisdiction over the issues involved. Carrie Katberg was awarded a $5,000 death benefit plus $150 funeral expenses. A rehearing was denied on November 9, 1940, and petitioners pray for a writ of review.

[1] The petitioners complain because the respondent commission did not hold

that the judgment in the superior court action was res judicata. They call to our attention the fact that in the superior court action the plaintiffs alleged at the time of the accident the decedent was employed in interstate commerce, that the petitioners did not deny said allegation, and judgment was rendered in their favor. The petitioners rest on the rule stated in 23 Cyc. 1215. It is as follows: "A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action." It is the same rule as stated in 34 C.J. 868. They vigorously contend that the judgment in the superior court action was res judicata that the decedent at the time of his accident was employed in interstate commerce. The respondent commission does not question that the rule is correctly stated. (Cromwell v. County of Sac., 94 U.S. 351, 24 L.Ed. 195), but it contends the rule is not applicable to the facts of this case. That contention, we think, must be upheld.

[2] As stated above, the rule stated in 23 Cyc. 1215 is almost a direct quotation from Cromwell v. County of Sac., supra. In that case Mr. Justice Field, speaking for the court, at page 352 of 94 U.S., 24 L.Ed. 195, says: "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Continuing, on page 353 of 94 U.S., 24 L.Ed. 195, he said: "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." It was the latter paragraph that served as a basis for framing 23 Cyc. 1215. The rule stated in the second quotation has never been controverted so far as we have noted. In this state the case has been cited many times as a correct statement of the rule. Maddux v. County Bank, 129 Cal. 665, 669, 62 P. 264, 79 Am.St.Rep. 143; Phelan v. Quinn, 130 Cal. 374, 378, 62 P. 623; Estate of Blake, 157 Cal. 448, 457, 108 P. 287. Furthermore the rule was, on the adoption of the codes, incorporated therein. Code Civ.Proc., § 1911. As so codified the rule is as follows: "What deemed adjudged in a judgment. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." A comparison shows that the rule as stated in our statute does not vary in any material respect from the rule as stated in Cromwell v. County of Sac., 94 U.S. 351, 353, 24 L.Ed. 195. That rule was further discussed by the same court in Russell v. Place, 94 U.S. 606, 24 L.Ed. 214. On page 608 of 94 U.S., 24 L.Ed. 214, the court said: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, —as, for example, if it appear that several distinct matters may have been litigated upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole

subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

[3] The plaintiffs alleged in action No. 27882 that the decedent at the time he met his death was engaged in interstate commerce. The petitioners did not deny said allegation and, by not denying, admitted it. Manifestly said allegation was not adjudicated or determined in said action. Jacobson et al. v. Miller, 41 Mich. 90, 1 N.W. 1013. The opinion in the cited case was written by Mr. Justice Cooley. Miller, the owner of certain lands, brought an action to recover rent from Gunzburg and Jacobson. He alleged the rents had accrued between October 15, 1875, and April 9, 1877, under the terms of a lease from himself to said defendants. The latter pleaded the general issue, but did not deny under oath the execution of the lease. Judgment was awarded to the lessor. Later the latter sued for rents accruing between July, 1877, and April, 1878. Jacobson alone appeared and in his answer denied he ever signed, executed, or delivered the lease. The plaintiff then pleaded the judgment in the first action. On the trial the defendant objected to the admission of the judgment, insisting that the prior judgment did not involve the lease and was therefore not admissible. Speaking of the effect of that, on page 1018 of 1 N.W., Mr. Justice Cooley said: "Now the rule under which the first suit between these parties was put at issue provided that the plaintiff shall not be put to the proof of the execution of a written instrument declared upon unless its execution is denied by the defendant under oath. Pleading the general issue, without such denial, the defendant could contest only those matters which were consistent with the execution of the lease. The narrow issue excluded that fact, and for the purpose of the suit conceded it. Peoria, etc., Ins. Co. v. Perkins, 16 Mich. 380, 384. Had the jury returned a special verdict, finding among other things that the lease had been executed, that portion of the finding would have been surplusage, and had they negatived its execution, the negation would have been stricken out as being outside the issue. But if the fact was one with which neither court nor jury could concern itself, in the former case, it must be one that the judgment does not conclude, except so far as is necessary to uphold the judgment. It was admitted for the purposes of that controversy, but not for the purposes of any other." (See, also, Van Fleet's Collateral Attack, p. 16). The decision in the Jacobson case is probably the leading case in America on the point involved. An examination of the books discloses that it has been cited and followed in many different cases. Among others, MacKenzie v. Union Guardian Trust Co., 1933, 262 Mich. 563, 247 N.W. 914. In that case numerous other authorities were also cited showing that there is no disagreement as to the rule. While sitting on the Circuit Court, Mr. Justice Taft, in City of Detroit v. Detroit City Ry. Co., C.C., 56 F. 867, 893, cited and followed the case. Mr. Justice Cardozo, sitting on the Court of Appeals at New York in 1929, made an extended examination of the point involved and cited and followed the Jacobson case in his opinion written in Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456, 458. See, also, Ornauer v. Penn. Mut. Life Ins. Co., 52 Colo. 632, 123 P. 650, 651; Savage v. Central Electric Co., 59 Colo. 66, 148 P. 254, 255, and Tudor v. Kennett, 87 Vt. 99, 88 A. 520, 522.

[4] The petitioners concede that on the face of the judgment the issue of interstate or intrastate commerce was not adjudged. But they earnestly contend that the allegation, in plaintiffs' complaint, that deceased was injured while he was engaged in interstate commerce, was the allegation of a jurisdictional fact; that jurisdiction of the subject matter may not be conferred by the consent of the parties; that, notwithstanding petitioners admitted said allegation by failing to deny it, the pleadings were not conclusive on the trial court; that the latter was bound to hear and determine the fact; and that such determination was absolutely necessary to the validity of the judgment. Conceding for the moment each of those contentions to be sound, the position of the petitioners is not helped. The verdict was in favor of petitioners and was general. Nothing to the contrary appearing on the face of the record, it will be presumed the judgment decided every allegation in plaintiffs' complaint against them and in favor of petitioners. So construing the judgment, it was a holding the accident happened in intrastate and not interstate

commerce. But the contentions of petitioners are too broad. The record does not show it was necessary in the superior court action to determine the issue. That is so because (1) the issue was admitted; (2) conceding said allegation was of a jurisdictional fact, the record does not show that anything arose making it necessary for the trial court to inquire into the truth of said admitted allegation; and (3) although the allegation was of a jurisdictional fact, and although it was admitted the trial court was not bound to ignore the admission and make inquiry into the subject.

In action No. 27882 the issue of interstate commerce does not appear on the face of the judgment to have been adjudged—but it was admitted. Nor was it actually and necessarily included therein. That is so because the record does not show the contrary—the judgment might have rested wholly on the fact that no negligence was proved. Nor was such issue necessary to the judgment, that is also true because the record does not show the contrary. As there were several distinct issues involved, it is clear it was not made to appear either upon the face of the record nor shown by extrinsic evidence that the precise question was raised and determined. Hence, the rule as stated in Code of Civil Procedure, section 1911, was not met.

In their supplemental brief the petitioners seem to question the rule as stated in Jacobson et al. v. Miller, supra. They cite and quote from Metcalf v. Gilmore, 63 N. H. 174, 189, 190; Steck v. Board of Education, 125 N.J.L. 261, 15 A.2d 454; Johnson v. Fontana County F. P. Dist., 15 Cal. 2d 380, 101 P.2d 1092. No one of those cases sustains the claims of the petitioners. In the Metcalf case the issue admitted was not necessary to a determination of the action in which the judgment was rendered. No evidence was offered thereon. To prove that fact a bill of exceptions in due form was introduced in evidence in the second action. In the Steck case and in the Johnson case the issue admitted was absolutely necessary to the judgment offered as res judicata.

[5] Not waiving their contention that said judgment was res judicata, the petitioners assert that it was an estoppel. In that assertion we think they are clearly mistaken. (Bigelow on Estoppel, 100.)

[6, 7] The petitioners also contend that the respondents erred to the substantial prejudice of petitioners in excluding evidence. That point is based on the fact that before the respondent commission the petitioners sought to introduce a stipulation made by counsel when opening the trial of action No. 27882. That stipulation was to the effect that the accident happened while engaged in interstate commerce. But the commission received in evidence the judgment in action No. 27882. As the pleadings in said action admitted the fact, it is difficult to see how the stipulation was anything but cumulative. But even if the ruling was erroneous, the error would not support a judgment of annulment.

[8-10] The respondent commission made a finding to the effect that the accident happened when the decedent was engaged in intrastate commerce. The petitioners claim there was no evidence to support the finding. We think they are mistaken. The evidence clearly showed that the accident happened in the railroad yard at Stockton. Nothing to the contrary appearing, it will be presumed it happened in intrastate commerce. However, the petitioners had introduced the judgment roll in the action in the superior court. That record showed an admission that the accident happened in interstate commerce. The most that can be said is that the evidence was conflicting. But this court may not annul an award made by the respondents merely because the evidence is conflicting.

The award is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

46 Cal.App.2d 176

KAUKE v. LINDSAY UNIFIED SCHOOL DIST. et al.

Civ. 2579.

District Court of Appeal, Fourth District, California.

July 21, 1941.

1. Schools and school districts 🔑20

Provisions of the school code, applying specifically to school districts having an average daily attendance of less than 850 pupils, must be held to limit general enactments to schools having larger average daily attendance by removing the smaller schools from their provisions where the specific provisions are inconsistent with them. St.1931, p. 1394.

2. Schools and school districts 🔑133

Teachers in school districts having average daily attendance of less than 850 pupils can only attain permanent tenure by affirmative action of school board, and permanent tenure is not a matter of right arising from continuous service, but is a matter of grace extended to the teacher by the board. School Code, § 5.501.

3. Schools and school districts 🔑133

In school districts having average daily attendance of 850 pupils or more, permanent tenure is a matter of right following continuous service for three years and re-employment by the school board. School Code, § 5.500.

4. Schools and school districts 🔑136

Teachers' tenure has its foundation in employment under contract by a school district. School Code, §§ 5.500, 5.501.

5. Statutes 🔑207

Where School Code, section 2.2101, was general in its terms and on face seemed to apply to all school districts that were unified into a district having an average daily attendance of 850 or more, but section 2.2102 of the School Code was by its terms made applicable only to unification of smaller school districts into a larger district, section 2.2101 would be held to deal with unification of larger districts and section 2.2102 with unification of smaller districts into a larger district in order to remove apparent conflict between the sections. School Code, §§ 2.2101, 2.2102.

6. Schools and school districts 🔑133

The provision of School Code that any probationary employee of school district having average daily attendance of less than 850, who becomes an employee of unified district having total average daily attendance of 850 or more, at end of his third complete successive school year of service in the school district shall not become a permanent employee of the unified district until he has served therein for complete school year immediately following effective date of formation of the unified school district and has been re-employed for succeeding school year, is "permissive" and when read in connection with statute relating to teachers' tenure in case of teachers in school districts having less than 850 pupils, permits board of trustees of the unified district to classify teacher as permanent employee when requirements of the provision are met. School Code, §§ 2.2102, 5.501.

See Words and Phrases, Permanent Edition, for all other definitions of "Permissive".

7. Schools and school districts 🔑133

Where school teacher had served only two years as a probationary employee of school district having less than 850 average daily attendance at time of unification of the district into a school district having more than 850 average daily attendance, the teacher could gain permanent tenure status only by serving as a probationary employee of the unified school district three years and being employed for a fourth year, and could not gain such a status under statute dealing with teacher who has served three years as a probationary employee in a smaller district at time of its unification into a larger district. School Code, §§ 2.2102, 5.667.

8. Schools and school districts 🔑133

The codal proviso that in case consolidation of two or more school districts shall result in a district in which under the provisions of the code the certificated employees are entitled to probationary or permanent classification, the employees of such consolidated district shall be entitled to such classification on same basis as certificated employees in other districts of like average daily attendance, refers to unification of one or more districts having average daily attendance of less than 850 pupils with another district so that resulting unified district has an average daily attendance of 850 pupils and requires the classification of the teachers by the unified districts on same basis as that used in other districts of the same class, namely the larger districts which must give a permanent classification only to probationary teachers who have served that district as such for three years and are employed for a fourth year. School Code, §§ 5.500, 5.667.

9. Statutes 🔑181(1), 189

Although it is not within the province of the District Court of Appeal to legislate by judicial decision, it cannot put a strained construction on language used nor nullify the intention of the legislature in enacting or amending the statute, when its intention seems clear from all the legislative enactments on the same subject, and confusion or an unreasonable result would be reached by giving literal effect to exact language used in one section treating with subject dealt with in others.

10. Statutes 🔑181(1), 189, 205

Where language of statute is subject to two interpretations it is the intention of the legislature which must be given effect and not the literal interpretation of one portion of the statute.

11. Statutes 🔑181(1), 183

The intention of legislature will be given effect even though it may be inconsistent with the strict letter of the statute.

12. Statutes 🔑181(2)

A statute will not be construed in such a manner as to result in a palpable absurdity.

13. Schools and school districts 🔑133

The codal proviso that in case the consolidation of two or more school districts results in a district in which, under provisions of code, the certificated employees are entitled to probationary or permanent classification, the employees of such consolidated district shall be entitled to such classification on same basis as certificated employees in other districts of like average daily attendance, is not subject to literal interpretation so as to require that a three-year probationary period must be served by teacher in a unified district of average daily attendance greater than 850 created out of three or more districts each with an average daily attendance of less than 850 pupils. School Code, § 5.667.

14. Schools and school districts 🔑63(1)

The legislature in enacting codal proviso that in case the consolidation of two or more school districts results in a district in which under provisions of code the certificated employees are entitled to probationary or permanent classification, the employees of such consolidated district shall be entitled to such classification on same basis as certificated employees in other districts of like average daily attendance, did not intend to take away rights from the school employees, nor to give them any new rights. School Code, § 5.667.

15. Statutes 🔑200

Where School Code provided that on consolidation of "one or more" school districts in which average daily attendance for preceding school year was less than 850 pupils with district in which average daily attendance was or might become 850 or more pupils, the regular three-year probationary period should be served after effective date of consolidation by any probationary employee who had been serving in district of less than 850 average daily attendance, and in an amendment, the quoted words were changed to "two or more", but in a later amendment the original wording was restored, the substitution of words "two or more" in the first amendment, was regarded as resulting from a typographical error and as not expressing true intention of the legislature in amending the provision. School Code, § 5.667.

16. Schools and school districts 🔑133, 141(1)

Where school district having average daily attendance of less than 850 pupils was united with another district and the unified district had an average daily attendance of more than 850 pupils, and a school teacher who had been employed for two years in the smaller district was employed for three years in the unified district, the school teacher who was not offered a contract for the fourth year did not attain the status of a permanent teacher and her dismissal by the board of trustees of the unified school district was not improper. School Code, §§ 5.500, 5.501, 5.667.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Ruth R. Kauke against the Lindsay Unified School District and others for writ of mandamus to compel defendants to employ the petitioner as full-time elementary school teacher. From an adverse judgment, the petitioner appeals.

Affirmed.

Farnsworth, Burke & Maddox, and James K. Abercrombie, all of Visalia, for appellant.

Leroy McCormick and Walter C. Haight, both of Visalia, for respondents.

CONWAY, Justice pro tem.

Petitioner and appellant, Ruth R. Kauke, in this action sought a writ of mandamus to compel the defendants, Lindsay Unified School District and the Board of Trustees thereof, to employ her as a full-time elementary school teacher under the provisions of the California School Code relating to teachers' tenure. The trial court denied the petition and refused to issue a peremptory writ of mandate, from which ruling this appeal is taken.

This appeal is taken upon the judgment roll, and the findings of fact made by the trial court present the uncontroverted facts of the case. For two years prior to July, 1936, petitioner was employed as a full-time elementary school teacher by the Lindsay School District, which school district at all times had an average daily attendance of less than eight hundred and fifty pupils, being so employed for the school years of 1934-35 and 1935-36. On July 1, 1936, pursuant to the provisions of section 2.2011 of the School Code, the Lindsay School District was united with the Lindsay High School District and thereupon became the Lindsay Unified School District, which unified school district at all times had an average daily attendance of more than eight hundred and fifty pupils.

Petitioner was subsequently employed by the Lindsay Unified School District for the school years 1936-37, 1937-38 and 1938-39, and in each instance signed her offer of employment which classified her as a probationary employee of said district. On April 20, 1939, the Board of Trustees of the Lindsay Unified School District notified petitioner that she would not be offered a contract for the school year 1939-40, and dismissed her as an employee of said district. No questions of certification qualifications or of dismissal for cause, or discontinuance of the subjects taught by the petitioner are here involved.

On August 17, 1939, appellant filed her petition for writ of mandate and an alternative writ was issued and served upon defendants. The trial court denied the writ of mandate from which denial this appeal is taken.

It is petitioner's contention that she had acquired a classification as a permanent teacher, and was not subject to dismissal, except for cause, by reason of the fact that her employment for two years by the Lindsay School District prior to its unification should be counted as a part of her probationary service, and that upon being employed for one full term by the Unified School District and on being rehired, she automatically obtained a permanent classification, and was not subject by virtue of sections 5.500 and 5.501 of the School Code to dismissal except for cause.

In considering the questions presented on this appeal it should be borne in mind that on July 1, 1936, when the unified district was formed, petitioner had been employed but two years by the Lindsay School District and had attained no other classification than that of probationary teacher.

[1] Since 1931 (Stats.1931, p. 1394) the legislature has divided school districts into two classes in so far as the teachers' tenure law is concerned, namely, those having an average daily attendance of less than eight hundred and fifty pupils and those having an average daily attendance of eight hundred and fifty pupils or more. The statutes on this subject may now be regarded as falling into two classes; first, those dealing with the subject of teachers' tenure generally and also dealing with the larger schools, and, secondly, those dealing with the smaller schools. In some instances the general enactments were not amended so that they, by their terms, seem to apply to both classes of schools. However, in many instances they are enactments applying specifically to the smaller schools which must be held to limit the general enactments to the larger schools by removing the smaller schools from their provisions where the specific laws are inconsistent with them.

[2, 3] Teachers in the smaller districts can only attain permanent tenure by the affirmative action of the school board. § 5.501, School Code. There permanent tenure is not a matter of right arising from continuous service, but is a matter of grace extended to the teacher by the board. In the larger districts tenure is a matter of right following continuous service for three years and reemployment by the school board. § 5.500, School Code.

[4] Tenure has its foundation in employment under contract by a school district. Gould v. Santa Ana High School District, 131 Cal.App. 345, 21 P.2d 623. This being true, it should follow that as the Lindsay Unified School District had an

average daily attendance of more than eight hundred and fifty pupils and as petitioner only served that district under contract with it for three years without a renewal of her contract for the fourth year, she did not gain a permanent status in that district unless there is a statutory enactment requiring that district to give credit for the probationary period served in the Lindsay School District.

On July 1, 1936, when the Lindsay Unified School District was formed, there were in effect sections 2.2101, 2.2102 and 5.667 of the School Code, under the provisions of which this case must be decided.

Section 2.2101 was general in its terms and on its face would seem to apply to both classes of school districts that were unified into a district having an average daily attendance of eight hundred and fifty or over. Section 2.2102 was by its terms made applicable only to the unification of a smaller school district into a larger district. As the provisions of section 2.2102 conflict with those of section 2.2101 and deal with a special subject, it must be held that section 2.2101 deals with the unification of the larger districts and section 2.2102 with unification of a smaller district or districts into a larger district. In this way the apparent conflict between the two sections can be removed.

Section 2.2102 of the School Code provided as follows:

"Any probationary employee of an elementary school district or high school district having an average daily attendance of less than eight hundred fifty, who, under the provisions of this article, becomes an employee of a unified school district having a total average daily attendance of eight hundred fifty or more at the end of his third complete consecutive school year of service in such elementary or high school district shall not become a permanent employee of the unified school district until he has served therein for a complete school year immediately following the effective date of the formation of such unified school district and has been reemployed for the succeeding school year."

[6] The provisions of this section are permissive and when read with section 5.501 of the School Code would seem to permit the board of trustees of the unified district to classify the teacher as a permanent employee when the requirements of the section are met.

The third paragraph of section 5.667 of the School Code, in effect at that time, provided as follows:

"Provided, on the consolidation of one or more school districts in which the average daily attendance for the preceding school year was less than 850 pupils, with a district or districts in which the average daily attendance was or may become 850 or more pupils, the regular three-year probationary period must be served after the effective date of the consolidation, by any probationary employee who has been serving in a district of less than eight hundred fifty average daily attendance."

In 1937, the legislature repealed section 2.2102 of the School Code. Stats.1937, p. 106. The repeal became effective on April 10, 1937. The same legislature amended section 5.667 of the School Code, Stats.1937, p. 106, the amendment also becoming effective on April 10, 1937. The important part of this amendment here is the change of the words "one or more school districts" appearing in the third paragraph of the section we have already quoted to "two or more school districts". In 1939, the legislature again amended the third paragraph of the section by changing the word "two" appearing in the 1937 amendment to the word "one", thus restoring the section to the substantial form of 1935. Stats.1939, p. 1254. This amendment went into effect on May 15, 1939, and strongly suggests that the use of the word "two" in the 1937 amendment in the place of the word "one" in the earlier statute was the result of a typographical error. However, we do not need to place our decision on that ground. We will accept the various sections and amendments literally as passed and as expressing the exact intent of the legislature.

[7] Section 2.2102 of the School Code dealt only with teachers who had served three years as a probationary employee in a smaller district at the time of its unification into a larger district. The provisions of this section should not govern here as they do not fit the facts of this case since petitioner had served but two years as a probationary employee of the Lindsay School District at the time of its unification into the Lindsay Unified School District. This is true because the provisions of the third paragraph of section 5.667 of the School Code, in effect in 1936, cover the precise situation before us. That para-

graph of the section required that petitioner serve as a probationary employee of the Lindsay Unified School District three years and be employed for a fourth year before she could become a permanent employee of the unified district.

She entered the employment of that district under the terms of that statute as a probationary employee in 1936 and was so serving on April 10, 1937, when the amendment of that section in that year went into effect. That amendment dealt solely with the unification of two or more of the smaller districts with a third district, so that the resulting unified district had an average daily attendance of eight hundred and fifty or more pupils. We have no such situation here. Two smaller districts were unified and no third district was involved so if we apply the amended third paragraph literally as expressing the intent of the legislature and disregard the apparent typographical error in it, it is not applicable to the situation and cannot govern this decision.

The 1939 amendment, apparently to correct the error in the 1937 amendment, provided that when one or more of the smaller districts are unified with another district so that the unified district shall have an average daily attendance of eight hundred fifty or more pupils, the probationary teacher who had served in one of the smaller districts must serve as a probationary teacher of the unified district for three years and be reemployed for a fourth year before she could attain a permanent status in the unified district. The section as thus amended would require petitioner to have served the unified district three years as a probationary employee and to have been employed for a fourth year before she could gain a permanent status in that district. She was employed for three years as a probationary employee but was not reemployed.

The 1939 amendment, as did the original statute and the 1937 amendment, contained the following:

"The provisions of this section, and all rights hereby granted, shall apply to any such division, uniting, unionization, unification, or consolidation of school districts, or change in school district boundaries or organization, made at any time subsequent to January 1, 1931, to the same extent as changes made subsequent to the effective date of this section, and the provisions hereof shall be, and shall be construed to be retroactive to January 1, 1931."

If this provision be given effect and held to be retroactive according to its terms it is clear that it gave retroactive effect to the third paragraph of the same section (Stats.1939, p. 1254), which required petitioner to serve for three years and be reemployed for a fourth year before she could attain a permanent status in the unified district. This should be true as there was no specific provision of the teachers' tenure law covering the exact situation in which petitioner found herself between the April 10, 1937 amendment to section 5.667 of the School Code and May 15, 1939, the effective date of the amendment of that year of the same section.

If we fail to give retroactive effect to the last quoted second paragraph of section 5.667 of the School Code, then it is probable that the concluding clause of the first paragraph of that section, read in connection with section 5.500 of the same code, is controlling here. In the 1937 amendment that clause read as follows: "provided, however, that in case the unionization, unification or consolidation of two or more school districts shall result in a district in which, under the provisions of this code then in effect, the certificated employees are entitled to probationary and/or permanent classification, the employees of such union, unified or consolidated district shall be entitled to, and shall be given, such classification, on the same basis as certificated employees in other districts of like average daily attendance."

[8] It may be inferred from the language used that this clause refers to the unification of one or more of the smaller districts with another district so that the resulting unified district has an average daily attendance of eight hundred and fifty pupils and requires the classification of the teachers by the unified district on the same basis as that used in other districts of the same class, namely, the larger districts which must give a permanent classification only to probationary teachers who have served that district as such for three years and are employed for a fourth year. Strength is added to this conclusion by the code provision (§ 2.2011 of the School Code) that the existence of the districts unified into the larger districts ends on the unification being completed and the further fact that tenure must be based on employment under contract, express or implied. Gould v. Santa Ana High School District, supra. A

unified district could not have employed teachers under contract or otherwise prior to the time it came into existence.

[9-12] Section 3 of the School Code requires that the provisions of the code be "liberally construed, with a view to effect its objects and to promote justice". While this court is well aware that it is not within its province to legislate by judicial decision, nevertheless it cannot put a strained construction on language used nor should it nullify the intention of the legislature in enacting or amending the statute in question when its intention seems clear from all legislative enactments on the same subject, and confusion or an unreasonable result would be reached by giving literal effect to the exact language used in one code section treating with a subject dealt with in others. There is no dearth of recent cases, all enunciating the principle that where its language is subject to two interpretations, it is the intention of the legislature that must be given effect and not the literal interpretation of one portion of a statute. See In re Haines, 195 Cal. 605, 234 P. 883; In re Washer, 200 Cal. 598, 254 P. 951; Universal Picture Corp. v. Superior Court, 9 Cal.App.2d 490, 50 P.2d 500; Fresno City H. S. Dist. v. De Caristo, 33 Cal.App.2d 666, 92 P.2d 668; Southern Pacific Co. v. County of Riverside, 35 Cal.App.2d 380, 95 P.2d 688; Jordt v. Cal. State Board of Education, 35 Cal.App.2d 591, 96 P.2d 809; Leo v. Board of Medical Examiners, 36 Cal.App.2d 490, 97 P.2d 1046. In People v. Black, 45 Cal.App.2d 87, 113 P.2d 746, 750, it was said:

> "Once the intention of the legislature is ascertained it will be given effect even though it may not be consistent with the strict letter of the statute. In re Sekuguchi, 123 Cal.App. 537, 11 P.2d 655; Crawford v. Payne, 12 Cal.App.2d 485, 55 P.2d 1240. In construing a statute it must be remembered that no law is to be construed in such a manner as to result in a palpable absurdity. People v. Craycroft, 111 Cal. 544, 44 P. 463."

[13] If we give absolute literal interpretation to the third paragraph of section 5.667 of the School Code as amended in 1937, it would require that a three-year probationary period must be served by a teacher in a unified district of average daily attendance greater than eight hundred and fifty created out of three or more districts, each with an average daily attendance of less than eight hundred and fifty pupils. It might be argued that by implication no such three-year probationary period would be required of a teacher serving in a unified district created out of two, and only two, districts each with an average daily attendance of less than eight hundred and fifty pupils before unification.

[14] No conceivable basis can be found for such an anomalous classification of unified school districts. If the section is considered in its entirety a manifest intention is disclosed on the part of the legislature to take away no rights from the school employees nor to give them any new ones.

[15] Furthermore it is clear that the legislature intended to give the board within the newly unified district the same length of time, as other boards in which to judge its school employees to determine whether or not it wished to hire them for a fourth term, and thus automatically give them a permanent classification, save in those instances wherein the school employees affected by the unification were employed in a school district of an average daily attendance of eight hundred and fifty pupils, or more, who would be deprived of their credit toward permanent classification, which might have been theirs eventually except for unification of their school district with another. The conclusion is entirely reasonable that the substitution of the words "two or more school districts" in the 1937 amendment of section 5.667 of the School Code for the words "one or more school districts" appearing in the original section was the result of a typographical error and did not express the true intention of the legislature in amending the section.

[16] This court must, therefore, hold that petitioner and appellant was not entitled to a permanent classification and that the school board acted within its right in dismissing appellant from its employment at the end of the third year of service as a probationary teacher in the Lindsay Unified School District.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

SACRAMENTO MUNICIPAL UTILITY DIST. v. PACIFIC GAS & ELECTRIC CO.

Civ. 6603.

District Court of Appeal, Third District, California.

July 16, 1941.

Hearing Granted Sept. 11, 1941.

1. Constitutional law 🔑208(1), 317
Costs 🔑4
Statutes 🔑72

The legislature may enact a statute requiring certain class of litigants to pay not only statutory costs but also all other damages and expenses, including attorney's fees, resulting to the defendant, without violating Fourteenth Amendment to federal Constitution or state constitution, provided that classification is based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted. Const.Cal. art. 1, §§ 11, 21; U.S.C.A.Const. Amend. 14.

2. Constitutional law 🔑45

Where it plainly appears that there is no reasonable basis for a classification set up in a statute, the courts are charged with duty of nullifying the enactment.

3. Constitutional law 🔑208(1), 317
Costs 🔑4
Statutes 🔑72

The statute making a person or corporation bringing a suit to enjoin issuance of bonds by political subdivision of state for purpose of acquiring public utility works liable for all costs, damages and necessary expenses resulting to a defendant by reason of filing such suit, if injunction is finally denied, is unconstitutional as violative of Fourteenth Amendment to federal Constitution, and of provisions of state constitution that all laws of a general nature shall have a uniform operation, and that no citizen or class of citizens shall be granted privileges or immunities which, upon same terms, shall not be granted to all citizens. Code Civ. Proc. § 526b; Const.Cal. art. 1, §§ 11, 21; U.S.C.A.Const. Amend. 14.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action under section 526b of the Code of Civil Procedure by the Sacramento Municipal Utility District against the Pacific Gas & Electric Company to recover attorney's fees expended by plaintiff in an action brought by defendant to enjoin the issuance of bonds for the purpose of acquiring electrical works. From a judgment for plaintiffs, the defendant appeals.

Judgment reversed, with directions.

Thos. J. Straub, and John C. Wood, both of San Francisco, for appellant.

Robert L. Shinn, Marshall K. Taylor, Stephen W. Downey, John F. Downey, and Downey, Brand & Seymour, all of Sacramento, for respondent.

PER CURIAM.

This action was brought under the provisions of section 526b of the Code of Civil Procedure, to recover attorney fees expended by respondent in the litigation hereinafter described. Findings were entered in favor of respondent and judgment in the sum of $9,500 was rendered against appellant. The appeal is taken from such judgment.

Respondent is a public corporation organized and existing under the Municipal Utility District Act. California Stat.1921, p. 245, as amended. Appellant is a public utility corporation organized and existing under the laws of the state of California, and owns, controls and operates plants and equipment for, and is engaged in the business of generating, transmitting and distributing electric energy within respondent's boundaries. In November, 1934, the electors within the boundaries of respondent voted to issue bonds in the sum of $12,000,000 for the purpose of acquiring works for supplying the inhabitants thereof with electric energy for light, heat and power purposes. Respondent thereafter brought an action under section 16 of said act to determine the validity of said bonds. Appellant appeared in said action and contested the validity of said bonds on the ground that taxes might be levied to pay the same, and that such taxation of its property would constitute a taking thereof without compensation and without due process of law, in violation of the fourteenth amendment to the Constitution of the United States. The State Supreme Court held (Sacramento Municipal Utility Dist. v. All Parties and Persons, 6 Cal.2d 197, 203, 57 P.2d 506) that the issue tendered thereby was premature and refused to make a finding thereon. Thereafter, when such bonds were about to be issued and sold by respondent, appellant brought an action in the United States District Court for the Northern District of California to enjoin respondent from executing, selling, issuing or delivering such bonds. Said court rendered its decision in favor of respondent. Pacific Gas & Electric Co. v. Sacramento Municipal Utility Dist., 17 F.Supp. 685. From said judgment appellant appealed to the Circuit Court of Appeals for the Ninth Circuit, which court affirmed the judgment of said District Court. 92 F.2d 365. The Supreme Court of the United States denied certiorari. 303 U.S. 640, 58 S.Ct. 610, 82 L.Ed. 1100. It was stipulated herein that no injunction either temporary or permanent, or restraining order of any kind was ever issued in said action by any of said courts of the United States. It was also stipulated that all costs incurred in said action which were taxable as costs in the several courts of the United States were taxed according to rules of such courts and were fully paid by the appellant.

The facts are undisputed, and bring the case clearly within the purview of section 526b of the Code of Civil Procedure, which reads as follows:

"Every person or corporation bringing, instigating, exciting or abetting, any suit to obtain an injunction, restraining or enjoining the issuance, sale, offering for sale, or delivery, of bonds, or other securities, or the expenditure of the proceeds of the sale of such bonds or other securities, of any city, city and county, town, county, or other district organized under the laws of this state, or any other political subdivision of this state, proposed to be issued, sold, offered for sale or delivered by such city, city and county, town, county, district or other political subdivision, for the purpose of acquiring, constructing, completing, improving or extending water works, electric works, gas works or other public utility works or property, shall, if the injunction sought is finally denied, and if such person or corporation owns, controls, or is operating or interested in, a public utility business of the same nature as that for which such bonds or other securities are proposed to be issued, sold, offered for sale, or delivered, be liable to the defendant for all costs, damages and necessary expenses resulting to such defendant by reason of the filing of such suit."

Appellant contends that the said section is unconstitutional in that it denies the equal protection of the law to those owning or operating public utilities, and therefore offends against the fourteenth amendment of the federal Constitution, and that it violates sections 11 and 21 of article I of the Constitution of California, which read as follows:

"Sec. 11. All laws of a general nature shall have a uniform operation."

"Sec. 21. No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

We believe that the position of appellant is sound.

It may be first noted that the said section does not purport to allow an attorney fee as part of the ordinary "costs of suit". It creates a new liability which may be enforced by an independent action. Respondent gives the following reasons for the enactment of the statute:

"A genuine problem exists. It was necessary to devise some way to check nuisance lawsuits instituted solely to delay the effort of a public entity to enter a utility business. Such delays of course are of great profit to any private entity with which the public would eventually compete or whose business it would take over. But it is a loss to the public. A very fair plan has been arrived at to discourage such delay suits. The person bringing such suit should pay the expense to which he puts the defendant by bringing it. This is but equitable and just. If the party in fact does have a meritorious case and wins, he is subjected to no penalty. If he loses because his case is not meritorious he does no more than pay the expenses he forced the other party to incur—expenses doubtless offset many times by the profits made during the period of delay."

We do not believe there is any substantial basis for the assumption that all or many of such actions are "nuisance lawsuits". No evidence is presented which would afford the basis for a conclusion or finding to that effect. On the contrary, in all dealings, whether between individuals, or between public corporations and public utilities, the presumption of fair dealing obtains. If the law was designed to penalize vexatious litigation, it should have provided, as a basis for recovery, that plaintiff must prove that the action was, in reality, not commenced in good faith, but with an ulterior purpose in view. In the absence of such proof we cannot conclude that the action for the injunction was commenced for any reason other than to protect and preserve the rights of the plaintiff therein.

[1] May the legislature say to a certain class of litigants that if you go into court to preserve or assert a right, and if you lose the case you must pay not only statutory costs, but all other damages and expenses (including attorney fees) resulting to the defendant in such action? The answer is that it can do so, without violating the fourteenth amendment or the state Constitution, provided that the classification is based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted. Gay v. Engebretson, 158 Cal. 21, 109 P. 876, 139 Am.St.Rep. 67; Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666. If, however, there is no logical basis for placing the litigant in the class where he must be thus penalized the statute clearly contravenes the said constitutional provisions. Thus it has been held that the legislature cannot require that an attorney fee be paid a lien-claimant under the Mechanic's Lien Law—chapter II, title IV, Code of Civil Procedure. Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 P. 982, 983, 17 L.R.A.,N.S., 909, 119 Am.St.Rep. 193, 11 Ann.Cas. 712. In that case the court said:

"The statutory provision in question is found in section 1195, Code of Civ.Proc., and is as follows: 'The court must also allow, as a part of the costs, * * * reasonable attorneys' fees * * * to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant.' It is to be noticed that this section provides for an attorney's fee to plaintiff, but not to defendant, even though the latter be successful in the action, and that attorney's fees are allowed even to plaintiff, only in actions under the mechanics' lien law; the general rule being that 'the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties.' Code Civ.Proc., § 1021. This provision is, in our opinion, violative both of the federal and the state Constitutions—of the 14th amendment of the former, which guaranties to every person 'the equal protection of the law,' and of the provisions of the state Constitution which provide that general laws shall be uniform, prohibit special laws, and declare the inalienable rights of all men of acquiring, possessing, and protecting property. A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed."

It may be said that the pronouncement in the latter case is the general rule throughout most jurisdictions. Like most rules, however, it has certain exceptions and these are relied upon by respondent as supporting the enactment, although none is directly in point. First, there are actions where an insurance company has failed to pay a claim within a definite time fixed by statute. The weight of authority is to the effect that there is no constitutional objection to the imposition of attorney's fees upon insurance companies where they refuse to pay claims within a specified period, without a like imposition of them upon unsuccessful plaintiffs. Numerous authorities supporting that view are found in 90 A.L.R., page 534. Practically all of the cases justify this unequal application of the law upon the ground that it is a necessary and proper regulation of the insurance business, and is designed to overcome vexatious delays in the payment of claims. The following excerpt from the case of Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N.W. 313, 315, shows clearly the grounds for classifying insurance companies apart from other litigants:

"It is a matter of common knowledge that corporations engaged in the business of insuring real estate have been long accustomed to vexatiously and oppressively resist payment of claims arising under their policies. The reports of this court bear abundant evidence to the fact that no other class of litigants has so persistently endeavored to escape liability from their contract obligations by interposing technical and unconscionable defenses to actions instituted against them. The legislature was, we think, within its constitutional power in selecting this class of insurance companies from all other litigants, and subjecting them, if unsuccessful, to the payment of attorney's fees, because experience and observation had shown that the defenses upon which they generally rely are without merit, and constructed out of some of the forfeiture clauses with which their policies are thronged. The law in question was designed to repress an evil practice, to advance public interests and promote justice. It was an exercise of legislative power justified by considerations of public policy."

The foregoing statement is typical of many others involving the question. Such opinions seem to warrant the conclusion that stricter regulation of the business of insurance is necessary. In fact, it would seem as though many of the states have seized upon this novel, but rather drastic method as a means of enforcing certain regulations.

Another instance where a similar law has been upheld is in certain actions against railway companies, arising out of losses sustained when livestock is killed, or damages resulting from fires. The classification is justified upon the ground that the imposition of attorney fees under such circumstances is in the nature of a police regulation.

Turning to the instant case, we have no circumstances present which bring appellant within the ruling laid down in the insurance cases. No criticism whatever is raised in respect to the manner in which appellant does business—particularly in respect to its relations with its customers. There is no ground for placing appellant within the insurance company class. Neither do the facts bring the case within the rule laid down in the railway cases. There is nothing in the record to justify the legislation upon the ground of general police power.

[2] It is strongly urged by respondent that classification is primarily one for the legislature, and that the courts should not interfere unless it can be plainly seen that such classification has no basis in the facts. We have stated the rule governing this phase of the case as laid down in **Gay** v. Engebretson, supra. If it plainly appears that there is no reasonable basis for such classification, the courts are charged with the duty of nullifying the enactment.

Respondent devotes considerable space to some of the evils of private ownership of utilities, and the urgent necessity of curbing their opposition to competition from municipally owned utilities. This is largely an economic question, although mixed quite often with political considerations. There is nothing before the court to substantiate any of the charges made by respondent relating to the alleged common practice, on the part of private utilities, of starting litigation for the mere purpose of harassing the municipality. It cannot, therefore, be urged that the classification was made by the legislature to curb practices which are inimical to the public welfare—such practices as appeared in the insurance, railroad, and tax cases cited by respondent. In the former, it was the failure to pay losses promptly. In the railroad fence cases, it was the failure to maintain proper fences against livestock. In the tax cases, it was a penalty for failure to pay taxes when due. In all these matters the attorney fee was imposed as a penalty for failure to perform an act required by law or contract. Here, the fee is imposed, not for failing or neglecting to do any act enjoined by law or contract, but because appellant seeks to assert a right by filing an action which necessarily resulted in delaying the plans of respondent. If, as we have said, the statute provided that an attorney fee must be paid if the court found plaintiff was merely seeking to delay a bond issue, and not acting in good faith, a penalty of this character might be exacted. The fact that the attorney fee can be recovered only in the event that the injunction is finally denied, cannot justify an inference that there was bad faith in the commencement of the action. Merely because a litigant is unsuccessful does not brand him with the mark of fraud.

Respondent seeks to justify the classification upon the ground that the public has a very acute interest in public utilities. They point out such corporations have been granted the right of eminent domain. We cannot see how the grant of such power can justify legislation which penalizes a particular litigant for going into court. It may be a classification for certain purposes, but it is not one which can be the basis for the exaction of a penalty. The case of Marin Municipal Water District v. Marin Water & Power Co., 178 Cal. 308, 173 P. 469, 472, simply holds that it was no denial of the equal protection of the law for the legislature to provide that the State Railroad Commission should try all actions in eminent domain where a public corporation was seeking to take over the property of any existing utility. The court held that the state had a right to establish different rules of procedure for different classes of litigants. The following facts were held to afford a valid basis for the classification:

> "Elements of peculiar complication and difficulty are often involved in the valuation of the property of a public utility. The fact that public utilities are subject to constant regulation and examination by the Railroad Commission may well have led the Legislature to conclude that that commission was best able to make a just and equitable appraisement of their property. Kennebec Water Dist. v. Waterville, supra [96 Me. 234, 52 A. 774]. So far as defendants are concerned, the classification made by the act cannot therefore be regarded as purely arbitrary."

No such facts have been called to our attention in the instant case. Even though the courts have upheld the classification of utilities for certain purposes, it does not follow that they may be classified for any or all purposes. As respondents state: "Each statute rests on its own peculiar circumstances."

All parties seem to agree that this section was enacted as a deterrent upon litigation, with the obvious purpose of discouraging a certain litigant from resorting to legal process in the assertion and protection of his rights. No distinction is made in the statute between actions commenced in good faith and those filed for the purpose of harassing the other party. Practically all suits for injunctive relief result in delaying some action which the defendant is about to take, and the situation here is not peculiar to public corporations. There is no legal distinction between public and private patience.

[3] We are of the opinion that the rule quoted above from Builders' Supply Dept. v. O'Connor must govern the consideration of the statute we are here contemplating. No sound or valid reason can be advanced for the classification. The enactment definitely violates the fourteenth amendment to the federal Constitution, and also the provisions of sections 11 and 21 of the Constitution of California.

We do not deem it necessary to discuss other questions raised by appellant.

The judgment is reversed, with directions to enter findings and judgment in accordance with the views herein expressed.

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46 Cal.App.2d 108

CALIFORNIA TRUST CO. v. GARBETT et al.

Civ. 6586.

District Court of Appeal, Third District, California.

July 17, 1941.

Appeal and error 🔑805

Where in interpleader action by trustee under express trust ultimate question was validity of trust, and appeal from judgment upholding validity was abandoned by one of interpleading defendants through mistake of counsel in overlooking importance of keeping judgment alive and thus preventing opposing counsel from making use of it as res judicata in other actions, a denial of motion to vacate written abandonment of the appeal was not an abuse of discretion. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the California Trust Company against Leal Garbett and others. From an order of the superior court denying named defendant's motion under section 473 of the Code of Civil Procedure to set aside and vacate a written abandonment of an appeal, the named defendant appeals.

Affirmed.

H. Sidney Laughlin, of Los Angeles, for appellant.

Overton, Lyman & Plumb, Cecil A. Borden, and Kenyon F. Lee, all of Los Angeles

(John A. Loomis, of Los Angeles, of counsel), for respondent.

TUTTLE, Justice.

This is an appeal from an order denying the motion of appellant, under section 473 of the Code of Civil Procedure, to set aside and vacate a written abandonment of an appeal. In support of the motion, appellant relies upon the affidavit of her counsel and the records and files of the action. No counter affidavit was filed by respondent. There is no dispute as to the facts upon which the application was based. There is in reality only one appellant, who is sued as an individual and also as executrix.

On September 2, 1938, a judgment in the above-entitled action was entered against appellant in the superior court of Los Angeles county. The pleadings are not in the record before this court. From the affidavit filed by appellant, and the court's findings, it appears that the action was brought by plaintiff, as trustee under an express trust. It was alleged in the complaint that an actual controversy existed between appellant and Occidental Petroleum Corporation as to their rights under said trust. Appellant, in her pleading, set up facts to show that the trust agreement was obtained through menace and undue influence. Respondent set up the statute of limitations as one of the defenses. The court found that the action was barred by said statute, and also that there was no fraud, duress or undue influence used in the preparation and execution of said trust agreement. It was adjudged that appellant take nothing by reason of the action. An appeal was taken from said judgment to the Supreme Court. Thereafter, and on February 8, 1939, appellant filed an abandonment of said appeal. It appears that three other actions of a similar nature, but each with a different plaintiff, were filed in the superior court, and one of such actions was filed in the United States District Court, Southern District of California. Counsel for appellant did not come into the cases until January 5, 1939, and was unfamiliar with the affairs of appellant prior to said date.

When the action in the federal court was tried on March 15, 1939, the court held that as the judgment in the state court had become final, it was a bar to the action, and rendered judgment against appellant. Appellant very frankly states her position to be as follows:

"Thus it appears Leal Garbett, appellant herein, is in the anomalous position of seeking relief of this court from an order denying her motion to set aside and vacate her abandonment of appeal theretofore filed and to reinstate her appeal from a judgment rendered against her, while being, at the same time, disinclined to prosecute such appeal. The seeming anomaly of her position is more apparent than real, however, as a thoughtful weighing of the facts will disclose. Appellant is, to state it briefly, forced to this appeal in order to protect other litigation now being prosecuted by her, from the plea of res adjudicata by respondent herein. This the lower court did not fully comprehend when it denied the motion, the effect of which denial was not confined solely to this action, but very materially affected four others, involving large sums of money. Three of those actions are now before this court on appeal from the judgment. * * * In this action the statute commenced to run from the date of the trust as to both appellant and her husband, and some seven years having elapsed, it is apparent, unless some reason appear to stay the statute, that it had run its course and the cause of action is barred. If the only finding of the lower court had been that the statute had run, and the action was thereby barred, appellant would not now be in this predicament. But the lower court made other findings to the effect that no threats of criminal prosecution, promises of immunity, menace, duress, undue influence or fraud was or were made or employed by respondent to procure the conveyance of such property to the trustee plaintiff. * * *

"Under the pleadings of this action, as between the interpleading defendants, the ultimate fact is the validity of the trust agreement. However, the special plea of the statute of limitations was raised by the answer of respondent corporation to the claims of appellant. As between these parties such a plea is in bar, and must be heard and determined by the trial court before the merits of the action can be heard. If it is then found that such plea is good, the court is not authorized to go further into the facts involving the merits of the action, and certainly not to make any findings on the merits. In view of such plea, the only relief to which respondent is entitled is a judgment that the action abate."

We believe that the foregoing argument should properly have been addressed to the federal court in opposition to the plea of res adjudicata. We do not deem it our duty to decide here whether or not the former judgment was a bar. Our only inquiry here is whether or not the trial court abused its discretion in denying the motion. It is true that appellant finds herself in a dilemma, and that it is one brought about by the mistake of her counsel in overlooking the strategic importance of keeping the judgment alive, and thus preventing opposing counsel from making use of it as res adjudicata. She admits that the appeal had no merit, but she has hopes of securing a modification which would show that the merits of the case were not adjudicated. All of such facts were presented to the trial court. We cannot say that it abused its discretion by failing to assist appellant in resisting the plea of her opponents in the other actions.

The order is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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46 Cal.App.2d 248

AMENDT v. PACIFIC ELECTRIC RY. CO.

Civ. 13054.

District Court of Appeal, Second District, Division 2, California.

July 29, 1941.

As Corrected Aug. 11, 1941.

Rehearing Denied Aug. 27, 1941.

1. Street railroads 🔑98(6)

In crossing street railway track, it is pedestrian's duty to use such reasonable care as to avoid colliding with passing vehicles.

2. Street railroads 🔑98(6, 8)

Where a pedestrian is about to cross street railway track, he must use his senses before stepping onto the track to ascertain whether a car is approaching, and if upon the track, he must leave it when a car comes near.

3. Street railroads 🔑93(4)

A motorman cannot be charged with duty of anticipating that anyone would suddenly step from a place of safety onto tracks in front of an approaching car, and streetcar company is not responsible to person who carelessly or absent-mindedly walks suddenly in front of a moving car.

4. Street railroads 🔑112(3)

Where pedestrian steps directly in front of approaching streetcar and is struck instantly, but one inference can be drawn, to-wit, his negligence.

5. Street railroads 🔑98(10)

In crossing street railway tracks, ordinarily prudent man is under duty, before placing himself in a position of danger, to look in the direction of the anticipated peril.

6. Street railroads 🔑98(7)

A pedestrian who, with knowledge of practice of railway operatives in switching across a sidewalk where no switchman is on duty, steps upon track in front of a car which he has observed standing near the point of collision, is negligent.

7. Street railroads 🔑117(22)

A pedestrian is not negligent as a matter of law in crossing a streetcar track, merely because he knows a streetcar is approaching.

8. Street railroads 🔑85(6)

A pedestrian has right to use portions of a street occupied by streetcar tracks, so long as he does not unnecessarily obstruct the movements of cars.

9. Street railroads 🔑98(5)

It is not negligence for a pedestrian to walk in close proximity to or upon streetcar tracks.

10. Street railroads 🔑85(6)

By reason of mutual rights of pedestrian and streetcar to area of tracks, subject to necessity for pedestrian to yield upon signal of the car's approach, reciprocal rights obtain, and reciprocal duties are imposed.

11. Street railroads 🔑93(3, 4)

When a pedestrian is lawfully within a cross-walk dedicated to his uses, it is incumbent upon a motorman to see him and use ordinary care to avoid running him down.

12. Street railroads 🔑98(10)

When traversing a street of congested traffic, pedestrian must look ahead and toward any quarter from which danger might come, in order to avoid colliding with others.

13. Street railroads 🔑98(10)

A pedestrian in a street intersection need not look continuously backward for a streetcar which he has seen standing, but must exercise only such degree of vigilance as would under the circumstances constitute reasonable care.

14. Street railroads 🔑98(5)

A pedestrian may rely upon streetcar to sound the warnings which it customarily sounds when approaching the point where he walks.

15. Trial 🔑139(1), 165

In considering a motion for nonsuit, evidence must be viewed most favorably to plaintiff, and motion should not be granted except where there is no substantial evidence to support a verdict for plaintiff.

16. Trial 🔑139(1)

If, by disregarding adverse evidence and giving plaintiff's proof and every legitimate inference their full legal value, substantial evidence remains to support a verdict for plaintiff, nonsuit should be denied.

17. Street railroads 🔑117(22, 23)

Presence of a streetcar in vicinity of a pedestrian's path, and pedestrian's failure to look again to his right in presence of what he considered a definite hazard in front of him, are questions for jury.

18. Trial 🔑139(1)

If plaintiff has presented such substantial evidence as will support a verdict in his favor, notwithstanding conflicts therewith, nonsuit must be denied.

19. Negligence 🔑136(1)

A plaintiff has a right to have every material issue of fact in a negligence case determined by jury, and nonsuit should not be granted except where clearly no material issue remains for jury.

20. Street railroads 🔑98(7), 117(22)

Where pedestrian was familiar with intersection of two streets and street railway private right of way, and with custom of sounding gong before entering intersection, he had a right to rely upon warning, and was not guilty of "negligence" as a matter of law in crossing intersection after seeing car stopped behind him at intersection, nor in continuing to cross after looking again and seeing car still stopped, but his contributory negligence as affecting street railroad's liability when he was struck by car coming from behind was for jury in view of other traffic which he was required to watch.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

21. Street railroads 🔑98(7)

A pedestrian's right to rely upon giving of warning by streetcars entering intersection as was customary at such intersection should be considered in his behalf in determining his contributory negligence in crossing intersection after seeing car stopped behind him.

22. Street railroads 🔑98(10)

Though pedestrian crossing street railway tracks at intersection of two streets and private street railroad right of way was under duty to exercise reasonable care to look in direction of anticipated dangers, he was not required to oscillate his head like a clock pendulum to avoid colliding with persons ahead and at the same time to watch approach of street car from behind.

23. Trial 🔑165

On motion for nonsuit, in case of conflict in evidence, testimony favorable to the defense must be disregarded, and merits of the motion are to be measured by the most favorable evidence given on behalf of plaintiff.

24. Street railroads 🔑117(23)

A pedestrian's failure to hear streetcar's approach from behind, in view of noise created by heavy traffic at such intersection, entitled him to a jury's finding whether his negligence barred recovery from street railroad for resulting injuries.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Chris Amendt against the Pacific Electric Railway Company for injuries suffered when struck by streetcar. From a judgment for defendant, after motion for nonsuit had been granted, plaintiff appeals.

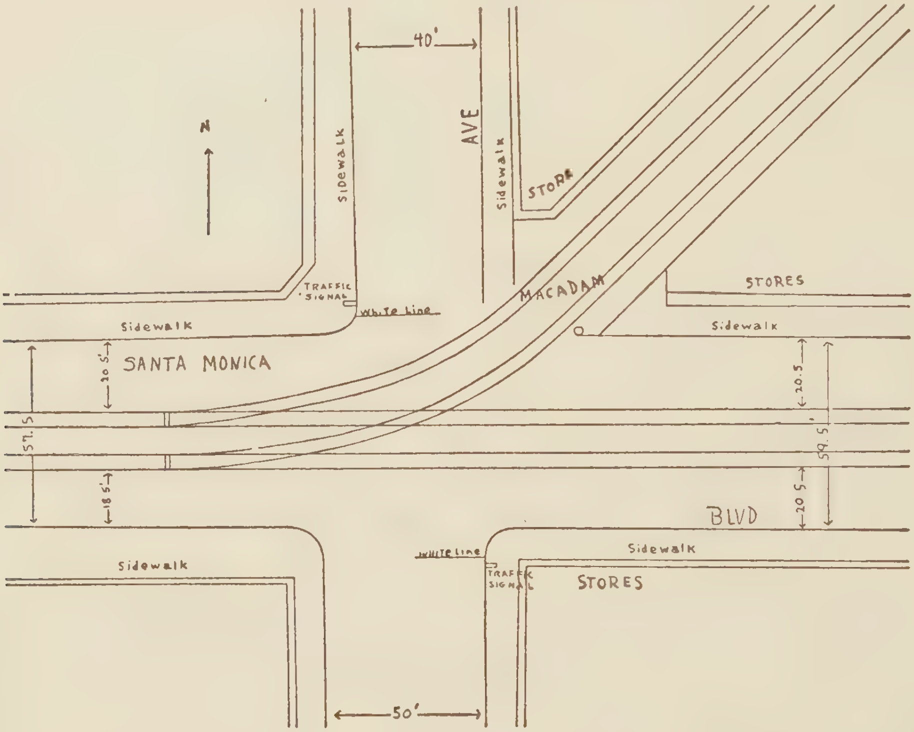
Reversed.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment entered after a nonsuit had been granted on defendant's motion. The action was to recover for personal injuries suffered when plaintiff was struck by one of defendant's streetcars in the city of Los Angeles.



On the occasion in question, plaintiff while proceeding easterly on the north sidewalk of Santa Monica boulevard approached its right-angle crossing with Fairfax avenue. That is a busy intersection, consisting not only of heavy flows of automotive traffic on both streets but also of two streetcar tracks of defendant on the boulevard upon which travel interurban cars from the city to outlying communities. To complicate the traffic problem there defendant has a right-of-way 36 feet in width, extending from the northeast corner of the intersection northeasterly toward Hollywood boulevard. The boundary lines of this private right-of-way intersect the property lines of the boulevard and the avenue at angles of about 45 degrees. Over this right-of-way a system of double tracks is laid, over which streetcars travel from Santa Monica boulevard to Hollywood boulevard, about one-half mile distant. This double track system enters Santa Monica boulevard at Fairfax. The northerly rail of its southerly track intersects the northerly rail of the northerly track which lies in Santa Monica boulevard at the very center of the intersection. At the time of plaintiff's arrival at the westerly curb of Fairfax a streetcar was standing at the southwest corner, headed eastward.

Before entering the intersection plaintiff awaited the "Go" signal, and before stepping into Fairfax avenue to make his crossing he looked back to the southwest corner to see that the eastbound streetcar was still standing. It stood in a position to continue east on the boulevard or diagonally to cross the intersection and to proceed northeasterly on the private right-of-way. After plaintiff had passed the center of Fairfax he looked again and saw that the car was still standing. The distance he had to travel from the time he left the center of Fairfax to the prolongation of the north sidewalk of Santa Monica boulevard was about 53 feet. As he proceeded within the crosswalk easterly of the center of Fairfax his attention was engaged by motor traffic going east and west, both of which might turn north out of Santa Monica boulevard into Fairfax; also by a westbound car on the Hollywood line, which came to a stop on the private right-of-way a short distance from the crosswalk and plaintiff. After observing this car come to a stop plaintiff continued directly along the course necessary to be traveled to enable him to reach a place of safety on the sidewalk. He watched for the westbound automobiles and listened for the eastbound car which he had seen standing at the southwest corner. When he looked for the second time to the southwest he was about 10 feet from the northerly rail of the westbound Hollywood track. Before stepping upon the northerly track on which the Hollywood westbound car would come he looked to his left only to see that car start up, ringing its gong. It was then 35 feet distant to the northeast of him. While watching on his right for motor traffic he advanced, listening for the bell of the car which had been standing.

For more than five years plaintiff had crossed the intersection almost every day, and was conscious of the presence of the tracks and of the practice of defendant's motormen to ring their gongs before entering the crosswalk. No warning was given by the eastbound car. The westbound car sounded its gong as plaintiff stood upon its track. Thereupon he proceeded, still within the crosswalk, to the south track of the Hollywood line, where he was struck by the eastbound car and dragged 30 feet, causing him serious injuries. It was early evening and the visibility was still good. During the five or six years he had lived in the vicinity plaintiff had seen a great many streetcars stop at the intersection for the embarkation and discharge of passengers. He had observed that practically all cars give warnings before starting from the intersection and that some cars cross the boulevard and go toward Hollywood while others continue directly east toward the city.

The only question for decision is whether plaintiff was guilty of contributory negligence, the basis of the trial court's ruling.

[1-6] On behalf of its plea of contributory negligence respondent correctly declares a number of established legal principles usually invoked upon the trial of controversies arising out of crossing railway tracks. They follow: (1) it is the duty of a pedestrian to use such reasonable care as to avoid colliding with passing vehicles (Finkle v. Tait, 55 Cal.App. 425, 203 P. 1031); (2) where a pedestrian is about to cross a track he must use his senses before stepping onto the track to ascertain whether a car is approaching, and if upon the track he must leave it when a car comes near (Bailey v. Market St. Ry. Co., 110 Cal. 320, 42 P. 914); (3) a motorman cannot be charged with the duty of anticipating that anyone would suddenly step from a place of safety onto the car tracks in front of an approaching car, and that a streetcar company is not responsible to a person who carelessly or in an absent-minded way walks suddenly in front of a moving car (Schooley v. Fresno Traction Co., 56 Cal.App. 705, 206 P. 481; Richardson v. Southern Pac. Co., 88 Cal.App. 648, 263 P. 1039); (4) where a pedestrian steps directly in front of an approaching car and is struck instantly, but one inference can be drawn, to-wit, his negligence (25 R.C.L. 1285); (5) there is a duty devolving upon the ordinarily prudent man before placing himself in a position of danger to look in the direction of the anticipated peril (Moss v. H. R. Boynton Co., 44 Cal.App. 474, 186 P. 631; Flores v. L. A. Ry. Co., 15 Cal.App.2d 576, 59 P.2d 856); (6) a pedestrian is not free from negligence where, with knowledge of the practice of the railway operatives in switching across a sidewalk where no switchman is on duty, he steps upon the track in front of a car which he has observed standing near the point of collision. Grandy v. Southern Pac. Co., 9 Cal.App.2d 441, 49 P.2d 1127.

The foregoing authorities refer to many others upholding the doctrine of contributory negligence in the cases of pedestrians or others who go upon tracks over which cars and trains frequently pass. These authorities, strictly applied, render easy a superficial solution of many controversies growing out of the collisions of streetcars with persons who cross railroad tracks. No formula has been invented whereby in a few brief words it can be said that under all circumstances a person crossing over or walking upon a streetcar track may be said to be guilty of or free from negligence. In order to do justice the facts of a case must be scrutinized cautiously and weighed thoughtfully in the light of all applicable rules. Particularly is this true where from the many aspects of the facts various principles may be brought to play. Under such circumstances it is only after the sifting process has been completed, after all material facts have been gleaned, and when the authorities have been harmonized, that a court may feel with a fair degree of certainty that a just conclusion has been derived.

[7-14] The facts of the instant case may with propriety be considered in the light of other coordinate principles which follow: (1) A pedestrian is not negligent as a matter of law to cross a streetcar track because he knows a streetcar is approaching. (2) A pedestrian has the right to use those portions of a street occupied by streetcar tracks so long as he does not unnecessarily obstruct the movements of cars. (3) It is not negligence for a pedestrian to walk in close proximity to or upon the track. (4) By reason of the mutual rights of both pedestrian and car to the area of the tracks, subject to the necessity for the former to yield upon signal of the approach of the latter, reciprocal rights obtain and reciprocal duties are imposed. (5) When a pedestrian is lawfully within a crosswalk dedicated to his uses, it is incumbent upon a motorman to see him and to use ordinary care to avoid running him down. (6) When traversing a street of congested traffic the pedestrian must look ahead and toward any quarter from which danger might come, in order to avoid colliding with others. (7) The pedestrian in a street intersection need not look continuously backward for a car he has seen standing, but must exercise only such degree of vigilance as would under the circumstances constitute reasonable care. (8) A pedestrian may rely upon a streetcar to sound the warnings which it customarily sounds when approaching the point where he walks. Noce v. United Railroads, 64 Cal.App. 658, 222 P. 642; Wright v. Los Angeles Railway, 14 Cal.2d 168, 93 P.2d 135; Aurenz v. Los Angeles Railway, 35 Cal.App.2d 615, 96 P.2d 397; Bailey v. Market St. Ry., 3 Cal.App.2d 525, 40 P.2d 281; Kuhn v. San Francisco, 13 Cal.App.2d 641, 57 P.2d 147; Gnesa v. City and County of San Francisco, 40 Cal.App.2d 640, 105 P.2d 376; Scott v. San Bernardino Valley Traction Co., 152 Cal. 604, 93 P. 677; Berguin v. Pac. Elec. Ry. Co., 203 Cal. 116, 263 P. 220; Hansen v. Market Street Ry. Co., 64 Cal.App. 426, 221 P. 955; Hammond v. Pacific Electric Ry. Co., 32 Cal.App. 756, 164 P. 50; Babcock v. Pacific Gas & Electric Co., 120 Cal.App. 218, 7 P.2d 736; Runnels v. United Railroads, 175 Cal. 528, 166 P. 18; Dunbar v. S. F.-Oakland T. Rys., 54 Cal.App. 15, 201 P. 330; Campbell v. L. A. Railway Traction Co., 137 Cal. 565, 70 P. 624; Gilmore v. L. A. Ry. Corp., 211 Cal. 192, 295 P. 41; Ross v. S. F.-Oakland T. R. Co., 47 Cal.App. 753, 191 P. 703; Lawyer v. L. A. Pac. Co., 161 Cal. 53, 118 P. 237; Arbunich v. United Railroads, 28 Cal.App. 291, 152 P. 51; Collins v. California Street Cable Ry. Co., 91 Cal.App. 752, 267 P. 731; Smith v. So. Pac. Co., 201 Cal. 57, 255 P. 500.

[15-19] In considering a motion for nonsuit the evidence must be viewed most favorably to the plaintiff. Such motion should not be granted except where there is no substantial evidence to support a verdict if awarded to plaintiff. Barnett v. La Mese Post No. 292, American Legion Department of Calif., 15 Cal.2d 191–194, 99 P.2d 650; Richardes v. Richardes, 211 Cal. 392, 394, 295 P. 816. If, by disregarding adverse evidence and by giving plaintiff's proof and every legitimate inference their full legal value, substantial evidence remains to support a verdict for plaintiff, a nonsuit should be denied. Gish v. Los Angeles Railway Corp., 13 Cal.2d 570, 90 P.2d 792. The presence of a car in the vicinity of a pedestrian's path is a question for the jury as is also his failure to look again to his right in the presence of what he considered a definite hazard in front of him. Nelson v. S. P. Co., 8 Cal.2d 648, 67 P.2d 682. If plaintiff has presented such substantial evidence as will support a verdict in his favor, notwithstanding conflicts therewith, the nonsuit must be denied. Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, 197, 64 P.2d 946. A plaintiff has a right to have every material issue of fact in a negligence case determined by the jury. A nonsuit should not be granted except where clearly no material issue remains for the jury's determination. Mastrangelo v. Westside U. H. School Dist., 2 Cal.2d 540, 544, 42 P.2d 634.

[20-22] From a consideration of the foregoing principles and the cited authorities, plaintiff's conduct was not such as to constitute negligence as a matter of law. He might have looked but once, before leaving the curb, and not have been negligent. Whether he was negligent in crossing where he had a right to cross, or to walk in his manner of walking, were facts for the jury's determination. He had a right to expect and rely upon a warning to be given as he neared the tracks and this right was a factor to be considered in his behalf. Noce v. United Railroads, supra; Hansen v. Market Street Ry. Co., 64 Cal.App. 426, 221 P. 955. The traffic that whirled by plaintiff was calculated to render him anxious and confused. The

arrival of the westbound streetcar was not a factor to assure him of his safety as it came to a stop near the crosswalk. Although he had memories of the custom of the motormen to give warnings as they cross Fairfax northeasterly toward the crosswalk, at the street center he looked again to see whether the eastbound car was still standing. When the westbound car signaled for a start plaintiff, being on its track, moved on to the eastbound track, where without a warning he was knocked down. If a reasonably prudent person in the position in which plaintiff found himself as he proceeded from the westbound track to the eastbound track, fearful of the many lines of motor traffic to his right, would have ventured to cross the eastbound track without looking again to the southwest, then it was not negligence in plaintiff to accept the hazard and undertake that crossing. Whether plaintiff was sufficiently vigilant or whether he looked too infrequently to the southwest as he walked towards the eastbound tracks is a question upon which reasonable minds might differ, which fact entitled him to the findings of a jury. Bailey v. Market Street Ry. Co., 3 Cal.App.2d 525, 530, 40 P.2d 281. In forming a judgment whether he should proceed he was warranted in considering the distance of the crosswalk from the point at which the car had been standing, the speed at which it ordinarily made the diagonal crossing, the practice of the motormen to sound a gong before entering the crosswalk, and all other circumstances which would tend to increase or diminish the need for caution upon his part. While it was plaintiff's duty in the exercise of reasonable care to look in the direction of anticipated dangers, it was not incumbent upon him to oscillate his head like the pendulum of a clock to avoid colliding with others ahead of him and at the same time to watch the approach of the car behind him. He was required to exercise only such vigilance as would constitute reasonable care under the circumstances. Whether he exercised reasonable care is the paramount fact to be determined by the jury from the evidence of the amount of his caution in looking out for cars, from a consideration of the rights of the parties and of their reciprocal duties, from the nature of the surface of the street and from all other facts, including whether the pedestrian had a right to rely upon a warning to be given by the motorman.

The rule of stop, look and listen, invoked by respondent, originated at a time when the only dangerous vehicles to be encountered were the locomotives which crossed highways, country lanes and bypaths. In the interest of economy the burden was cast upon the traveler who intended to cross railroad tracks to make certain that the time was opportune for his safety before attempting the crossing. But this rule cannot be applied to crossings of streetcar tracks on the streets of the modern municipality. Its throngs of pedestrians as well as of vehicular travelers must of necessity proceed along and upon streets where streetcars must run. If there be any hope that mankind may survive the perils of automotive traffic, it is incumbent upon all operators of electric and automotive conveyances to cooperate with one another and with pedestrians to the end that their common effort may terminate or at least lessen the tragical list of daily casualties. All drivers of such cars or vehicles should be governed by the humane instinct and desire to aid others and not to do them harm—to warn those who are in proximity to or who may be upon the track or course of his travel.

[23, 24] Respondent contends that the noise caused by the approach of the streetcar was in itself sufficient warning to appellant without the aid of the gong or whistle. Its brief contains passages from the testimony of one witness who was in the intersection at the time and who described the extent of the noise created by the eastbound car as a sufficient warning of its approach. The answer to this contention is twofold: first, on a motion for nonsuit in case of a conflict in the evidence the testimony which is favorable to the defense must be disregarded; the merits of the motion for nonsuit are to be measured by the most favorable evidence given on behalf of the plaintiff. In the second place, the testimony of the plaintiff was that although his ability to detect sound was good he did not hear the approach of the car In view of the noise created by the motor traffic at that intersection, it was not unreasonable for plaintiff to rely upon the usual signals given by the streetcar operatives in approaching the crosswalk. His failure to hear the car entitled him to a jury's finding as to whether such failure was due to his negligence. The cases cited by respondent do not apply. Deike v. East

Bay St. Rys. Ltd., 7 Cal.App.2d 544, 551, 46 P.2d 812; Schooley v. Fresno Traction Co., 56 Cal.App. 705, 206 P. 481. In each of them plaintiff used no caution.

The judgment is reversed.

I concur: McCOMB, J.

WEST KEY NUMBER SYSTEM

46 Cal.App.2d 119

LYON v. MacQUARRIE.

Civ. 2763.

District Court of Appeal, Fourth District, California.

July 17, 1941.

Rehearing Denied Aug. 13, 1941.
Hearing Denied Sept. 11, 1941.

1 Appeal and error 🔑1011(1)

Conflicts in the evidence are addressed to the trial judge and are settled by him.

2. Appeal and error 🔑931(1)

On appeal, evidence supporting findings and judgment must be accepted as true.

3. Partnership 🔑53

Where partnership rests in parol, plaintiff has burden of establishing partnership and its essential elements by clear and convincing evidence.

4. Partnership 🔑53

What is clear and convincing evidence to establish partnership which rests in parol and essential elements thereof is a "question of fact" addressed in the first instance to the trial judge.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Appeal and error 🔑1010(1)

Trial judge's finding regarding existence of partnership cannot be disturbed on appeal, where there is substantial evidence supporting finding of existence of partnership.

6. Partnership 🔑17

An intent to form a partnership may be implied from the conduct of the parties.

7. Partnership 🔑5

The sharing of profits is an incident of a "partnership."

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership".

8. Partnership 🔑5

The obligation to share losses follows from the "partnership" relation, even though there is no express agreement to share losses. Civ.Code, § 2409.

9. Partnership 🔑53

In action to recover one-half the profits allegedly accruing from a radio production, evidence warranted finding that plaintiff and defendant had the intent to form a partnership.

10. Partnership 🔑53

That there was no complete control of every part of the venture vested in each partner does not negative existence of "partnership," for by agreement one partner may be given the duty of management of the partnership enterprise or any part of it.

11. Partnership 🔑53

That the contribution of partners to assets of partnership was not of equal value was merely a circumstance to be passed upon and weighed by the trial judge in determining whether or not a partnership was in fact formed, and did not positively negative the fact of formation of "partnership."

12. Appeal and error 🔑1010(1)

Where there is evidence supporting finding of formation of partnership, decision of trial judge on such question is as final as is his decision on any other like controverted question of fact.

13. Partnership 🔑53

In action to recover one-half the profits allegedly accruing from a radio production, that contracts for the production were made in name of defendant and that payments were made to defendant were merely circumstances bearing on question of formation of partnership, and such circumstances were not of themselves sufficient to disprove existence of partnership relation between plaintiff and defendant.

14. Partnership 🔑81

A partner receiving and keeping the receipts from partnership business became indebted to partnership for the amount so retained by him.

15. Partnership 🔑72

Where an idea is reduced to concrete form and put into action in the form of a business enterprise, the results of the idea, such as an invention, or a book, or an opera or a theatrical production, are subject to private ownership, and can be conveyed to a partnership as a part of the assets thereof.

16. Partnership 🔑72

Where an idea was reduced to concrete form and was put into action as a theatrical production transmitted to the public over the radio, the production, if not the idea, was the subject of private ownership, and could be conveyed to a partnership as a part of the assets thereof.

17. Partnership 🔑61

Where no time is fixed by partners for duration of partnership, the partnership is a "partnership at will."

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership at Will".

18. Partnership 🔑121

Evidence warranted plaintiff's recovery of one-half the profits accruing from a radio production, on ground that plaintiff and defendant entered into a partnership, that the radio production was transferred to partnership, and that plaintiff and defendant expressly agreed to share the profits equally.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by George D. Lyon against Frank Haven MacQuarrie to recover partnership profits. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Freston & Files, and Ralph E. Lewis, all of Los Angeles, for appellant.

W. I. Gilbert, and Joe Fainer, both of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiff $33,244.92, being one-half of the profits found to have accrued from the radio production entitled, "Do You Want to be an Actor?", which was alleged and found to have been produced by plaintiff and defendant as copartners.

The sole ground urged for the reversal of the judgment is that the evidence is insufficient to support the findings to the effect that a partnership had existed and the conclusions of law drawn from those findings.

Defendant had been connected with the theatrical business for many years during which time he had presented an act on the Orpheum Vaudeville Circuit under the headline "Do You Want to be an Actor?" After the collapse of vaudeville he had been engaged in various undertakings. In 1935, he was operating an actors' employment agency in Hollywood under the name of "The MacQuarrie Agency".

In 1935, Lyon was a civil service commissioner of the city of Los Angeles. He was also engaged in writing insurance. He met MacQuarrie during that year and the two became friends. He was given desk room in MacQuarrie's place of business. MacQuarrie introduced Lyon to prospects for insurance among his customers and Lyon brought some new patrons for the agency and found employment for some of them as well as for some old customers. In this way both profited to some small degree from Lyon's efforts though MacQuarrie received no part of Lyon's insurance premiums. The arrangement probably had its inception in both the friendship existing between the two men and MacQuarrie's belief that Lyon's political connections would enable them to contact persons he could not reach otherwise.

[1, 2] Up to this point in the contact of the two men there is no material conflict in the evidence that could affect the results of the action. The testimony concerning their later relations is in such flat conflict as to suggest more than faulty memories on the part of one group of witnesses or the other. Under the fixed rule that conflicts in the evidence are addressed to the trial judge and are settled by him and that on appeal the evidence supporting the findings and judgment must be accepted as true, we will confine our summary of the evidence to that portion of it supporting the decision of the trial court.

In July or August, 1936, MacQuarrie conceived the idea of putting his old vaudeville act of "Do You Want to be an Actor?" on the radio. He communicated this idea to Lyon and asked him if he had any contacts with anyone in the radio production business. Lyon made one appointment for the following afternoon. The two arrived early for the appointment, and, according to Lyon, the following conversation occurred:

"A. He (MacQuarrie) said, 'We have been starving out in this agency of ours in Hollywood, and there is no reason why we should continue to do it. I think that this act that went over on the stage would go over the radio. What do you think about it?' 'Well, I think it is a grand idea.' And he said, 'We have always been partners in the agency business and there is no reason, if this goes over, why you cannot have that house you have been talking about on Silver Lake, and I can have the house I want up in the hills where it won't be so hard on my asthma.' And said, 'What do you think; are you willing to go in with me on it?' I said, 'Why, of course.' He said, 'The reason I want you particularly is, you have had business experience, and if we get into this thing, this radio act, there are going to be a lot of business details and so forth that I want you to attend to.' He said, 'I know I can trust you because we have been together a year and a half and we have always gotten along very well. Never had any difficulties. We have always split our earnings, and what was mine was yours, and what was yours was mine. Will you go in with me on it?' He said, 'Will you be my partner in this thing and do all this work and help me in a general way?' I said, 'Why of course I will.' He said, 'All right; shake. To make our first million, let us go up and see Robert Braun.'

"Q. Did you discuss with him at that time on what basis the partnership would be?

"A. We said we have always been together and whatever was yours was mine and vice versa. And 'Whatever I make in this, fifty per cent is yours.' I said, 'Isn't this a coincidence, because that steel deal I was telling you about—the hardening of steel out of a product called tetralloy that I have had.' I said, 'It is just a coincidence. I am going to make some money on that.' And I said, 'You are in fifty per cent on that deal with me, just like I am fifty per cent on this radio act with you.' He said, 'O. K.; that is O. K. by me; shake. We are partners.'"

The two then talked about the radio production to a Mr. Braun, who was much interested. According to Lyon the interview ended as follows: "Yes. He (MacQuarrie) said, 'You know, Mr. Braun, you are not just doing this for me.' He said, 'This is an opportunity to help your friend George Lyon, because George is my partner in this, and whatever we make in this radio act, we share and share alike.'"

MacQuarrie finally made contact with the operators of a radio station over which the program was broadcast on a trial or sustaining basis without compensation to him. The first program was broadcast on September 7, 1936, and was continued thereafter on the same basis until November 16, 1936, when a contract was signed between MacQuarrie and the studio under the terms of which MacQuarrie was paid a bonus of $10,000 and $900 a week for the production. About the middle of December, 1936, a second contract was entered into with the agents of the owner of a nationally advertised product under the terms of which MacQuarrie received $5,000 per week for the broadcast of his radio play, "Do You Want to be an Actor?" The broadcast under this contract was continued until the late spring of 1937. On January 4, 1937, MacQuarrie repudiated his contract with Lyon and refused to pay him any of the profits received under either of the two contracts.

Lyon had an 8 per cent interest in the Tetralloy Corporation. He testified that under his contract with MacQuarrie this interest became an asset of the partnership and the trial court so found. It has little or no value.

Lyon testified as to the division of duties between himself and MacQuarrie under the partnership contract. He was positive that he had performed all of his duties under it until January 4, 1937, when MacQuarrie repudiated the contract.

According to Lyon, MacQuarrie received the payments for the broadcasts in the form of checks made payable to MacQuarrie. MacQuarrie, usually accompanied by Lyon, presented these checks to the bank on which they were drawn and took cashier's checks made payable to MacQuarrie, which were kept in a bureau drawer in his home. On several occasions Lyon asked MacQuarrie when the receipts from the broadcasts were to be divided, and MacQuarrie told him there would be no division at the time, but that when a good big sum had accumulated there would be a division and the two would have a real melon to cut.

Plaintiff produced several witnesses who testified to various conversations with MacQuarrie concerning the radio program, in which MacQuarrie was quoted as saying, in effect, that he and Lyon were partners in the program and were going to share whatever they made out of it, fifty-fifty; that they were partners in "Do You Want to be an Actor?"; that the radio program was going very nicely and they (MacQuarrie and Lyon) were really going to put it over and were waiting for a suitable sponsor and would make a million dollars apiece. Another witness testified that MacQuarrie said to him concerning the tetralloy process: "Well, you had better hurry up and make some money, because you know George (Lyon) and I are partners and he has a partnership with me in this 'Do You Want to be an Actor' program, * * *"

[3-5] Defendant urges that as the partnership rested in parol the burden was upon plaintiff to establish it and its essential elements by clear and convincing evidence. Welch v. Alcott, 185 Cal. 731, 198 P. 626; Swanson v. Siem, 124 Cal.App. 519, 12 P.2d 1053; Blinn v. Ritchie, 101 Cal.App. 691, 282 P. 390.

While this is true, what is clear and convincing evidence is a question of fact addressed in the first instance to the trial judge. His finding on that question cannot be disturbed on appeal where, as here, there is substantial evidence supporting the finding of the existence of a partnership.

[6-9] Defendant next urges that the evidence fails to show the intent of the parties to enter into a partnership which the law requires. The evidence fails to sustain this argument. The intent to form a partnership may be implied from the conduct of the parties (Sterman v. Zeim, 17 Cal.App.2d 414, 62 P.2d 160), as well as established by direct evidence. Here the evidence justifies the conclusion that the parties expressly agreed to hold in joint equal ownership the radio production and the 8 per cent interest in the Tetralloy Corporation. The duties of each in connection with the radio production were understood and for a time carried out. There was an express agreement to share the profits equally which is an incident of partnership. While there was no agreement to share losses, that obligation follows from the relationship. Sec. 2409, Civ. Code. This evidence sufficiently supports the finding of an intent to form a partnership.

[10] That there was no complete control of every part of the venture vested in each partner does not negative the existence of a partnership, for, by agreement, one partner may be given the duty of management of the partnership enterprise or any part of it. Thompson v. O. W. Childs Estate Co., 90 Cal.App. 552, 266 P. 293; Associated Piping & Engineering Co. Ltd. v. Jones, 17 Cal.App.2d 107, 61 P.2d 536.

[11, 12] Nor does the fact that the contribution of the partners to the assets of the partnership was not of equal value positively negative the fact of the formation of a partnership. It is merely a circumstance to be passed upon and weighed by the trial judge in determining whether or not a partnership was in fact formed. Griggs v. Clark, 23 Cal. 427; Whitley v. Bradley, 13 Cal.App. 720, 110 P. 596. When there is evidence supporting the finding of the formation of a partnership the decision of the trial judge on this question is as final as it is on any other like controverted question of fact.

[13, 14] The fact that the contracts for the production of the radio play were made in the name of MacQuarrie and the payments were made to him are merely circumstances bearing on the question of the formation of the partnership. Of themselves those circumstances are not sufficient to disprove the existence of the relationship between the two men. When MacQuarrie received and kept the receipts from the partnership business he became indebted to the partnership for the amount so retained by him. Pritchard v. Mercantile Trust Co., 65 Cal.App. 327, 224 P. 103.

Defendant argues that "Do You Want to be an Actor?" was merely an idea in his mind and was "not the subject of ownership" so that it could not be conveyed to the partnership as a part of its assets.

[15-17] This argument is not impressive. Many businesses and great industrial organizations have sprouted from the germ of an idea in the mind of some man. When the idea is reduced to concrete form and put into action in the form of a business enterprise, an invention, a book, an opera or a theatrical production, the results of the idea are subject to private ownership. This is just the situation we have here. The original idea for the production sprouted in MacQuarrie's brain. The idea was reduced to concrete form and put into action as a theatrical production transmitted to the public over the radio. The production, if not the idea, was the subject of private ownership and under the findings of the trial court became the property of the partnership, which was a partnership at will as no time was fixed by the partners for its duration. Harris v. Hirschfeld, 13 Cal.App.2d 204, 56 P.2d 1252.

[18] As we have already observed, the evidence is flatly and irreconcilably conflicting. A finding that no partnership had been formed, had one been made, would have had considerable evidentiary support. As the finding which was made of the formation and the existence of the partnership has ample support in evidence which was accepted by the trial judge as substantial and which was taken as true by him, we cannot disturb the judgment here.

The judgment is affirmed.

We concur: BARNARD, P. J.; KELLY, Justice pro tem.

46 Cal.App.2d 218

PEOPLE v. WILSON et al.

Cr. 3432.

District Court of Appeal, Second District, Division 1, California.

July 25, 1941.

Rehearing Denied Aug. 5, 1941.
Hearing Denied Aug. 22, 1941.

1. Burglary 🔑41(1)

Evidence was sufficient to sustain convictions for burglary with explosives and second degree burglary under information charging defendants with previous felony convictions. Pen.Code, § 464.

2. Burglary 🔑41(1)

In prosecutions for burglary with explosives and second degree burglary, evidence respecting presence of an oxygen cylinder and a tank of acetylene at scene of a theater burglary and evidence of possession or access to supplies of oxygen and tools possessed by defendants or found at scene of crime and respecting manner in which safes at scenes of other burglaries had been opened warranted inference that safes in question had been opened through use of explosives. Pen.Code, § 464.

3. Criminal law 🔑742(1)

Credibility of witnesses was solely for decision of jury.

4. Criminal law 🔑622(1)

Whether defendants charged with the joint commission of a series of offenses should have been granted separate trials was a matter resting solely in sound discretion of trial court.

5. Criminal law 🔑641(1)

Whether defendant should have been granted permission to dismiss his counsel and defend criminal prosecution in person was a matter addressed to sound discretion of trial court.

6. Criminal law 🔑369(2)

In prosecution for burglary, evidence introduced in an attempt to connect defendants with a gun found in weeds near a burglarized theater was admissible, as against contention that evidence should have been excluded as proof of an offense other than that charged, where defendants' connection with the gun would have tended to connect defendants with burglary of theater.

7. Criminal law 🔑369(2)

Evidence tending to connect a defendant with the commission of a crime charged against him is not to be excluded on ground that it tends to connect defendant with an offense not included in the charge.

8. Witnesses 🔑240(2)

On direct examination of a witness in a criminal case, leading questions may be asked in the discretion of the trial court when it appears that interests of justice so require. Code Civ.Proc. § 2046.

◆

Appeals from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Charles M. Wilson and one Bauer were convicted of burglary with explosives and burglary in the second degree under an information charging defendants with prior felony convictions, and they appeal.

Affirmed.

Appellants in pro. per.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Acting Presiding Justice.

On an information charging the joint commission of seven offenses, appellants were found guilty of burglary with explosives as charged in three counts of the information, of burglary in the second degree on a fourth count, and appellant Bauer alone was found guilty of second degree burglary on a fifth count. Both appellants were found by the jury to have been armed at the time of the commission of one of the offenses charged. Appellants both admitted prior felony convictions as charged. A motion by appellants for a new trial was denied. Each appellant, in propria persona, prosecutes a separate appeal from the judgments and orders.

The evidence on which appellants were convicted reveals the following: On the morning of April 29, 1940, safes at the Arden Farms Dairy in Los Angeles were found "burned" open and their condition plainly indicated that they had been rifled. On Monday, May 13, 1940, the manager of the J. C. Penney Store in Westwood found that the store had been robbed over the week-end. Early on the morning of May 31, 1940, the manager of an Atlantic & Pacific Tea Company store on West Pico street in Los Angeles discovered that during the night a hole had been sawed in the roof of the store, a hole had been burned through the safe and the safe had been opened, a certain amount of silver removed therefrom; and bottles of liquor had also been taken from the store. On June 9, 1940, the plant of the Home Oxygen Company, within the metropolitan area of Los Angeles, was burglarized and oxygen cylinders were removed therefrom. At about four in the morning of June 10, 1940, the night watchman in a theater in Leimert Park, a Los Angeles suburb, was held up and forced into a lavatory of the theater, the theater safe was then cut open and the premises robbed. The watchman made his escape through a fire door in the lavatory and telephoned the police. When the police arrived at the scene appellant Bauer was observed walking across the boulevard. Bauer was then 100 or 150 feet from the front of the theater. In explanation of his presence there he stated that he had been to see a girl friend, but was unable to give the girl's name or her address, except that it was "somewhere" on Leimert boulevard. Bauer was discovered to be wet with perspiration, and a search revealed certain articles on his person which were identified as having been taken from the theater. The safe in the theater had been cut open, the manager's office was littered and disordered and a tank was found in the manager's office, which was later identified as an oxygen tank belonging to the Home Oxygen Company. In the weeds outside the theater there was found a metal suitcase containing tools, including a tank sufficiently identified as containing acetylene gas; and a .32 caliber Colt automatic pistol was also found in the weeds near the fence by the theater. The night watchman stated that he had been held up with a .45 caliber gun and at the trial identified appellant Wilson as the man who had held him up.

Appellant Wilson was apprehended in San Diego on the evening of June 13, 1940. After Wilson's arrest there was found in his automobile, from which he had removed the license plates, a suitcase containing a number of articles, a torch, tubing, brace and bit, flashlight, gloves, pliers, hatchet, rope, saw and saw filers. Also found in the car was a suit of clothes. This suit and the suit worn by appellant Bauer at the time of his arrest were both found to be impregnated with the same kind of debris and steel slag. This debris and slag was identified as being similar to that found in front of the safe at the Leimert theater. Wilson's quarters in San Diego were located by the police. In a garage at Huntington Park to which Wilson had a key, as hereinafter noted, there was found a .45 caliber gun and shells, and in Wilson's apartment in San Diego .45 caliber shells were found. In the same garage in Huntington Park were found oxygen tanks belonging to the Home Oxygen Company. At the time of his arrest appellant Bauer had on his person a ring of keys; one of these keys fitted the padlock on this garage. Bauer, under examination by Wilson at the trial, stated he got the padlock in question from Wilson. Among Wilson's effects there was found a key which fitted the same padlock. Found in Wilson's car was a small disc with holes. This disc fitted a respirator found in the garage with the oxygen tanks.

In the safe at the Arden Dairy there had been a bag of large size old United States currency and a bag of odd United States coins. Both were found in Bauer's apartment. There was a large quantity of stamps, both in sheets and rolls, taken from the Arden Farms Dairy. Similar stamps were found in Bauer's apartment. A partial roll of three-cent stamps was found in Wilson's apartment, identified as similar to those in the Arden safe. Wilson failed to give a very satisfactory explanation of why he should be in possession of such a large quantity of stamps in a roll. He stated he had bought them at the post office for $15, a roll of 500 three-cent stamps. Wilson claimed to be a construction contractor but did not explain why, if at all, he would need such a quantity of stamps. One of the police officers testified that Wilson had told him that the stamps had been bought from a "kid in San Pedro" for a dollar. Seven bottles of liquor, identified by handwriting on the labels as having come from the rifled Atlantic & Pacific Tea Company store, were found in Bauer's apartment; and an empty liquor bottle, identified in like fashion, was found in Wilson's apartment. Wilson was unable to explain the presence of the bottle. Articles identified as having been taken from the Penney store were found in Bauer's apartment.

Appellants made a motion for separate trials which was denied. Appellant Wilson appears to have become dissatisfied with his counsel during the course of the trial. Counsel for Wilson had appeared in the first instance merely for the purpose of having the bail reduced, but had remained to defend Wilson, apparently because Wilson had not obtained other counsel. Requests were made by counsel during the trial for permission to withdraw and Wilson requested that he be allowed to dismiss his counsel and defend in person. The court at first denied these requests but later granted counsel's request to withdraw, and Wilson defended in person during the balance of the trial.

Both appellants contend the evidence is insufficient to support the verdicts. In this respect it is to be noted that appellant Wilson argues for a reversal of the judgments upon this ground, while appellant Bauer argues for reversal of the judgments as to burglary; but merely contends for modification of the judgments as to burglary with explosives on the ground that there was insufficient evidence as to use of explosives. Both appellants assign as error the denial of separate trials and the acceptance and rejection of certain evidence, and contend that both the court and prosecutor committed prejudicial misconduct during the trial. In addition, appellant Wilson assigns as error the refusal of the trial court to permit him to defend in person and without counsel; and also contends that counsel for his codefendant was guilty of misconduct prejudicial to Wilson.

[1-3] There is no merit to any of appellants' contentions as to the insufficiency of the evidence. The evidence did not merely include possession by appellants of the fruits of the burglaries, but included as well failure on the part of both appellants to account for such possession upon a theory inconsistent with guilt of the offenses charged, acts and conduct of appellants strongly tending to show their guilt, and, in addition, direct and circumstantial evidence closely connecting both appellants with the commission of one of the burglaries charged, together with a set of highly incriminating circumstances surrounding both appellants with general relation to the offenses in question. Moreover, the presence of both an oxygen cylinder and a tank of acetylene at the scene of the Leimert Park theater burglary, together with other evidence of possession or access to supplies of oxygen, evidence of the tools possessed by appellants or found at the scene of the crime, and the manner in which safes at the scenes of the other burglaries had been opened, furnished ample basis for an inference that the safes in question had been opened through the use of explosives. Section 464, Penal Code. The entire chain of circumstance thus created was sufficient to warrant the conclusion that appellants were guilty of the crimes charged by the counts here in question. People v. Taylor, 4 Cal.App.2d 214, 40 P.2d 870. And see People v. McGilver, 67 Cal. 55, 7 P. 49. The evidence also warrants an inference that appellants were armed at the time of the commission of the burglary at the Leimert Park theater. It should be stated that the question of the credibility of the witnesses was one solely for the decision of the jury.

Appellant Bauer has seized upon an apparent typographical error or inadvertent mistake in respondent's brief as the basis for a contention that the burglary of the Home Oxygen Company was not proven. The address given by respondent in its brief as that of the Home Oxygen Company appears from the record to be that of the witness who testified as to the burglary. Bauer contends for a variance between the charge and the proof as to the burglary in question. Respondent's reference to the record immediately reveals that no such variance exists, that the burglary was proven in accordance with the charge and that the inconsistency with respect to the address of the plant burglarized exists solely in respondent's brief.

[4] The trial court did not err in refusing to grant appellants separate trials. The matter was one resting solely in the sound discretion of the court. Appellants were charged with the joint commission of a series of offenses and it does not appear that the court abused its discretion in refusing to grant appellants' motion in this respect. People v. Eudy, 12 Cal.2d 41, 45, 82 P.2d 359, and cases there cited.

[5] The matter of granting appellant Wilson permission to dismiss his counsel and defend in person was likewise one addressed to the sound discretion of the trial court. Rather than a show of abuse of discretion in this regard, the record reveals a solicitude on the part of the court for the cause of appellant's defense.

[6, 7] It is urged that evidence introduced in an effort to connect appellants with the gun found in the weeds at the Leimert Park theater should have been excluded as proof of another offense than those charged, since the evidence thus introduced went to show that the gun had been stolen. But connection of appellants with the gun in question would also tend to connect them with the burglary of the theater; and "the rule is too firmly established that evidence tending to connect a defendant with the commission of a crime charged against him is not to be excluded on the ground that it tends to connect him with an offense not included in the charge, to require the citation of a long list of authorities". People v. Perry, 195 Cal. 623, 636, 234 P. 890, 895.

[8] Appellants complain that the court erred in permitting the prosecution to ask leading questions of witnesses on direct examination, principally with relation to the identification of a large number of exhibits. On direct examination leading questions may be asked in the discretion of the court when it appears that the interests of justice so require. People v. Sparks, 44 Cal.App.2d 748, 112 P.2d 974; § 2046, Code Civ.Proc. Under the circumstances of the instant case there was obviously no abuse of discretion in permitting the leading questions of which appellants complain.

The assignments of other errors and of misconduct on the part of the court, prosecutor and counsel are so lacking in substance and merit as to be unworthy of detailed discussion.

For the foregoing reasons the judgments and orders denying motion for new trial are affirmed.

We concur: WHITE, J.; DESMOND, J. pro tem.

46 Cal.App.2d 67

IRWIN v. BROWN et al.

Civ. 6587.

District Court of Appeal, Third District, California.

July 16, 1941.

1. Deeds 🔑211(3)
Vendor and purchaser 🔑44

In suit to cancel contract whereby owner agreed to convey half interest in apartment building subject to incumbrance and to join in executing note secured by second trust deed on building in order to finance renovation of building and to cancel the deed of conveyance, on the ground that instruments were procured by fraud, evidence supported finding that no fraud was established on the part of grantee of half interest or mortgagee who bid in building upon foreclosure of second trust deed, and the evidence supported judgment in favor of such grantee and mortgagee.

2. Deeds 🔑211(3)
Evidence 🔑471(2)
Vendor and purchaser 🔑44

In suit to cancel contract whereby owner agreed to convey half interest in apartment building subject to incumbrance, and to join in executing note secured by second trust deed on building, and to cancel deed conveying half interest, on the ground that such instruments were procured by fraud, testimony of contractor as to whether apartment building was one that would be attractive to renters was inadmissible, since such testimony threw no light on the question of fraud and called for a conclusion of the witness.

3. Evidence ⚿117

In suit to cancel contract and deed involving title to apartment building on ground that such instruments were procured by fraud, an objection to plaintiff's inquiry as to whether a real estate agent, who had lived across the street from property for many years, had ever heard apartment building referred to as the "House of Mystery" was properly sustained, in absence of any evidence that building was a house of ill fame or that it was rented to any tenant of ill repute following the conveyance by plaintiff of a half interest therein.

4. Evidence ⚿317(1)

In suit to cancel contract and deed, whereby owner agreed to convey and did convey half interest in apartment building, on ground that such instruments were procured by fraud, testimony of real estate agent, who visited apartment building at plaintiff's request, regarding a conversation with janitor about manner of renting apartments and approximate income therefrom was "hearsay" and inadmissible.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

5. Evidence ⚿145

In suit to cancel contract, whereby owner agreed to convey half interest in apartment building subject to incumbrance and to join in executing note secured by second trust deed on property, and to cancel deed conveying such half interest, evidence regarding condition of apartment building after the completion of foreclosure of such second trust deed was inadmissible as being remote and incompetent.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Suit by Grace Monroe Irwin against Elon L. Brown and others to cancel a deed and contract involving title to an apartment house in Los Angeles on the ground that such instruments were allegedly procured by fraud. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Fontaine Johnson, of Sacramento, for appellant.

Horowitz & McCloskey and Harold Larson, all of Los Angeles, for respondents.

THOMPSON, Justice.

The plaintiff has appealed from a judgment which was rendered against her in a suit to cancel a deed and contract involving the title to an apartment house in Los Angeles, which instruments were alleged to have been procured by fraud.

The complaint alleges that the plaintiff was the owner of the three-story Romanesque Villa Apartments at No. 1309 North Harper street, in Los Angeles, of the value of $100,000, subject to a first trust deed to secure an indebtedness of $37,000; that the building is situated in an exclusive Hollywood district; that several apartments were then leased and the property when fully occupied has a rental value of $15,900 per year. It is asserted the defendant Junior Realty Company, Ltd., formerly Junior Capital Company, Ltd., a real estate firm of Los Angeles, falsely and fraudulently represented to plaintiff that it had a long list of tenants waiting for apartments and if she would convey to the realty company one-half interest in the building and enterprise, give to it exclusive control and management of the business and join in a note secured by a second mortgage on the property to secure a loan of $9,500, with which to pay interest, taxes, operating expenses and costs of repairing and remodeling the building, it would pay to her $500 in cash and it could and would procure the immediate rental of the apartments at prices which would pay all interest on indebtedness, together with taxes and costs of maintenance and claims for improvements, so as to net plaintiff as her share of the profits the sum of $900 per month, and that the company would also procure a "responsible purchaser of the property" at a selling price which would furnish the plaintiff a "substantial profit".

It is further alleged that the plaintiff, relying upon those representations, executed and delivered to the company the contract dated November 21, 1936, which is marked exhibit "A" and attached to the complaint. By the terms of that instrument the plaintiff agrees to convey to the company one-half of her interest in the property and to join in a promissory note for the loan of $9,500, secured by a second trust deed on the property. It also covenants to grant to the realty company immediate and exclusive possession and control of the property and of the funds borrowed and received therefrom, subject only to the rendering of periodical statements of accounts and the payments of plaintiff's share of the profits. Absolute control of the repairs, renovation, painting, remodeling and renting of the property is conferred upon the company, together with the duty to determine and pay all debts and claims incident thereto.

It is alleged that, pursuant to the agreement, the plaintiff, on the last-mentioned date, conveyed to the Junior Capital Company, Ltd., one-half interest in her property, and executed the $9,500 note and second trust deed to secure the same, which sum was borrowed from the defendant Elon L. Brown; that the realty company thereupon took immediate possession of the property and wrongfully ousted the tenants, terminating all income therefrom, and proceeded to so extravagantly and negligently expend or appropriate the funds on hand, and to discourage or prevent the renting of apartments that the income derived therefrom was wholly destroyed, the value of the property was greatly diminished, the plaintiff was prevented from refinancing or selling the property, and her credit was seriously impaired.

It is alleged the realty company conspired with the other defendants, in the manner previously related, to destroy the value of the property and to prevent the plaintiff from operating, refinancing or paying the indebtedness thereon, so that she would be compelled to forfeit her title thereto. It is asserted the company wilfully permitted deterioration and damage of the property in the course of the repairing and management thereof to plaintiff's detriment in the sum of $2,500; that it permitted the destruction of the lawn and shrubbery to her damage in the sum of $1,000; that it covered with paint and ruined the Moorish stenciled decorations in the building to her damage in the sum of $4,000, and that her financial credit and standing were impaired by defendants' conduct, in the additional sum of $90,000.

The defendants answered, denying the material allegations of the complaint. The cause was tried by the court sitting without a jury. The court adopted findings favorable to the defendants in every respect. Judgment was accordingly rendered to the effect that plaintiff take nothing by her cause of action. From that judgment the plaintiff has appealed.

It is contended the court erred in rejecting evidence offered by the plaintiff to establish the alleged fraud of the defendants, and that the findings and judgment are not supported by the evidence.

There is a conflict of evidence regarding many issues, but there is substantial proof that the property was worth, as the court determined, only about the sum of $55,000, and that it was so heavily encumbered, and the demand for apartments therein so limited, that it could not be operated at a profit. The very contract which the plaintiff executed recognizes the valuation of the property to be much less than the sum alleged in the complaint, for it provides it shall not be sold by the realty company for "less than $65,000". It satisfactorily appears that the company negotiated the loan for $9,500 according to the terms of the contract, and that it was all expended for necessary repairs, except the sum of $500, which was paid to plaintiff; that at the time the company took possession of the property there were only three apartments rented for the gross sum of $140 per month, and that those leases were necessarily terminated so that the repairing and renovating of the building could be done, and because the rental which the tenants paid was inadequate. It also appears the realty company exercised every reasonable effort to rent and to sell the property without avail; that the defendants did not misrepresent, defraud or prevent the plaintiff from procuring suitable renters or from refinancing the indebtedness on the property; that on the contrary they did all they reasonably could under the circumstances to finance and successfully operate the enterprise, but that without fault on their part it failed, and the makers of the second note and mortgage defaulted in the terms of those instruments. February 9, 1938, a notice of default in the payments due under the second deed of trust was regularly served and recorded. The property was subsequently sold, pursuant to the terms of the contract and the provisions of law, to the beneficiary, Elon L. Brown, subject to the first trust deed, he being the only bidder therefor. This suit was then filed on June 30, 1938.

[1] The findings and judgment are adequately supported by the evidence.

[2] We are of the opinion the court did not err in sustaining objections to evidence offered by the appellant. The court sustained an objection to a question propounded to a contractor who inspected the premises as follows: "In your opinion, would you say that the building was one that would be attractive to renters for occupancy?" That objection was properly sustained. The question throws no light on the issue as to whether defendants were guilty of fraud in procuring control of the property or in the conveyance of one-half interest therein. It calls for a conclusion of the witness. Appellant's attorney made no effort to enlighten the court regarding the relevancy of that testimony, or to explain the purpose of the proffered evidence.

[3] A real estate agent by the name of Thompson, who had lived across the street from the property in question for many years was asked if he had ever heard the building referred to as the "House of Mystery". The objection to that question was properly sustained. The purpose of this evidence was not explained by counsel for the appellant. It was not suggested the appellant sought to prove that the apartment house bore a bad reputation. There is no evidence that the defendants rented the property to individuals of ill-repute. The authorities cited by appellant which uphold the right to prove general reputation of a house of ill-fame are not applicable to the facts of this case. In fact, the appellant herself operated the apartments until November 21, 1936, when she executed the contract for the realty company's management. After that date considerable time was consumed in renovating and repairing the building. All tenants left during that operation. We are pointed to no evidence that it was ever thereafter leased by the defendants to any tenant of ill-repute. Mr. Jensen, another real estate agent, who testified in behalf of the appellant, said that he visited the premises in April, 1937, and that no tenants then occupied the building. There was no opportunity for the defendants to manage the property in the few months they had control of it in a manner which could have given it a bad reputation. The appellant did not contend at the trial that the building had a bad reputation, or that the defendants had done anything to cause it to be known as a "House of Mystery". There is no merit in this challenged ruling.

[4] It was neither erroneous nor prejudicial to sustain an objection to the statement of Mr. Lee Lay Porte, another real estate agent, who visited the building in December, 1937, at the request of the appellant, regarding a conversation he had with the janitor about the manner of renting the apartments and the approximate income from that source. Apparently the janitor properly told him he must get that information from the owners. If the janitor made any statement to Mr. Porte in that regard, it was hearsay and properly excluded. Moreover, the witness went there at the request of one of the owners of the property. He must have known who the manager was, and that he could obtain accurate information regarding the exact amount of income from the property.

[5] The court did not err in sustaining an objection to the proposed evidence of James E. Camp, regarding the condition of the property after the foreclosure proceedings were completed. We are of the opinion that evidence was remote and incompetent.

We have carefully examined the record regarding the other alleged errors in excluding evidence, and believe there is no substantial merit in any of them. There appears to have been no prejudice in those rulings. The plaintiff's witnesses were not unduly restricted in their evidence. The cause seems to have been fairly and impartially tried. There is no substantial evidence of fraud on the part of the defendants or any of them. The findings and judgment are adequately supported by the record.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

46 Cal.App.2d 63

PEOPLE v. JOHNSON.

Cr. 2150.

District Court of Appeal, First District, Division 1, California.

July 16, 1941.

1. Criminal law ⚿1159(2)

A reviewing court should not interfere with a verdict and judgment on ground that the evidence of the prosecution was so inherently improbable that it was of little, if any, value, unless the court can say that the testimony was so obviously and inherently improbable that the only recourse is to reverse the judgment.

2. Criminal law ⚿1159(2)

Improbability of the evidence of the prosecution must plainly appear before a reviewing court should assume functions of trial jury.

3. Criminal law ⚿1159(4)

Contradictions and inconsistencies in testimony of a witness alone will not constitute "inherent improbability" requiring reversal of judgment obtained on such testimony, and it is not sufficient that testimony may disclose circumstances which are unusual.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherent Improbability".

4. Larceny ⚿65

Evidence supported conviction of grand theft.

5. Criminal law ⚿742(1)

A jury, in passing upon credibility of witnesses, may take into consideration many factors, among them being character of witnesses as shown by the evidence, the manner in which they testified, as well as the plausibility of their stories.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Louise Johnson was convicted of grand theft, and she appeals.

Affirmed.

A. J. Hennessy, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The defendant appeals from a conviction of grand theft, based on the verdict of a jury finding her guilty of having stolen $57 from the person of William R. Mize. Insufficiency of the evidence is the only ground of appeal.

The cause was submitted to the jury on the testimony of Mize, the defendant, and a police officer. Mize testified that the defendant stole the money from his hip pocket while she was riding beside him, at night, in his automobile. At the trial defendant admitted riding with Mize on the night in question, but denied having stolen anything from him. She was arrested the day following the alleged theft, and the police officer testified, as a rebuttal witness, that a few days after her arrest she told him that she had never seen Mize before—that she did not know him.

Defendant concedes that the evidence is directly conflicting on all points, but contends that the conviction should be set aside upon the ground that Mize's testimony relating to the circumstances under which he claimed the theft was committed is so inherently improbable as to show that he is unworthy of belief. This contention cannot be sustained.

The facts of the case as they were established by his testimony were these: Between 10 and 11 o'clock on the night in question he was driving alone south on Gough street, in San Francisco, on his way home. He lived on San Bruno avenue, is married, the father of three boys, and for about 19 years has been employed as a mechanic by the Fairbanks-Morse Company. There is a traffic stop sign at the corner of Fulton and Gough streets, and as Mize stopped in obedience to the sign, the defendant, a colored woman, who according to her testimony had not worked for about a year but engaged in acts of prostitution, walked up to his car and asked if he was going toward Fifteenth and Howard streets, stating she had "walked miles" and that her "feet were very sore". The street corner mentioned by her being on the route Mize was taking to reach his home, he consented to let her ride. She took the seat beside him, to his right; and soon after she entered the car she began, as Mize expressed it, "playing around" with his pants, and suggesting that they "go and have a party", to which he gave a negative reply. He carried his money in a wallet in his right hip pocket, and after letting her out at her destination he leaned over to close the door and observed his empty wallet on the seat. Without indicating what he had observed, he told her to get back in the car and they "would have the party she wanted to have". She re-entered the car and Mize then started to drive her up Howard street to the Seventeenth street police station. Realizing what he was about to do, she said, "You ain't taking me to the police station", and she reached over to turn off the ignition switch. Failing in this she grabbed the gear-shift lever, stalled the car and got out. Mize followed and tried to hold her; and while they were struggling in the street two men drove up in a car, stated they were policemen and that they would take care of her; whereupon she got in their car and they drove away. She left behind her hat and purse, but Mize's money was gone.

[1-4] As said in People v. Moreno, 26 Cal.App.2d 334, 79 P.2d 390, 392, "Unless the appellate court can say that the testimony is so obviously and inherently improbable as to leave the court no recourse without self-stultification, except to reverse the judgment, the reviewing court should not interfere with the verdict and the judgment of the trial court upon that ground. People v. Antunez, 28 Cal.App. 740, 153 P. 963; People v. Becker, 140 Cal.App. 162, 35 P.2d 196. Such improbability must 'plainly appear before the reviewing court should assume the functions of the trial jury.' People v. Antunez, supra (page 964). 'Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability' (People v. Amadio, 25 Cal.App. 729, 145 P. 151, 152), and 'it is not sufficient that the testimony may disclose circumstances which are unusual' (People v. Collier, 111 Cal.App. 215, 226, 295 P. 898, 902.) The limitations placed upon the appellate court and the rules by which it must be governed are stated in People v. Lewis, 18 Cal.App. 359, 364, 123 P. 232, 234: 'We must assume, in the absence of something in the record upon which to base a contrary opinion, that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice. We must also assume that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial. * * *'" Applying the doctrine thus stated to the present case, it is apparent that no legal ground exists for interference with the jury's verdict.

The story told by defendant differed throughout from the one related by Mize; but it would serve no useful purpose to set forth the details thereof, because at the most it merely created a conflict in the evidence, and it was the exclusive province of the jury to determine which of them told the truth. Stated briefly, her version was that at Fulton and Gough streets Mize drove his car up to the curb near her and invited her to get in, saying, "How about having a little party tonight"; that as soon as she got in they started bargaining about the price he should pay her; that he drove her first to Golden Gate Park, paid her five dollars, and then said he would take her to his room; that after driving some distance she inquired where he was going, and calling her a vile name he replied he was taking her "to the country"; that she became frightened, stalled the car and jumped out; and that he was using violence upon her in the street when the two men drove up and took her away. She stated also that she did not know the two men; that after they let her out, she went to her room on Folsom street, but did not remain there; that she spent the night with friends on O'Farrell street, where she was arrested the next day.

[5] The rule has been often restated that a jury, in passing upon the credibility of witnesses, may take into consideration many factors, among them being the character of the witnesses as shown by the evidence, the manner in which they testify, as well as the plausibility of their stories; and in the present case, even though the story told by defendant could be deemed sufficient to exculpate her from the criminal charge, it was for the jury to say whether it should be accepted in preference to the one adhered to by Mize, and since it rejected her story, its decision is controlling on appeal. People v. Von Benson, 38 Cal.App.2d 431, 101 P.2d 527.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

46 Cal.App.2d 140

PEOPLE v. SELK.

Cr. 610.

District Court of Appeal, Fourth District. California.

July 18, 1941.

1. Embezzlement 🔑1
False pretenses 🔑1
Larceny 🔑1

The offense of theft has been substituted for the former separate offenses of larceny, embezzlement, and obtaining money or property by false pretenses. Pen.Code, §§ 484, 490a.

2. Criminal law 🔑878(4)

In grand theft prosecution wherein information contained one count charging larceny, another count charging the obtaining of money by false pretenses and a third count charging accused with procuring complainants to report falsely of their wealth and thereby obtaining fraudulently possession of certain money, but it was apparent from the evidence that there was but one transaction, and but one unlawful taking, if any, involved in the charge, the accused could not be convicted under each count and only a conviction under one count could be sustained. Pen.Code, § 484.

3. Embezzlement 🔑1
False pretenses 🔑1
Larceny 🔑1

Although the offense of theft has been substituted for the former offenses of larceny, embezzlement and obtaining money or property by false pretenses, no elements of the former crimes have been changed. Pen. Code, § 484.

4. False pretenses 🔑20

Where possession of money is obtained by fraud, trick or device, a question whether the crime, if any, is larceny or false pretenses may depend on a nice analysis of facts and legal principles.

5. False pretenses 🔑7(5)

A false promise to do something resting upon an event to happen in the future is not within the statute denouncing false pretenses, but a promise of future performance when coupled with a false statement concerning past or existing facts which induces another to rely on the false promise will in connection with the representation as to existing facts constitute a "false pretense" so that a conviction may be had thereon. Pen. Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "False Pretense".

6. False pretenses 🔑7(5)

If one is induced by false representation as to a past or existing fact to part with title to personalty, the law recognizes such a crime as the obtaining of that property by "false pretenses" chargeable as "theft". Pen. Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Theft".

7. Larceny 🔑14(1)

Where possession merely has been parted with and transaction is fraudulently secured with a present felonious intent to convert the property so acquired, the offense is recognized as "larceny". Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny".

8. False pretenses 🔑49(1)
Larceny 🔑62(2)

Evidence that accused obtained order for purchase of light plant equipment and obtained from purchaser a modernization note and a credit statement and by trick and device obtained purchaser's signature to a borrower's completion certificate which was presented to bank which purchased the note, and that the accused did not complete the installation of the equipment, sustained conviction of larceny which was chargeable as grand theft, but did not sustain conviction for obtaining money by false pretense or procuring complainants to report falsely of their wealth and thereby obtain fraudulent possession of money. Pen.Code, § 484.

9. Criminal law 🔑1170½(5)

The showing of substantial injury resulting from limitation of cross-examination is essential to require reversal because of such limitation.

10. Criminal law 🔑1170½(5)

Refusal to permit cross-examination of a complaining witness which would allegedly show prejudice on part of the complaining witnesses was not reversible error where all the essential facts testified to by the complaining witnesses were admitted.

11. Criminal law ⚷370, 372(5)

In grand theft prosecution based on transaction whereby accused obtained by trick and device a borrower's completion certificate from purchasers of light plant equipment, which accused presented to bank which purchased modernization note executed by the purchasers, evidence of other similar transactions with the same common design as the criminal enterprise with which accused was charged was admissible to prove general plan or scheme to defraud as well as to prove consciousness of guilt. Pen.Code, § 484.

12. Criminal law ⚷824(11)

Where accused did not seek to have trial court give special instruction in regard to cross-examination of accused concerning transactions about which the accused claimed he had no knowledge, accused could not complain of the failure of the trial court to instruct the jury to disregard such cross-examination.

13. Witnesses ⚷277(5)

In grand theft prosecution, the accused who opened up subject of other similar transactions could not close the door to an inquiry by the district attorney on cross-examination concerning such other transactions. Pen.Code, § 484.

◆

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Carl Selk was convicted of larceny, obtaining money in excess of $200 by false pretense, and procuring complainants to report falsely of their wealth and thereby obtaining fraudulent possession of $280, and he appeals.

Affirmed in part and reversed in part.

Bernard Brennan, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., Earl Redwine, Dist. Atty. of Riverside County, and John Neblett, Deputy Dist. Atty., both of Riverside, for respondent.

GRIFFIN, Justice.

Appeal from a judgment of conviction and order denying a new trial. Appellant was charged in an information filed November 28, 1940, with three counts of grand theft, under section 484, Penal Code. Count 1 charged larceny in the sum of $321.95, count 2 with obtaining a sum in excess of $200 by false pretense, and in count 3 with procuring complainants to report falsely of their wealth and thereby obtaining fraudulent possession of $280. After a plea of not guilty, appellant was tried by a jury and verdicts of guilty were returned on each of the three counts in the information. Motion for a new trial was denied. Appellant was sentenced to the state prison on counts 2 and 3 to run concurrently with the sentence on count 1.

The appellant, whose true name is Carl Selk, called at the farmhouse of the complaining witnesses, Mr. and Mrs. Knittle, near Perris in Riverside county. During this visit appellant used the name of Bowers. The Knittles had a Delco light plant equipment which they wanted replaced. Appellant showed them circular illustrations of a 1000-watt Onan Generating Plant, a set of batteries consisting of sixteen cells, and a battery watchman. The Knittles thereupon ordered the Onan equipment from appellant. In connection with the order of the equipment, dated August 21, 1940, the Knittles signed, at that time, the order, which was marked "Rush", a blank modernization note and a credit statement application. Mr. Knittle testified that he did not knowingly sign a borrower's completion certificate on that occasion. On the following day appellant went to the San Bernardino branch of the Bank of America, where the Knittles had previously established credit. In dealing with the bank, appellant gave his correct name, Mr. Selk. Appellant presented the order, note and credit statement application to the bank for purchase. The reverse side of the note carried this indorsement, reading in part, "* * * that the work and/or materials to be done or supplied have been delivered and/or installed satisfactorily * * *".

The bank approved the purchase of the note and caused a cashier's check to be drawn in the sum of $280, payable to the Lighting Plant Sales, the firm name in which appellant did business. The cashier's check was then given to appellant by the bank, when it was discovered that the note was post dated. Upon discovery of the error in this first note, the appellant was called back into the bank from his car, and a new note was prepared and given to him, together with a borrower's completion certificate. The banker did not know whether a borrower's completion certificate was presented on the first occasion, but testified that it was a necessary prerequisite in order that such a loan be insured by the government under the N.H.A., and that the instant transaction was handled as such. The cashier's check was paid on August 26, 1940. The banker allowed appellant to secure the signature of the Knittles to the new note and other documents, which were returned to the bank on August 28, 1940. The following day, after the discovery of the error in the date on the first note, the appellant took the new note and the borrower's completion certificate out to the Knittles. Appellant told Mr. Knittle that the bank had made a mistake in copying the note and that the month of July had been put in instead of the month of August, and that he had been requested to have a new note signed. Appellant and the Knittles then went into a drug store in Perris, and Mr. Knittle sat on one side of appellant and Mrs. Knittle on the other. Appellant then took a leather folder from his pocket, with the papers protruding from it, and asked Mr. Knittle to sign the papers. There was a blank paper covering the modernization note entirely. Underneath the blank paper was the modernization note and underneath this note was the borrower's completion certificate. After signing the note, Mr. Knittle lifted up the paper, and appellant stated, "That one too", whereupon Mr. Knittle signed the bottom paper, which turned out to be a borrower's completion certificate. At about the time Mrs. Knittle was putting her signature on the papers appellant threw a Jefferson nickel down and stated that it would bring her luck or a lot of money, or words to that effect. The borrower's completion certificate read as follows:

"Notice to Borrower—Do Not Sign This Certificate Until the Work is Satisfactorily Completed.

"Dated at San Bernardino
..... 196.. Aug. 22 ..'40 ....., 19..

"I (we) the undersigned hereby certify that all articles and materials have been furnished and installed and the work satisfactorily completed on premises at 6 miles W. of Perris, Gavilan Hills in accordance with my application for a loan dated August 24th, 1940, pursuant to the provisions of Title I of the National Housing Act, as amended.

"Albert S. Knittle
"Carmela M. Knittle."

On that date none of the equipment had been delivered, installed or put in operation. Mr. Knittle or Mrs. Knittle at no time knowingly signed a borrower's completion certificate. Appellant told the Knittles he would bring the batteries the first of the week and that they would get the generating plant in about three weeks or less. On September 4, 1940, a set of batteries was delivered to the Knittles' home. These batteries were not the ones described on the order blank, nor were they the ones described in the circular shown to the Knittles. No equipment other than the batteries was ever delivered to or received by the Knittles in connection with this transaction. On August 28th, appellant sent a letter to the Knittles telling them that he would deliver the batteries to them, and he signed it "Mr. Bowers".

In addition to the transaction with the Knittles, the prosecution proved similar transactions of appellant with several others in which the borrower's completion certificate was fraudulently obtained or forged, and who never received their equipment either. An officer of the C.I.T. Corporation testified that in buying commercial paper of this character a completion certificate was necessary to show that all improvements had been installed before that corporation would purchase the paper as a discount transaction. Appellant, who had been previously convicted of a felony, took the stand and offered no testimony to refute the evidence of the false signatures nor the evidence regarding the obtaining of the borrower's completion certificate. He admitted that he secured the signature of the Knittles on the borrower's completion certificate on August 23, 1940. Appellant produced numerous items of correspondence to show that there was a delay in the delivery of the 1000-watt generating plant by the Kato Engineering Company. In one of the letters to the Kato Engineering Company, the appellant refers to a $1,000 damage suit that had been filed by one of his customers. Appellant admitted that no such damage suit had been filed against him, but that he just wanted to "high pressure" the company. On rebuttal, the prosecution introduced a letter sent to the Bank of America, San Bernardino Branch, by appellant, which reads as follows:

"Dear Sir:

"Your letter of September 24th has been received by us with reference to Mr. Knittle and the equipment he purchased.

"Mr. Bowers who sold this unit has installed the batteries and was expecting special equipment to be installed on the generator which was not in stock at the time, but the equipment is all ready to be installed only that Mr. Bowers was called up to the Army Ammunition Reservation near Hawthorne, Nevada, in regard to some emergency work, and he is expected back within the next day or so, and will then complete the installation.

"Thank you for calling this to my attention, as I did not know that the job was not completed, or I would have taken care of it myself.

"Very truly yours,
"Carl Selk,
"Lighting Plant Sales."

When cross-examined with respect to this letter, appellant admitted that when he wrote the letter to the bank, he knew that the equipment had not been installed in the Knittle home and that the information conveyed to the bank by the letter was false.

Appellant first argues as to count 1 that the evidence is legally insufficient to support the verdict and judgment; that there is nothing in the record to show any misrepresentation or fraudulent intent on the part of the appellant in the making of the sale of light plant equipment; that the transaction was civil in nature and handled in the ordinary course of business; that the bank was not defrauded because the credit was obviously upon the note and the credit information furnished upon the application and upon the credit standing of the Knittles at the bank, rather than upon the borrower's completion certificate; that after the purchase of the note any representations made in securing the substitute note or completion certificate or additional security or papers would not date back and make a criminal act. The same argument is made in response to counts 2 and 3.

[1] Section 484, Penal Code, provides that every person who shall feloniously take the property of another or shall, by any false or fraudulent representation or pretense, defraud any person of money or personal property, or who causes or procures others to report falsely of his wealth whereby he obtains credit and thereby obtains possession of the property of another, is guilty of theft. It will be noted that the act reads in the disjunctive and any one of the acts denounced constitutes the crime of theft. The offense of theft has been substituted for the former separate offenses of larceny, embezzlement and obtaining money or property by false pretenses. Pen. Code, sec. 490a; People v. Carter, 131 Cal.App. 177, 21 P.2d 129.

[2] It is apparent from the evidence that there was but one transaction and but one unlawful taking, if any, involved in the charge. There was but one offense of grand theft under any construction of the evidence, i. e., either obtaining the money or property by false pretenses, by larceny or obtaining it by falsely reporting another's wealth. Three separate and distinct crimes, therefore, were not committed under the evidence. Ex parte McCarthy, 72 Cal. 384, 14 P. 96; People v. Werner, 29 Cal.App.2d 126, 84 P.2d 168; People v. Johnson, 22 Cal.App. 362, 134 P. 339; People v. Lawlor, 21 Cal.App. 63, 131 P. 63.

[3, 4] Appellant raises this point only by contending that the evidence is not sufficient to support his conviction on each count. The credit statement referred to in count 3, given by the Knittles, set forth in detail their age, intended use of proceeds of loan, description of their real estate and obligations outstanding and similar statements. There is no evidence that any of these statements are or were false or reported falsely. The conviction, therefore, on the charge of grand theft set forth in count 3 in this respect is lacking in evidentiary support. The conviction, therefore, must stand upon the theory that appellant otherwise obtained the money or property by false pretenses or by larceny. The unlawful taking of the same property cannot be said to have been accomplished by both methods so as to constitute two separate offenses; in other words, it must have been by one method or the other, but not by both. Conviction on both counts 1 and 2, therefore, cannot be sustained. At least one must fall. The question then remains, from the evidence, Have the essential elements of the former offense of larceny or the former offense of obtaining money or property by false pretenses been established? Although the offense of theft has been substituted for the two former offenses mentioned, no elements of the former crimes have been changed. People v. Myers, 206 Cal. 480, 275 P. 219. The necessary and essential elements of each have been clearly established and distinguished. People v. Delbos, 146 Cal. 734,

81 P. 131; 12 Cal.Jur. 451, sec. 3; 12 Cal. Jur. 460, sec. 13. Where possession of money is obtained by fraud, trick or device, a question whether the crime, if any there be, is larceny or false pretenses often depends upon a nice analysis of facts and legal principles. People v. Shwartz, 43 Cal. App. 696, 185 P. 686.

[5] Commonwealth v. Tidwell, 162 Ky. 114, 172 S.W. 102, involved a promise to deliver goods in the future. That court approved the rule that, a false promise to do something resting upon an event to happen in the future is not within the statute denouncing false pretenses, but stated that a promise of future performance, when coupled with a false statement as to a past or existing fact which induces another to rely upon the false promise will, in connection with the representation as to the existing fact, constitute a false pretense so that a conviction may be had thereon. In the instant case, our attention has not been called to any particular false representation made by appellant of a past or existing fact prior to the delivery of the note. The evidence completely establishes the elements of the former crime of larceny, by trick and device, now included in section 484 of the Penal Code. This is the former offense of larceny by trick and device, which was a form of larceny, now a part of grand theft, and comes within the first count of the information.

It is clear from the evidence that the transaction should be considered in its entirety. People v. Sing, 42 Cal.App. 385, 183 P. 865. It is not clear why the bank should advance the appellant the $280 before all of the necessary papers were completed. This, however, is not sufficient to divide the transaction into two parts for the reason that the bank did require a borrower's completion certificate to be signed and appellant did procure the signatures of the Knittles on the borrower's completion certificate in such a manner that the Knittles did not know that they were signing it and at the time appellant knew that the equipment had not been installed. Further, appellant knew that the Knittles would not have signed the borrower's completion certificate had they known that they were signing such a paper. The first modernization note, dated August 22, 1940, was cancelled. The Knittles were not longer liable thereon. Their liability was only upon the second note which was obtained in the manner described by tricking them into signing the "Borrower's Completion Certificate" which was required for the necessary completion of the transaction. The procuring of the order, the discounting of the paper, the procuring of additional signatures, the failure to install the equipment is all one transaction, and from start to finish, it is impregnated with fraud. Standing by itself, even without the showing of additional similar transactions, the evidence is sufficient to support a finding of guilt on the first count as charged.

[6, 7] If one is induced by false representation as to a past or existing fact to part with title to personal property, the law recognizes such a crime as the obtaining of that property by false pretenses chargeable as theft. On the other hand, where possession merely has been parted with and the transaction is fraudulently secured with the present felonious intent to convert the property so acquired, the offense is recognized as larceny. People v. Campbell, 127 Cal. 278, 59 P. 593.

[8] It is apparent from the entire transaction that the jury was justified in the belief that the Knittles did not intend to part with the title to the note until the Bank of America, to which the application for the credit or loan was directed, accepted the application for the loan or credit and were satisfied that all materials had been furnished and satisfactorily installed. The note itself, on the reverse side, specifically provided, in the proposed assignment form, that the work and the material supplied had been delivered. The Knittles, as well as appellant, therefore, knew that the appellant could not rightfully assign the note to the bank without delivery having been made. The credit statement, furnished by the Knittles, was directed to that same bank and recites:

"To Bank of America . . .

"The following information . . . is furnished for the purpose of inducing you to grant credit under the terms of Title 1 of the National Housing Act. . . .

"We authorize you . . . and agree that it (credit statement) shall remain your property whether or not our note is finally accepted by you. . . . that if the loan is granted to us or our note purchased, the entire proceeds will be used exclusively in payment for alterations, * * *."

A signed accompanying statement of appellant Selk provided that:

"To Bank of America . . .

"In consideration of your accepting the note of Albert S. and Carmela M. Knittle, for $321.94, dated August 24th, 1940 . . . 19 . . ., I hereby certify that all articles and materials contracted for have been furnished and installed and the work fully completed that the signatures on the note and Completion Certificate are genuine, that the Completion or Installation Certificate was signed after the articles and materials contracted for had been furnished and installed and the work fully completed, * * *."

Mr. Knittle also testified that, "I knew I was signing a Note, but I did not think he would get the money without delivering the equipment".

Six forms of verdicts were presented to the jury, one of guilty and one of not guilty as to each count. The trial court, after reading the six forms of verdict, instructed the jury that, "Your verdict may be in one of the following forms:".

It is apparent from the evidence that the allegations of count 1 received sufficient support to warrant a conviction thereon. The conviction on the second and third counts must fall for the reasons expressed. People v. Shwartz, supra.

Appellant next contends that his cross-examination was unduly limited on the question of a delay in the delivery of equipment. An examination of the reporter's transcript shows that an extended cross-examination in reference to this subject was permitted. Communications by appellant and a certain manufacturing concern in reference to the generating plant were received in evidence. On September 10, 1940, more than two weeks after appellant described the machinery to be installed and took the order for the generator, appellant wrote this letter to the manufacturing concern: "As per our conversation on the phone today, I wish to again state that I am interested in a 1,000 Watt, 32 Volt generator which can be arranged to be stopped by some kind of voltage control when the batteries are fully charged * * * advise me immediately what you can build for us and at what price, * * *."

[9] Appellant claims that a generator finally arrived on October 25, 1940, which was intended for the Knittles, but was returned due to faulty construction; that about December 27, 1940, another one arrived which appellant claims was satisfactory, but that he did not deliver it to the Knittles on advice of his attorney. Three pages of cross-examination on the claimed causes of delay were permitted by the court and appear in the record. No substantial injury has been shown by any claimed limitation of cross-examination, which showing is essential. People v. Watts, 198 Cal. 776, 792, 247 P. 884.

[10] Appellant endeavored to show on cross-examination prejudice of Mr. Knittle in that he permitted Mrs. Knittle to file an affidavit in an injunction suit to restrain the appellant from doing business under the name of Delco Light Sales, and that the jury should have had the benefit of any evidence of bias or prejudice in order to weigh the proof of the testimony of the complainants, the Knittles. It is sufficient to say in this respect that all of the essential facts testified to by the Knittles are admitted. People v. Terkanian, 27 Cal. App.2d 460, 81 P.2d 251; People v. Kelly, 32 Cal.App.2d 624, 90 P.2d 605.

[11] Appellant contends that evidence of other similar transactions was not admissible against him. Evidence of other similar transactions with the same common design as the criminal enterprise charged in the indictment is admissible to prove a general plan or scheme to defraud as well as to prove consciousness of guilt. People v. Humphrey, 27 Cal.App.2d 631, 639, 81 P.2d 588; People v. Thorne, 10 Cal.2d 705, 708, 76 P.2d 491.

[12, 13] Appellant sets forth a number of questions propounded by the district attorney in reference to the difficulties appellant had with other customers. It is appellant's contention that the court failed to instruct the jury to disregard those questions after the court had agreed to do so. It should be noted at the outset that this subject was opened by appellant at the start of his direct testimony. It appears in the record as follows: "Q. Have you had difficulties with any of your transactions other than those which have been brought to the attention of the court here?" Mr. Niblett's objection to this question of appellant's counsel was overruled. Answer by Carl Selk: "None." After appellant opened up this line of inquiry, the district attorney on cross-examination asked about many other instances where it was claimed appellant

failed to deliver the generator plants ordered. If appellant sought to have the court give a special instruction in reference to certain of the transactions about which appellant claimed he had no knowledge, such an instruction should have been submitted to the court by appellant, otherwise appellant is in no position to complain. People v. More, 10 Cal.App.2d 144, 146, 51 P.2d 175. Inasmuch as appellant opened up the subject of difficulty in other transactions, appellant himself cannot close the door to an inquiry concerning those other transactions. People v. Madison, 3 Cal.2d 668, 678, 46 P.2d 159.

None of the other claimed errors are meritorious.

The judgment of conviction and the order denying a new trial as to the first count are affirmed. As to the second and third counts, the judgment and order are reversed.

We concur: BARNARD, P. J.; MARKS, J.

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46 Cal.App.2d 152

BECK et al. v. CAGLE et al.

Civ. 2805, 2785.

District Court of Appeal, Fourth District, California.

July 19, 1941.

1. Mines and minerals 🔑57

Where owner of federal oil and gas prospecting permit approved escrow instructions, providing for the securing by prospective lessee of an interest in the property covered by permit, the failure of escrow instructions to set forth the terms of the lease and the failure of parties subsequently to agree upon such terms militated against prospective lessee's contention that a binding contract existed.

2. Specific performance 🔑37

Where parties to escrow instructions, providing for the securing by prospective lessee of an interest in federal oil and gas prospecting permit, failed to agree upon the time within which prospective lessee should commence drilling operations, upon the number of wells to be drilled and as to the amount of royalties, specific performance of the escrow instructions could not be required of the holder of federal permit nor could she be required to execute a lease.

3. Mines and minerals 🔑58

The fact that prospective lessee refused to pay the amount due under escrow agreement, providing for the procuring by him of an interest in a federal oil and gas prospecting permit, because holder of permit refused to sign lease form submitted, and the fact that holder of permit refused to sign such form and insisted upon a different form showed that the parties failed to reach an agreement upon the proposed deal.

4. Mines and minerals 🔑101

Where holder of federal oil and gas prospecting permit proposed to lease one tract covered by permit and to enter into partnership or joint adventure with prospective lessee with respect to other tract, contingent upon prospective lessee's entering into lease satisfactory to holder of permit with respect to first tract, the fact that a lease was never executed because the terms thereof could not be agreed upon between the parties did not entitle prospective lessee to one-half of returns received by holder of permit as result of drilling agreement with third party on theory that all property covered by permit was handled on a joint adventure basis.

5. Joint adventures 🔑1

To constitute a "joint adventure", there must at least be a community of interest in the object of the undertaking, an equal right to direct and govern the conduct of each other with respect thereto, share in the losses if any, and close and even fiduciary relationship between the parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventure".

6. Account 🔑15

Mines and minerals 🔑101

Where action to require holder of federal oil and gas prospecting permit to account for money and property received by reason of transactions with regard to such permit was not commenced until more than four years after holder of permit indicated by words and deeds that she no longer was dealing with plaintiff with respect to leasing to plaintiff a portion of tract covered by permit or entering into joint adventure with plaintiff with respect thereto, such action was commenced too late.

7. Joint adventures ⚿2
Partnership ⚿267

The abandonment or dissolution of a partnership or joint adventure may take place by conduct inconsistent with its continuance.

8. Estoppel ⚿70(2)

A person may not withhold his claim, awaiting the outcome of an enterprise, and then, after a decided turn has taken place in his favor, assert his interest, especially where he has thus avoided the risks of the enterprise.

9. Equity ⚿72(4)

Where property involved is of a speculative or fluctuating character, more than ordinary promptness is required of a claimant in pressing his claim thereto at the earliest possible time.

10. Mines and minerals ⚿101

The rule that a person may not withhold his claim, awaiting the outcome of an enterprise, and then, after a decided turn has taken place in his favor, assert his interest is applied with great strictness in the case of mining property, which is of a specially precarious nature and is exposed to the utmost fluctuations in value.

11. Account ⚿10
Mines and minerals ⚿101

Where holder of federal oil and gas prospecting permit was held not liable to account to plaintiff with whom holder of permit had negotiated with a view to leasing portion of tract covered by permit and entering into joint adventure with plaintiff with respect to other portion of tract, an oil company, with whom holder of permit entered into a drilling agreement following termination of negotiations with plaintiff, could not be held liable to plaintiff.

◆

Appeals from Superior Court, Fresno County; Ernest Klette and H. Z. Austin, Judges.

Action by Albert Beck and others against Eva C. Cagle and another, to require the named defendant to account for money, property and things of value received by her by reason of dealings in regard to a governmental oil and gas prospecting permit. From a judgment in favor of the named defendant and a judgment of dismissal entered upon the demurrer of the other defendant, plaintiffs appeal.

Judgments affirmed.

Alfred Siemon, and Bennett Siemon, both of Bakersfield, David E. Peckinpah, and L. N. Barber, both of Fresno, for appellants.

Hanna & Morton, of Los Angeles, Ray W. Hays, of Fresno, for respondents.

MUNDO, Justice pro tem.

This is an action to require respondent Eva C. Cagle to account for money, property and things of value received by her by reason of dealings and transactions in regard to a government oil and gas prospecting permit. The superior court (Judge Klette sitting) sustained the demurrer of the defendant Superior Oil Company without leave to amend, and a judgment of dismissal was entered thereon. An appeal was duly taken, but prosecution of that appeal was suspended by consent of the parties pending the outcome of the case against the other defendant. The case then went to trial (Judge Austin sitting) and judgment was rendered in favor of defendant Eva C. Cagle. An appeal was likewise taken from this judgment. Both appeals are now before this court together. Since the case will appear to be such that Superior Oil Company would be liable only in the case of liability on the part of defendant Eva C. Cagle, it is well to proceed to the determination of the liability, if any, of Eva C. Cagle in the premises.

Eva C. Cagle was the owner of a federal oil and gas prospecting permit, which is practically equivalent to the ordinary oil and gas lease granted to a private landowner, covering 528 acres in the Coalinga area in Fresno county. In March, 1932, she and Albert Beck started negotiating with the view of Mr. Beck acquiring an interest in the property. Their negotiations led to the execution of the following instrument:

"Security Title Insurance and
Guarantee Company
"Riverside, California.
"Riverside, California
"April 21, 1932.

"Gentlemen:

"I hand you herewith the sum of $200.00, and will on or before 30 days hand you the additional sum of $1300.00, all of which you are hereby authorized and instructed to deliver to Eva C. Cagle, or her order, when you hold for me an operating agreement covering the right to explore, drill for, produce and market oil, gas and kindred substances on the following land:

"W½ of W½; NE¼ of NW¼; N½ of NE¼ of Section 6, township 20 South Range 16. E., M.D.B. & M.; consisting of 328 acres.

"And to be on the form now deposited in escrow or form known as lease form 88, to be at the option of Albert Beck, and when satisfactory title evidence has been submitted to the escrow and approved by Albert Beck as to the condition of the title to the oil rights.

"I will also deposit a personal unsecured note in the amount of 2,000.00 due on or before July 1, 1932, interest at 7% from the close of escrow payable at maturity and same is to be signed by the Artesia Investment Company, and the lease first above referred to is to be made to the Artesia Investment Company, and note to be made to Eva C. Cagle and delivered when lease above referred to is ready.

"I am to pay the escrow fee and the cost of bringing the title down from the present report.

"Artesia Investment Co., a corp.
"By Albert Beck, Secy.

"The foregoing instructions are hereby approved and I am to pay the cost of bringing the title down to the present report already made to San Bernardino Office. The broker in this deal is D. A. Bean and his commission is to be settled outside of escrow.

"Eva C. Cagle.
"Apr. 21, 1932.

"I have received the $200.00 to have been deposited, outside of escrow ($200.00).
"Eva C. Cagle.
"May 19, 1932.

"I hereby extend the time for depositing balance, an additional 10 days.
"Eva C. Cagle.
"Aug. 12, 1932.

"In place of money called for in these instructions, I am to deliver an Essex sedan, satisfactory to Mrs. Cagle, and will or B4 3 weeks deposit 1485.00 cash to be delivered to her.
"Albert Beck.

"Approved:
"Eva C. Cagle."

Following the execution of this instrument, the parties continued their negotiations over a period of several months by means of letters, telegrams and conversations. During the period of these negotiations, Mr. Beck advanced money to respondent Cagle to be credited to the escrow in amounts from 10 cents to $200, and gave her a Buick automobile for which he had paid $375. The total cash so advanced was approximately $675.

About May 12, 1933, respondent Cagle subleased the property to Lon V. Smith, which sublease was later assigned to the Superior Oil Company. No development work was done on the property during the period of negotiations between Mr. Beck and Mrs. Cagle. The Superior Oil Company obtained production on the property in 1939, whereupon plaintiff filed this action against Eva C. Cagle and the Superior Oil Company.

Plaintiffs have pursued two inconsistent theories for recovery, set up in two counts of the complaint: first, that the so-called escrow agreement was a meeting of the minds of the parties upon everything necessary to constitute a valid contract, including the drilling by Mr. Beck on the 328 acres and that he could elect to treat the sub-lease with Superior Oil Company as a completion of a joint adventure creating a trust in one-half of the profits in his favor. The second theory was that the law implied a joint adventure because respondent failed to return the moneys advanced by plaintiff upon the termination of the negotiations for the operating agreement giving the plaintiff the right to an accounting for such share of the profits as may be determined by the court to be just.

Respondent Cagle relied upon the defenses that the parties failed definitely to agree upon anything and therefore no contract ever existed; that the so-called escrow agreement failed to meet the requirements of the statute of frauds and that in any event appellants' action was barred by the statute of limitations and by laches.

According to the escrow agreement the operative rights which Mr. Beck was to have were to be on a certain form, a form supposed to have been deposited in escrow or form known as lease form number 88. No form was actually deposited in escrow, form number 88 or otherwise, but Mr. Beck, after requesting the respondent Cagle to fill out a form in October, 1932, filled in the blanks of a form and sent it to respondent Cagle. The latter replied with the following letter:

"San Bernardino, Calif.
"October 7, 1932

"Mr. Albert Beck,
"391 Palm Street,
"Anaheim, California.

"Dear Mr. Beck:

"After a thorough study of the 88 Form you left in my possession, it seems totally incompetent to cover a government permit. In fact, this form is more in the nature of an option than it is of a drilling agreement, and as you know I am in no position to grant an option for any period at all, let alone one for the term of two years. I have typed a copy of the agreement drawn by Mr. Hintze leaving out the features you found objectionable, and I know that your attorney will give you his opinion and on this I must rest. I am also enclosing a form relative to the 200 acres. I must ask that you make some immediate effort to begin operations on the land, also close the escrow in its entirety, because it is necessary for me to know what to base my application for extension that I intend to make the first of the week. I have tried to be patient, knowing that you have many matters demanding your attention, yet it is now time for me to give heed to my interests. Should you find it convenient, I would like to have your answer at once. Should you find it impractical to complete the deal, will you please send me the maps and other data you have in your possession relative to my permit? Mr. Jergens of Long Beach has some small interest in the Edison area and has expressed a wish to look over the maps and data on both my permits. I went through Riverside on my way to Long Beach today, and it seems that your little playmate, Dan Bean, was still among the missing. What a sour dish he has turned out to be. I certainly would like to have you go through with the program as you outlined it yesterday, Mr. Beck, but I cannot afford to wait any longer. If it is necessary for me to apply for an extension on my own efforts, without being able to state that a drilling arrangement has been made with you, I feel that I should withdraw all ties at the Security escrow, which will leave us both free and no obligation on either side. Please let me hear from you as to your wishes in the matter. Also please convey my sincere regards to your wife.

"Sincerely yours,
"Eva C. Cagle."

Thereafter, respondent Cagle demanded that appellant Beck complete the escrow by putting in the balance of the money. Mr. Beck told her that he would not give her the balance of the money until she put the lease in or gave him the lease as per the terms of the escrow. Mrs. Cagle told Mr. Beck that she was going to cancel the escrow if he did not put in the money. On January 16, 1933, she wrote on the escrow instrument: "You are hereby notified that the within escrow agreement is hereby cancelled and of no further force or effect. Eva C. Cagle." This attempted cancellation subsequently was withdrawn.

On January 23, 1933, Mr. Beck wrote to Mrs. Cagle as follows:

"Anaheim, California
"January 23, 1933

"Eva C. Cagle,
"215 G Street,
"San Bernardino, California

"Dear Madam:

"According your telephone call to me Thursday evening collect to me at Anaheim, Calif. I was to meet you in the Alexander Hotel. I got there 1:10 P. M. I was unable to find you but I suppose you were unable to come in on account of the rain. On my return home I found a letter from Attorney A. P. Ohanneson, 518 Washington Building. I will be glad to show you the letter when I see you. In regard to payments I have made you through escrow and moneys I have paid you outside of escrow, my check and cash, and tire bill and grease, car received from Sudduth & Lynd of Long Beach, December 16, 1932. And the Buick car which you ordered assigned to your mother, Mrs. Mary J. Cook, which is all to apply on the 320 acre Coalinga oil lease and the one-half interest in the 200 acres Coalinga oil lease. We can have our attorneys make both leases in one or make same in two separate leases, to myself, as I will assign same to Albert Beck trust, which I have formed while I was in Oklahoma City, to hand oil properties belonging to myself and wife. I gave you the 88 form of lease, which you told me was satisfactory to you at first, and after I drew same up you wanted changes made, so we will have to get our attorneys together and get a proper oil lease drawn. As our escrow in the title Co. which is contract because money has changed hands, as per your letter to me. But no leases has ever been drawn which has been satisfactory to both of us. I would like to get this shaped up in proper shape, and want to start a well on the Coalinga lease as soon as I finish the Beldridge well which we are now drilling.

"Very truly yours,
"Albert Beck."

The parties were out of touch with each other until about February, 1935, at which time respondent Cagle wrote to Mr. Beck. He replied as follows:

"Anaheim, California
"3-18-1935.

"Mrs. Eva C. Cagle
"Taft, Cal.

"Dear Mrs. Cagle:

"Received your letter dated February 27th and note what you have to say in regard to some land leases which are open to a permit entry near the Devils Den. You stated you would locate me real cheap on a government permit near there. I will try and arrange to see same the first time I am up that way. You state you would locate me real reasonable on account that I was unable to drill the Coalinga permit. I am sorry to say I would not drill on the Coalinga permit or any other lease or permit until I had proper title, as I have never received a lease from you as per our escrow instructions at the Security Title of Riverside, and same called for an 88 Form lease, and escrow was signed by yourself and myself. And I have all my canceled checks which I paid you outside of escrow, and you had me transfer the Buick car to your mother. This escrow will have to be completed or will have to ask the courts to pass on same and give me title as per escrow contract. Let me hear from you by return mail. If you are able to furnish the lease as per escrow and I will pay you the balance due you as per escrow as soon as you deliver good title to the oil and gas lease. Please answer soon.

"Yours truly,
"Albert Beck."

It would seem from the foregoing that Mr. Beck expected to get a lease from Eva C. Cagle, and that they never reached an agreement on the terms of said lease may be seen from the testimony given by Mr. Beck.

"Mr. Morton: Mr. Beck, you say she did not put anything into escrow in the way of documents. Did you ever put any documents in escrow? You understand. Just answer the question. A. No, I did not.

"Q. The only document in the way of a lease that you ever prepared and submitted to her was this draft of Form 88 on October 6th? A. I think you are right.

"Q. The previous Form 88, which you had shown to Mrs. Cagle, at the time of the escrow, was simply a form without anything filled in? A. That is right.

"Q. Didn't have the date, names, description or anything else? A. That is right.

"Q. And it wasn't until October 6th of 1932 that you ever, yourself, prepared any formal, written lease? A. That is right.

"Q. And she told you ten or fifteen times prior to the cancellation of the escrow, that is, prior to the time she wrote that cancellation, she would not take Form 88, didn't she? A. Yes, that is right.

* * *

"Q. And when you submitted Form 88, she submitted an entirely different form to you, didn't she, after you submitted the one of October 6, 1932? A. Well, Mr. Ohanesian and Mr. Whiteley drew some other forms.

"Q. But you remember she sent you two forms? A. Yes, sir.

"Q. With that letter of October 7, 1932? A. That is right.

"Q. Without comparing them, they were entirely different, particularly in that they required you to drill in a short time, didn't they? A. That is right.

"Q. The draft you made gave you two years in which to drill if you wanted to? A. That is right. * * *

"Q. But you were willing to consider changes from this form you submitted? A. No, I liked the 88 Form, which was a very fair form. And the escrow did not provide for any time. It provided to take care of the permit. * * *

"Q. You did not like the one she sent you in this letter? A. I did not. I did not agree to start drilling in 30 days, at any time. * * *

"Q. You didn't want either form she sent you? A. I wanted it plainer, in case the government raised the royalty, and she would get a certain amount.

"Q. In January, 1933, you wrote Mrs. Cagle a letter, which is Exhibit 30—here is a copy, and it says, 'But no lease has ever been drawn which has been satisfactory to both of us.' That was the condition on January 23, 1933, wasn't it? A. That is right. * * *

"Q. You were willing that could be in one lease or two separate leases? A. Yes, sir.

"Q. When you say there would be two separate leases possible, you were referring to those two separate parts of the 520 acres? A. That is right."

[1, 2] The failure of the escrow instructions to set forth the terms of the lease and the failure of the parties subsequently to agree upon the terms of a lease militates against appellants' contention that a binding contract existed. If we were called upon to compel Eva C. Cagle to specifically perform her contract or to compel her to execute a lease, we would have to deny the relief on the ground that there were vital features of the proposed lease upon which the minds of the parties had not met or come together. One important feature which the parties could not agree upon was the time of drilling. Mr. Beck thought he should have two years within which to drill; Mrs. Cagle thought thirty days should be the limit. Other terms such as royalty and the number of wells were not agreed upon.

[3] Mr. Beck says the reason he did not pay the balance of the money was because Mrs. Cagle did not sign form 88. He admits she refused to sign that form and insisted on a different form. This shows a failure of the parties to agree upon the proposed deal.

The only proposal of Mrs. Cagle to let him have a half interest in the 200 acres was contingent upon his drilling a well pursuant to the proposed lease of the 328 acres. Mr. Beck did not even pay the money called for as the consideration for that lease. By endorsement of August 12, 1932, he agreed to pay $1,485 cash within three weeks thereafter. He only paid a few hundred dollars after that date. If we assume he was justified in not paying the balance of the money as he agreed because they had failed to agree between themselves as to the form of the lease, that leads us to the same result, namely, that the parties never reached an agreement.

[4] Appellants urge that the evidence shows that the parties entered into a joint adventure agreement as to the 200 acres. The escrow agreement related only to 328 acres. When Mr. Beck sent Mrs. Cagle form number 88 filled in with the terms and conditions he desired and she rejected those terms and conditions, she sent back a letter and two proposed agreements. One agreement related to the 328 acres and the other to the 200 acres, the latter being contingent upon the fulfillment of the other agreement. Mr. Beck did not accept these proposed agreements. The evidence clearly shows that Mrs. Cagle's offer with respect to the 200 acres was contingent upon the completion of a satisfactory lease on the 328 acres and the drilling of a well thereon by Mr. Beck. That Mr. Beck expected to get two leases is shown by his letter of January 23, 1933, wherein he said that the Buick car was "to apply on the 320 acre Coalinga oil lease and the one-half interest in the 200 acres Coalinga Oil lease. We can have our attorneys make both leases in one or make same in two separate leases". The relationship which would have been established had this suggestion been followed by Mrs. Cagle would be that of lessor and lessee rather than of joint adventurers. In other words, negotiations were had with respect to a lease on the 328 acres, the terms of said lease never being reduced to writing by anything signed by the parties or in fact agreed upon in oral agreement. With respect to the other 200 acres Mrs. Cagle, the holder of the property, proposed an agreement which would have been a partnership or joint adventure as to the 200 acres if signed, contingent upon appellant Beck entering into the lease with respect to the drilling of the other 328 acres within 30 days. This does not privilege Mr. Beck to say that because the terms of the lease were not agreed upon and he did not obtain a lease, that he may elect to consider that all the property was being handled on a joint adventure and, perforce he is entitled to now say he can receive one-half of whatever Mrs. Cagle may have received out of the 328 acres or the 200 acres or any of them.

[5] To constitute a joint adventure, there must at least be (a) a community of interest in the object of the undertaking; (b) an equal right to direct and govern the conduct of each other with respect thereto; (c) share in the losses if any; (d) close and even fiduciary relationship between the parties. Larson v. Lewis-Simas-Jones Co., 29 Cal.App.2d 83, 84 P.2d 296. The only partnership or joint adventure ever proposed was the one in October, 1932, which agreement was never signed and which was contingent upon appellant Beck drilling the 328 acres. The parties here did nothing more than to discuss undertaking

some kind of enterprise, drilling, leasing, or selling the 200 acres in the event a deal between them was consummated as to the 328 acres. The evidence does not indicate that any enterprise was ever undertaken wherein the parties had an equal right to direct and govern each other with respect thereto. The question of losses was never mentioned and the parties obviously were not in a close or fiduciary relationship.

[6, 7] Even if we were to assume that a binding contract existed between Mr. Beck and Mrs. Cagle and that there was a joint adventure, we would have to rule that Mr. Beck is too late with his action. The present suit was commenced February 7, 1939, more than four years after Mrs. Cagle indicated by words and deeds that she no longer was dealing with Mr. Beck with respect to the 528 acres. The abandonment or dissolution of a partnership or joint adventure may take place by conduct inconsistent with its continuance. Middleton v. Newport, 6 Cal.2d 57, 56 P.2d 508. Mrs. Cagle testified and the court found it to be true that she called on Mr. Beck about May 11, 1933, and told him that she had a chance to make a deal with others and would do so unless he went through with his proposal and put up all the money; that on that occasion Mr. Beck said that if she made a deal she would have to count him in on it but that she had told him he would not be in on it. Late in 1933, or early in 1934, Mr. Beck consulted an attorney for the purpose of bringing suit against Mrs. Cagle "to enforce the escrow" as he says, but because of business in Oklahoma he put the matter off. Later on, he did not deem it urgent to communicate with Mrs. Cagle. In this connection, he said: "It was a wildcat lease."

[8-10] "A person may not withhold his claim, awaiting the outcome of an enterprise, and then, after a decided turn has taken place in his favor, assert his interest, especially where he has thus avoided the risks of the enterprise. Accordingly, if the property involved is of a speculative or fluctuating character, more than ordinary promptness is required of a claimant; he must press his claim at the earliest possible time. This rule is applied with great strictness in the case of mining property, since it is of a specially precarious nature, and is exposed to the utmost fluctuations in value." 21 C.J., p. 225, § 220. See, also, Warfield v. Anglo & London Paris Nat. Bank, 202 Cal. 345, 260 P. 881.

[11] Since the action against the Superior Oil Company must fail in the absence of a recovery against Mrs. Cagle, it is unnecessary, under the views herein expressed, to further consider the appeal from the judgment of dismissal entered in favor of that respondent.

Both judgments are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

ROTHSCHILD et al. v. WOLF et al.

Sac. 5375.

Supreme Court of California.

July 31, 1941.

Rehearing Granted Aug. 28, 1941.

1. Easements 🔑**2, 26(1)**

A right to use a stairway on property of another constitutes a grant in nature of an "easement", but the easement is in the building rather than in the land and the destruction of the building extinguishes the easement. Civ.Code, § 811, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

2. Easements 🔑**26(1)**

A stairway easement requires both a dominant and a servient tenement, and a complete destruction of the servient tenement destroys the easement because one of the requisite elements of such a property interest is lacking, even though interest granted was described as one which was to endure "forever".

3. Easements 🔑**26(1)**

The grantee of a stairway easement who possesses merely a right measured by existence of the particular structure has no property interest which survives destruction of servient tenement, even though destruction be accomplished by an act of the owner.

4. Easements 🔑**26(1)**

Where decree of distribution of property of former owner of adjoining buildings having a single stairway for use in reaching second floor of buildings provided that stairway should be maintained for use of properties so long as lot was occupied by building of which stairway formed a part, no obligation in support of stairway easement could be implied on part of owner of building to maintain the building pending its destruction by natural causes. Civ.Code, §§ 806, 811, subd. 2.

5. Easements 🔑**15**

The imposition of affirmative duties upon an owner of land should result only from the clear expression of intent of parties and should not be implied in absence of such an expression.

6. Perpetuities 🔑**6(1)**

Where decree of distribution of property of former owner of adjoining buildings having but a single stairway for use in reaching second floor of buildings provided that stairway should be maintained so long as building of which it formed a part remained, policy against undue restrictions upon use and alienation of property precluded imposition of an implied obligation to maintain building and stairway until destruction thereof by natural causes or by order of public authorities. Civ.Code, §§ 806. 811, subd. 2.

7. Easements 🔑**26(1)**

Under decree of distribution of property of former owner of adjoining buildings having a single stairway for use in reaching second floor of both buildings, providing that stairway should be maintained while building of which it was a part remained on lot, owner of dominant tenement was entitled to have stairway easement endure only for normal life of other building, and could not avoid loss of easement upon destruction of building and stairway by owners thereof for purpose of erecting a modern building upon premises. Civ.Code, §§ 806, 811, subd. 2.

8. Action 🔑**6**

In action for declaratory judgment involving right of plaintiffs to terminate a stairway easement by destroying their building, of which stairway formed a part, it was not error to admit evidence of depreciation and obsolescence which had taken place in building.

9. Action 🔑**6**

The granting of declaratory judgment lies within discretion of trial court, and plaintiffs cannot be penalized for attempting to show that action was brought in good faith. Code Civ.Proc. § 1061.

SHENK, CURTIS, and CARTER, JJ., dissenting.

In Bank.

Appeal from Superior Court, San Joaquin County; Marion G. Woodward, Judge.

Action by J. B. Rothschild and another against Franklin Wolf, the Yosemite Theater Company and others for a declaratory judgment establishing the rights of the parties in certain real property in the City of Stockton, wherein the defendants filed a cross-complaint. Judgment for plaintiffs, and the defendants appeal.

Judgment affirmed.

For prior opinion, see 104 P.2d 685.

Rutherford, Jacobs, Cavalero & Dietrich, Newton Rutherford, D. R. Jacobs, Philip

Cavalero, Stephen Dietrich, Nutter & Rutherford, and D. R. Jacobs, all of Stockton, for appellants.

Gaylord & Gaylord and Robert B. Gaylord, all of San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiffs brought this action for a declaratory judgment establishing the rights of the parties in certain real property fronting on Main street in the city of Stockton. Defendants bring this appeal from a judgment in favor of plaintiffs.

The plaintiffs, J. B. Rothschild and S. V. Rothschild, are the owners of the easterly portion of lot five on Main street, and the defendant, Franklin Wolf, is the owner of lot seven, the adjoining property. In 1905 Andrew Wolf, the father of this defendant, was the owner of both pieces of property. During that year he erected certain improvements upon the lots in question which, the court found, consisted of two separate structures, two stories in height and extending over both lots. The second floor of both buildings was designed to be used for business and professional offices. A hallway, parallel to Main street, ran the entire length of the second floor from the end of one building to the end of the other, and the sole means of access to this hallway from Main street was by means of a stairway in the building located on lot five, plaintiffs' property. After the death of Andrew Wolf in 1911, a decree of distribution was entered by the superior court of San Joaquin county in accordance with an agreement dividing the property among his heirs. The decree provided in part: "* * * that the stairway on Main Street then and now used for the purposes of ingress and egress to and from the properties hereinbefore mentioned, and fronting on Main Street of Stockton, California, should be kept and maintained as a stairway for the use of all the properties hereinbefore mentioned * * * so long as the Lot on which said stairway is now built is occupied by the building on said Lot, of which building said stairway forms a part." The stairway on plaintiffs' property has since been used jointly as a means of entrance to the second floor hallway by the tenants of both buildings, and it is this arrangement which plaintiffs seek the right to terminate.

Plaintiffs alleged that the building on their property has become obsolete and that they desire to destroy the building, together with the stairway, and erect a modern building upon the premises. A judgment was asked declaring the rights of the parties and decreeing that the plaintiffs might remove their building, including the stairway, and that thereafter all rights on the part of the defendants in plaintiffs' land should terminate. Defendants alleged in their answer that the stairway on plaintiffs' property was the only direct means of entrance to the second floor of their property and that, under the terms of the decree of distribution plaintiffs had no right to terminate the stairway easement by a voluntary destruction of the building on lot five. In a cross-complaint defendants prayed for a decree adjudging that the stairway in the building on lot five should be maintained for the use of defendants' property on lot seven until the building on plaintiffs' property should be destroyed without the fault of the plaintiffs or their successors in interest. The trial court rendered its judgment decreeing that plaintiffs might remove the building upon their premises, including the stairway, and that the rights of the defendants in the stairway should terminate upon the removal of plaintiffs' building.

In this appeal defendants urge that the improvements constructed by Andrew Wolf in 1905 constituted a single building extending over both lots five and seven. Considerable evidence was introduced upon this question at the trial, however, and the finding of the court that the improvements constituted two separate buildings has substantial support in the record. The only question requiring our consideration, therefore, is the determination of the rights of the parties under the terms of the decree of distribution in the estate of Andrew Wolf. Defendants contend that the language of the instrument creates an easement which cannot be terminated by the voluntary destruction of plaintiffs' building.

[1] It is established that the right to use a stairway on the property of another constitutes a grant in the nature of an easement. The easement, however, is in the building rather than in the land. Thus, it is held that the destruction of the building in which the stairway is located also extinguishes the easement since there is no longer a servient tenement in existence upon which the right can operate. Cohen v. Kutner Co., 177 Cal. 592, 171 P. 424,

L.R.A.1918D, 410; Muzio v. Erickson, 41 Cal.App. 413, 182 P. 974; Civ.Code, § 811 (2); Brechet v. Johnson Hardware Co., 139 Minn. 436, 166 N.W. 1070, L.R.A.1918D, 691; Shirley v. Crabb, 138 Ind. 200, 37 N.E. 130, 46 Am.St.Rep. 376; Rudderham v. Emery Bros., 46 R.I. 171, 125 A. 291, 34 A.L.R. 602; 9 Cal.Jur. 959; 19 C.J. 955; 17 Am.Jur. 1024; 2 Thompson, Real Property, 1939, p. 362; 34 A.L.R. 606; 1918, 6 Cal.L.Rev. 299. Defendants do not contest the validity of the rule set forth in the cases cited, but they contend that the rule is operative only where the servient tenement is destroyed without the fault or consent of the owner. Thus, admitting that the destruction of plaintiffs' building by natural forces would terminate defendants' stairway easement by destroying the servient tenement, it is argued that the plaintiffs cannot accomplish the same result by a voluntary destruction of the building.

[2, 3] Most of the cases in which the courts have held that destruction of the building constituting the servient tenement extinguishes the stairway easement have involved destruction by natural causes over which the servient owner had no control. See 34 A.L.R. 606. But the question of a voluntary destruction of the servient tenement in a similar situation was presented to the court in Union National Bank of Lowell v. Nesmith, 238 Mass. 247, 130 N.E. 251. In that case two adjoining buildings were erected in 1852 with a common entrance, stairways and landings. A successor in title to one of the buildings proposed to tear it down and erect a new one without making provision for the common entrance and stairways. The court held, in 1921, that this could be done, saying (238 Mass. page 249, 130 N.E. page 252): "Where there is an easement of way through a building as distinguished from such right upon and over land without reference to a structure thereon, the incorporeal hereditament is measured and limited by the existence of the structure in which it only can exist and be exercised; and the person owning the easement by the evident intent of the parties has no easement in the servient estate apart from the building. If the structure ceases to exist, the right ends as there is nothing upon which it can be exercised. * * * In the opinion of a majority of the court, the easement is also lost when the building is destroyed by the intentional act of the owner of the servient estate. The person entitled to such right has no interest in the land as such. * * * He cannot compel the servient owner to maintain thereon a building, and restrain him in the use of his land * * *. The parties did not intend to and did not create a right of any greater permanency in the use of the petitioner's building than was assured by the character of the structure and the likelihood that the owner would not for a considerable time change the manner of the use of his premises. This is the reasonable construction of their rights." See Cotting v. City of Boston, 201 Mass. 97, 87 N.E. 205; 3 Tiffany, Real Property, 3d Ed., 1939, p. 354. Very few cases have discussed the problem of voluntary destruction, and the question has not previously been passed upon in this state. Defendants rely upon certain language in Muzio v. Erickson, supra, as indicating that the rule is limited to destruction of the servient building without the fault of the owner, but the court in that case was dealing with an accidental destruction by fire and did not have in mind the specific problem here considered. An easement of this kind requires both a dominant and a servient tenement and a complete destruction of the servient tenement destroys the easement because one of the requisite elements of such a property interest is lacking. Cf. Bonney v. Greenwood, 96 Me. 335, 341, 52 A. 786; Day v. Walden, 46 Mich. 575, 586, 10 N.W. 26; Jones, Easements, p. 673, § 838. This is true even though the interest granted has been described as one which was to endure "forever". Cohen v. Kutner Co., supra. The conclusion is inescapable, therefore, that the grantee of a stairway easement who possesses merely a right measured by the existence of the particular structure has no property interest which survives the total destruction of the servient tenement, even though that destruction be accomplished by an act of the owner.

[4-6] In a particular case, however, the question whether the owner of the servient building may properly proceed to destroy it depends upon the intention of the parties. Assuming, under the principles set forth above, that the stairway easement would be terminated by any destruction of the servient structure, the easement owner might nevertheless be entitled to the aid of a court in preventing such destruction or in

recovering damages where the destruction is in violation of the clear intention of the parties. In the present case the instrument provides that "the stairway on Main Street * * * should be kept and maintained as a stairway for the use of all the properties * * * so long as the Lot on which said stairway is now built is occupied by the building on said Lot, of which building said stairway forms a part." This language in no way limits the power of the owner of the servient structure in dealing with his own property, nor does it suggest that he must maintain the building in its present form for any particular period of time. In the absence of a clear indication of the intent of the parties, it is impossible to imply, as suggested by defendants, that the parties intended the plaintiffs' building to be maintained in its present form, despite changing circumstances, pending its destruction by natural causes. The imposition of affirmative duties upon an owner of land should result only from a clear expression of the intent of the parties, and should not be implied in the absence of such an expression. See Coulter v. Sausalito Bay Water Co., 122 Cal.App. 480, 494, 10 P.2d 780; Civil Code, § 806. The agreement itself does not indicate that any such obligation is imposed upon the owner of the servient building, and there are strong objections of policy to the creation of such an affirmative burden by implication. An implied obligation to maintain the building until its destruction by natural causes or by order of the public authorities might easily result in a situation where the building could neither be disposed of nor replaced for a considerable period of time, contrary to the settled policy against undue restrictions upon the free use and alienation of property. See Friesen v. City of Glendale, 209 Cal. 524, 529, 288 P. 1080; 7 Cal.Jur. 733; 3 Tiffany, Real Property, 1939, p. 474. Furthermore, the implication of such an obligation might conceivably result in the building's reaching such a dangerous condition as to subject the owner to liability in tort to persons who might be injured in its occupation or use. It follows, therefore, that no such obligation can be implied from the agreement involved here.

[7] A far more reasonable interpretation of the instrument is that the parties intended the stairway easement to endure for the normal life of plaintiffs' building. Both buildings were new at the time the agreement was entered into, and the stairway easement was designed to endure for a period measured by the character of plaintiffs' structure and the probability that it would not be replaced for a considerable period of time. See Union National Bank of Lowell v. Nesmith, supra. The arrangement thus contemplated has in fact been carried out, and we can find no basis upon which defendants are entitled to the intervention of a court to prevent the contemplated improvements upon plaintiffs' property.

[8, 9] It was not error to admit evidence of the depreciation and obsolescence which has taken place in plaintiffs' building. The granting of a declaratory judgment lies within the discretion of the trial court (Code of Civ.Proc., § 1061), and the plaintiffs cannot be penalized for attempting to show that the action was brought in good faith.

The judgment is affirmed.

We concur: EDMONDS, J.; TRAYNOR, J.; SPENCE, J. pro tem.

SHENK, Justice (dissenting).

I dissent.

It is clear to me that the terms of the agreement as reflected in the decree of distribution are for the benefit of both parties and that each is bound to respect the rights of the other, at least to the extent of precluding a voluntary destruction of the other's right.

The agreement provides "that the stairway on Main Street *then and now used* for the purposes of *ingress* and *egress* to and from the properties hereinbefore mentioned, and fronting on Main Street in Stockton, California, should be kept and maintained as a stairway for the use of all the properties hereinbefore mentioned * * * *so long as the lot on which said stairway is now built is occupied by the building* on said lot, of which building said stairway forms a part". I have italicized the portions of the agreement creating the servitude to emphasize the point that it was unquestionably the intention of the parties that each should continue to have the use and benefit of the stairway as long as the building or any part thereof dependent upon the use of the stairway occupies the lot and is reasonably fit for use, and that neither party may deny to the other the right to such use.

The covenant in the agreement is sufficiently definite and certain. The entire lot is occupied by the building of which the stairway is a part. There is no showing that the building is unfit for profitable occupancy. It is of good construction, although not in conformity with restrictions not prescribed for new buildings. In my opinion, the District Court of Appeal for the Third Appellate District was correct in declaring that under the agreement of the parties the right of the defendants would cease in the event the building be destroyed without the fault of the owner of the servient tenement, and in modifying the judgment accordingly. Rothschild v. Wolf, 104 P. 2d 685.

We concur: CURTIS, J.; CARTER, J.

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18 Cal.2d 401

In re HUDELSON'S ESTATE.

Sac. 5395.

Supreme Court of California.

Aug. 7, 1941.

Rehearing Denied Sept. 4, 1941.

1. Insane persons 🔑**64**

Ordinarily, a court will not make allowances from incompetent's estate for support of persons to whom ward owes no duty of support, where it is not established that ward would have made such allowances if sane, though estate is sufficiently ample.

2. Insane persons 🔑**64**

A court may make allowances out of incompetent's surplus income for support of persons whom he would naturally wish to support, though under no legal obligation to do so.

3. Insane persons 🔑**64**

Great caution should be exercised by court in respect to making allowances from incompetent's estate to persons for whom ward is not legally bound to provide.

4. Insane persons 🔑**64**

The amount and proportions of allowances made from incompetent's estate to persons for whom ward is not legally bound to provide are entirely within court's discretion.

5. Insane persons 🔑**64**

In determining whether allowances should be made from incompetent's estate for support of persons whom ward is not legally bound to support, court should determine what ward would do if he were sane and act accordingly.

6. Insane persons 🔑**64**

Whether accounting should be required from one granted allowances for support from incompetent's estate is discretionary with court after careful inquiry as to what is best and most advantageous for incompetent.

7. Insane persons 🔑**64**

Generally, allowances may and should be made from incompetent's estate for support of his wife and children according to their circumstances, but such allowances to adult children competent to support themselves will generally be on condition that they shall be considered as advancements on final distribution of estate after ward's death.

8. Insane persons 🔑**64**

The courts, in course of their administration of incompetents' estates and independently of any statutory authority, have exercised jurisdiction to grant allowances from such estates for support of ward's relatives with or without conditions as facts warrant.

9. Insane persons 🔑**64**

The statute authorizing court to direct incompetent's guardian to pay surplus income, not used for ward's support, to his next of kin whom he would have aided, in court's judgment, had he been of sound mind, authorizes court, in making allowances, to attach conditions which it finds that ward would have imposed if he had capacity to act, as court acts for incompetent in reference to his estate as it supposes that he would have acted if he had been of sound mind. Probate Code, § 1558.

10. Appeal and error 🔑**909(1)**

Where contents of incompetent's adult daughter's written notice of election to continue to live in ward's home pursuant to court order to make such election within specified time as condition precedent to allowance for her support from ward's estate are not part of record on her appeal from so much of order granting allowances as provided that sums paid her should constitute advances against any inheritance received by her on ward's death, her statement that such notice contained no reference to her acceptance of allowances on such condition must be accepted as true by Supreme Court, which cannot assume that appellant voluntarily included in such notice acknowledgment that payments might be considered as charge against her prospective share of ward's estate. Probate Code, §§ 1050, 1558.

11. **Insane persons** ⚿64

The superior court's written order, providing that sums directed thereby to be paid by incompetent's guardian to ward's adult daughter from surplus income of ward's estate for her support should constitute advances against any inheritance received by her on ward's death, met statutory requirement that advancement to heir be established by proof of such intention of testator or donor expressed in writing, as court acted for ward and its order must be taken in lieu of ward's written expression of his intention that allowances to such daughter should be considered as advancements to her. Probate Code, §§ 1050, 1558.

12. **Insane persons** ⚿69

Generally, superior court, acting in equity for protection of interests of incompetent person, is free to exercise its sound discretion with reference to disposition and management of ward's estate after full consideration of evidence before it.

13. **Insane persons** ⚿64

The superior court had authority to allow payments from surplus income of incompetent's estate to his adult daughter for her support on condition that they should constitute advances against any inheritance she might receive on ward's death. Probate Code, § 1558.

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In Bank.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

In the matter of the guardianship of the person and estate of Forrest M. Hudelson, an incompetent person. From so much of an order, granting Thirza L. Hudelson, the incompetent's adult daughter, a monthly allowance from surplus income of his estate for necessary maintenance, as provided that sums paid her by guardian should constitute advances against any inheritance received by her on the incompetent's death, she appeals.

Affirmed.

For prior opinion, see Cal.App., 109 P.2d 964.

Mark A. Joseph, of San Anselmo, for appellant.

Frank B. Collier and Hawkins, Hawkins & Cardozo, all of Modesto, for respondent.

CURTIS, Justice.

Thirza L. Hudelson, the adult daughter of Forrest M. Hudelson, an incompetent person, has appealed from a portion of an order which she procured, pursuant to section 1558 of the Probate Code, to grant her from the surplus income of her father's estate a monthly allowance as necessary maintenance. That part of the order from which this appeal was perfected reads as follows: "and provided, further, that any sum or sums of money paid by the guardian to petitioner under the provisions hereof shall constitute an advance against any inheritance petitioner might receive upon the death of her father, and the guardian of said incompetent shall keep an account of all sums so paid." It is contended that the above-quoted portion of the order is unauthorized by law and void.

Upon the hearing of the application for an allowance from the estate of petitioner's father, the court found that Thirza L. Hudelson is the daughter and next of kin of Forrest M. Hudelson, an incompetent person; that there is in the latter's estate a small surplus income not used for his support and maintenance; that if the ward were of sound mind, he would have contributed to his daughter's support; that the petitioner was a resident in the ward's household, and that a portion of the surplus income of the estate should be paid to the daughter. It was then ordered that Thirza L. Hudelson be paid $50 per month "until the further order of this court," in addition to her room and board, while she remains in her father's household, or in lieu thereof, the sum of $100 per month if she resides elsewhere. It was further provided that all sums so paid by the ward's guardian shall be considered advancements to petitioner against any inheritance which she might receive from her father's estate at the time of his death, and that unless the petitioner shall elect in writing, within thirty days from the date of the order, whether she will remain in her father's home or live elsewhere, the petition will be deemed to have been denied. Although the written notice of petitioner's election is not part of the record on this appeal, which was taken from the judgment roll alone, it is conceded that within the time limit specified she did execute the necessary document evidencing her decision to live at home, and thus determining the amount of her allowance to be $50 per month.

The authority of the superior court to order payments from the funds of an incompetent to a next of kin is derived from section 1558 of the Probate Code, which provides: "On the application of the guardian or next of kin of an insane or incompetent person, the court may direct the guardian to pay and distribute surplus income, not used for the support and maintenance of the ward, or any part of such surplus income, to the next of kin whom the ward would, in the judgment of the court, have aided, if said ward had been of sound mind. The granting of such allowance and the amounts and proportions thereof shall be discretionary with the court, but the court shall give consideration to the amount of surplus income available after due provision has been made for the proper support and maintenance of the ward, to the circumstances and condition of life to which the ward and said next of kin have been accustomed and to the amount which the ward would, in the judgment of the court, have allowed said next of kin, had said ward been of sound mind."

Appellant contends that this section strictly limits the discretionary power of the court to a determination of whether under the particular circumstances an allowance should be made and, if so, the amount thereof, and that it does not confer authority to impress payments permitted upon the prospective interests of next of kin, as advancements. The respondents, all of whom are children of the incompetent and one of whom also acts as the guardian, dispute this interpretation and insist that the language of this provision is sufficiently broad to empower the court, in the course of its exercise of control over adjudged incompetents and their property, to grant allowances from the excess income of such estates, with or without conditions, as the facts of each case recommend. Thus, the crux of the argument presented here respecting the validity of the portion of the order which is the basis of this appeal, is whether the court exceeded its jurisdiction in making the challenged ruling. The point in controversy is, of course, solely one of statutory construction.

[1-5] Brief reference to the historic development of this branch of the law reveals that the authority of the courts to make allowances from an incompetent's estate is the logical outgrowth of their wide powers in the disposition and management of such person's property. The doctrine is well established in England, since the decision of Lord Eldon in Ex parte Whitbread, in the Matter of Hinde, 2 Merivale 99, 35 Eng. Reprint 878, decided in 1816, that the chancellor may, under proper circumstances, grant to needy relatives part of the surplus income of an incompetent. In approving such payments, the court will act with reference to the incompetent and for his benefit as it is probable that he would have acted for himself if he were of sound mind. Shelford on the Law of Lunatics, 2d Ed., 205; 21 Halsbury's Laws of England, 2d Ed., Par. 579, p. 332. The American rule on this subject, based upon like considerations, is well stated in 32 Corpus Juris 708, as follows:

"Ordinarily the court will not make allowances for the support of persons to whom the ward owes no duty of support where it is not established that the ward would have done so if sane, even though the estate is sufficiently ample; and this rule has been applied to collateral kindred. However, the court may make allowances out of the ward's surplus income for the support of persons whom he would naturally wish to support, although under no legal obligation to do so; and this rule also has been applied to collateral kindred. Great caution should be exercised in respect to making allowances to persons for whom the ward is not legally bound to provide; and in several cases it has been said that the practice ought rather to be narrowed than extended. The amount and proportions of such allowances, when made, are entirely within the discretion of the court. In all such cases the court should see what the ward would himself do if he were sane, and act accordingly."

[6] We shall now proceed to note a few of the English authorities cited by respondents as precedents upholding their argument that the granting of allowances and the appendage of conditions thereto rest solely in the sound discretion of the court. First in importance as well as in chronological order is Ex parte Whitbread,

supra, where in making provision for the petitioning blood relative, Lord Eldon announced the general principle which has been the basis of all subsequent decisions on the subject: "It is not because the parties are next of kin of the lunatic, or, as such, have any right to an allowance, but because the court will not refuse to do, for the benefit of the lunatic, that which it is probable the lunatic himself would have done." Consonant with this view, Lord Cottenham in In re Earl of Carysfort, Cr. & Phill. 76, 41 Eng. Reprint 418, allowed a retiring pension out of the income of the estate of the lunatic to an old servant, being "satisfied that the Earl of Carysfort would have approved if he had been capable of acting for himself". Then in In re Croft, 32 L.J.Eq. (N.S.) 481, an annual allowance was made to the first cousin of the lunatic, but it was ordered that the sum so advanced be brought into account against the petitioner's expectant share of the estate. The last of these pertinent cases called to our attention is Re Sparrow, 20 Ch.D. 320, wherein the petitioner, who had the remainder in the estate of which the lunatic was life tenant, was given an allowance conditioned upon its becoming a charge upon the remainder when petitioner should come to enjoy it. This highly persuasive line of decision, standing unchallenged as representative of the prevailing English rule of the court doing that which it is probable the lunatic would have done if competent, furnishes substantial support for respondents' contention that whether or not an accounting is to be required from the applicant whose petition for an allowance is granted, is discretionary with the court, after careful inquiry as to what is best and most advantageous for the incompetent.

[7] The American view regarding allowances as advancements is stated in 32 Corpus Juris 707, as follows: "Under the general rule allowances may, and should, be made for the support of the wife and children of an insane person, according to their circumstances. *Although adult children are not ordinarily entitled to support, if allowances are made to adult children competent to support themselves, this generally will be on condition that such allowances shall be considered as advancements upon the final distribution on the ward's death.*" (Italics added.)

Exemplary of this doctrine is the early case of In re Willoughby, 11 Paige, N.Y., 257, wherein the chancellor, after fully considering the power of a court of equity to administer the estate for the maintenance and care of those whom the incompetent is under no legal obligation to support, concluded at page 259: "But my present recollection is, that in all those cases, I required the adult children, who were competent to support themselves, to give a stipulation that the amounts advanced to them respectively should be brought into hotchpot, upon the death of the lunatic; if any part of his personal estate should come to them under the statute of distributions."

[8] The almost total lack of judicial expression by the courts of this country on the precise point involved here confirms the opinion of counsel that the question is, to a great extent, a novel one. Both appellant and respondents direct our attention to the well-considered case of In re Farmers' Loan & Trust Co., 181 App.Div. 642, 168 N.Y.S. 952; Id., 225 N.Y. 666, 122 N.E. 880, where it was held that allowances out of the estate of an insane person for the support of remote kin were to be treated as absolute gifts, and not as advancements. However, it was there recognized that it would always be within the discretion of the court to require an accounting of the sums granted, as a condition to the granting of the petition, and the following cogent language appearing at page 957 of that opinion in 168 N.Y.S. fortifies the respondents' position:

"Now, then, if these allowances were gifts, as it must be apparent they were, they belonged to the donees when paid. *It was, of course, entirely competent for the Supreme Court, in equity, to impose as terms for granting the petitions for equitable relief a stipulation that the petitioners would agree to be chargeable with the amount of the allowances in the event that they subsequently by any chance succeeded to an interest in the estate; but in none of these orders was any such provision made. In the absence of any such provision, these allowances, when so paid, were the absolute property of the donees.*" (Italics added.)

Thus, it appears from the foregoing review of authorities that the courts, in the course of their administration of the estates of incompetents and independent of any statutory authority, have exercised jurisdiction to grant allowances with or without conditions, as the facts warranted.

[9] The next inquiry relates to the effect of the enactment in 1935 of section

1558 of the Probate Code. Appellant insists that the authority to grant such allowances now depends upon this positive statement of law, and that the statute confines the court's exercise of this right within the precise limits established thereby. Accordingly, it is her position that in the absence of an express provision empowering the court to direct that payments to next of kin should be charged against their future inheritances, the court is without power so to do, and that portion of the order subject of this appeal must be declared void. But this rigid interpretation of the scope of the statute is not reasonable in view of the broad terms in which this section is couched, demonstrating that the purpose of this enactment was to supplement and confirm the inherent jurisdiction of the court, acting in equity, to exercise full control over incompetents and their property. In addition, the statute set up a standard for the guidance of the court in its ruling upon an application for aid to next of kin of the ward: To pay and distribute any part of the "surplus income" of the incompetent not needed for his support and maintenance, to the next of kin whom the ward would, "in the judgment of the court", have aided, if said ward had been of sound mind. In so doing the court acts for the incompetent in reference to his estate as it supposes the incompetent would have acted if he had been of sound mind, which principle coincides with the doctrine of both the English and American authorities, as reference to the above-discussed cases will indicate. It reasonably follows that the court in making allowances may attach conditions if it finds that the ward, had he the capacity to act, would have imposed them. If this were not possible, the court in many instances would be constrained to refuse the application for payments rather than grant it without terms. The statute's endorsement of a policy of flexible procedure, resting in the sound discretion of the court, permits recourse to principles of equity responsive to the interests of both the ward and next of kin.

[10-12] Appellant, however, insists that this construction of section 1558 conflicts with the express terms of section 1050 of the Probate Code, providing that advancements to an heir may be established only by proof of that intention on the part of the testator or donor expressed in writing, or by written acknowledgment thereof signed by the donee. It is her contention that in the instant case there has not been compliance with either of the alternatives mentioned in the statute as satisfactory evidence of the creation of an advancement: (1) that there is no proof of intention on the part of this donor, for an incompetent person is incapable of either consenting to the payments or legally designating them as advancements; and (2) that the written notice of election signed by appellant announces merely her intention to continue to live in her father's home and contains no reference to her acceptance of the monthly allowance on the condition prescribed in the order. This latter statement, of course, must be accepted as true, for the contents of the notice are not part of the record before us, and since the express terms of the court's order required only that a written declaration of appellant's choice of residence be executed within thirty days subsequent to said ruling, we cannot assume that appellant voluntarily included in this instrument an acknowledgment that the payments might be considered a charge against her prospective share of this estate. However, it is our opinion that appellant's first proposition is entirely without merit, for the court's written order expressing the intention of this donor to create an advancement fully met the requirements of section 1050. The incompetent not having legal capacity to act for himself, the court acted for him, and its order must be taken in lieu of the written expression of the incompetent donor of his intention that these monthly allowances shall be considered an advancement to appellant. This conclusion is in complete accord with the general principle that the court, acting in equity for the protection of the interests of the incompetent and after full consideration of the evidence before it, is free to exercise its sound discretion with reference to the disposition and management of the estate.

[13] From these premises our decision must be that the court had authority to allow these payments from the surplus income of the incompetent on condition that they "shall constitute an advance against any inheritance petitioner might receive upon the death of her father".

The order is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.; SPENCE, J. pro tem.

DRUZANICH v. CRILEY et al.

L. A. 17817.

Supreme Court of California.

Aug. 4, 1941.

Rehearing Granted Sept. 3, 1941.

1. Automobiles ⚷181(2)

Where driver of automobile and occupant were delegates to labor conference but the attendance of one was not necessary to the enjoyment of benefits of attendance by the other, and occupant was tendered and accepted transportation on condition that he assist in driving, occupant was a "passenger" whose promise to assist in driving was a special tangible benefit and constituted "compensation" for his transportation within Vehicle Code so as to entitle him to recover damages if driver negligently injured him. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation" and "Passenger".

2. Automobiles ⚷244(20)

In action by passenger of automobile for injuries resulting from alleged negligence of driver, a judgment for defendant was affirmed.

CARTER and TRAYNOR, JJ., dissenting in part.

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In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by George Druzanich against Dorothy Criley and others, for injuries sustained while riding as a passenger in an automobile. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

For prior opinion, see, Cal.App., 107 P.2d 445.

Edward M. Raskin and Belmore D. Goulden, both of Los Angeles, for appellant.

Joe Crider, Jr., of Los Angeles (John J. Ford, of Los Angeles, of counsel), for respondents.

CURTIS, Justice.

Plaintiff appeals from a judgment in favor of defendants after trial by the court without a jury. The action was brought against the operator and the owners of an automobile by an occupant thereof to recover damages for personal injuries. The third amended complaint contained three causes of action, the first two of which were abandoned at the trial. It was alleged in the third cause of action that plaintiff was a "passenger" in the automobile and that defendant Dorothy Criley was negligent in its operation. The trial court found that plaintiff was not a "passenger" but was riding in the automobile as "a guest without giving compensation for such ride". It further found that the defendant driver was free from negligence in the operation of the car in which plaintiff was riding at the time he sustained his injury.

From the above statements it may be seen that this case involves a problem already considered in the case of Whitechat v. Guyette, Cal.Sup., 115 P.2d 814, filed today, viz., the meaning of the phrase "without giving compensation" as used in section 403 of the Vehicle Code.

Appellant and respondent Dorothy Criley were delegates to a conference in Los Angeles of the United Cannery and Agricultural Workers of America, a labor union affiliated with the C. I. O. The conference was called by district No. 2 of this union for the purpose of forming a set of rules and the policy for this district, which comprises California, Nevada and Arizona. The parties were delegates from separate branches of the same local. The means of transportation to the conference was discussed in the union office in Sunnyvale. Those present were appellant, respondents Dorothy and Richard Criley, Lloyd Lehman, another delegate, and Luke Hinman, who was apparently not a delegate, but who desired to go to Los Angeles. Dorothy Criley asked her husband Richard if he would let her use their car so that they could all go together. Criley said he didn't feel she should use the car and drive all the way to Los Angeles, but if the others would assist her in driving, she could have the car. The parties all agreed to this, and they started that evening. Dorothy Criley drove from Sunnyvale to King City; appellant drove from there to Santa Maria; Hinman from Santa Maria to Santa Barbara, where respondent Dorothy Criley again took the wheel and drove until the time of the accident. There was no definite schedule or plan as to distances each was to drive, and the shifts were made as each driver felt in need of a rest. Lehman, who was to attend an early conference, didn't drive at all.

The accident occurred at about 7:30 o'clock in the morning. Appellant was in the back seat and because he was dozing at the time, his testimony is of little aid as to the events leading up to or the cause of the accident. Respondent Dorothy Criley didn't testify at the trial, but according to her deposition, she was driving at a speed of fifty or fifty-five miles an hour and came to a left curve. She was sleepy because of the all-night ride and blinked her eyes on the curve. The car was traveling on the outer lane and the wheels hit a soft shoulder. Respondent lost control and the car went over an embankment, turning over several times. Appellant was thrown out of the car and suffered the personal injuries for which he now seeks to recover damages.

Appellant first argues that he had given "compensation" for the ride within the meaning of section 403 of the Vehicle Code, St.1935, p. 154, and was thus a "passenger," who could recover if the driver were negligent, because the parties were engaged in a business venture for their mutual advantage and traveling in contemplation of their mutual business. This same contention was made by the respondents in the Whitechat case, supra, and we there held that the relationship between the driver and the deceased was not such as to bring the case within that group of cases headed by Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914, which stands for the above-mentioned proposition. The relationship in the Whitechat case differs from that presented herein that in the former case the driver although a member of the Young Men's Institute, was not required to attend the meeting in Stockton, whereas in the instant case both parties were delegates to the conference. However, the instant case still does not come within the Walker v. Adamson classification. It is true that both parties desired or, as delegates, were required to attend the conference. It is also true that each would be benefited by individual attendance. However, the attendance of one was not necessary for the enjoyment of the benefits of attendance by the other. This being so, it becomes immaterial whether the conference was of a business or social nature. The case of Doherty v. Edwards, 227 Iowa 1264, 290 N.W. 672, 674, is illustrative of that type of situation in which it may be said that compensation was given because the trip was an integral part of a business venture for the mutual advantage of the parties. There the driver of the car was a supervisor of federal loans and the occupant was interested in borrowing some money. The court stated that "Presumably the presence of both was necessary". In the instant case either the appellant or respondent Dorothy Criley could have enjoyed the benefits of the conference without the presence of the other. The fact that the parties were both interested in the general objective of the trip, viz., the attending of the conference, is not the controlling factor. If an attorney were transporting a client to a place where the client's case was to be heard, then it might be said that the client would be a "passenger" and not a "guest" who had not given compensation, but if two attorneys were riding to a certain point in a car owned by one for the purpose of appearing on different matters in the same court, no such relationship would exist unless some tangible benefit had passed from one to the other.

[1] The qualification of the last statement brings us to the second contention of appellant. That contention is that the promise to aid in the driving was sufficient to take him out of the category of a "guest" who had not given compensation. In opposition to this, respondents argue that this sharing in the driving was merely incidental and analogous to the sharing of expenses as in McCann v. Hoffman, 9 Cal. 2d 279, 70 P.2d 909. Cases may arise in which a sharing of the driving might be a "courtesy of the road" and thus not of sufficient benefit to be considered compensation, but this is not true in the instant case. Reference to the testimony of both parties in regard to the conversation prior to the trip show that the offer to transport appellant was conditional upon his sharing in the driving. This appellant agreed to do, and it was just as much payment for transportation as a railroad fare. Respondent Dorothy Criley desired to take her husband's car to Los Angeles, but she could not do so unless appellant and the others promised to share in the driving. Appellant's promise then was the "special tangible benefit" which was the "motivating influence for furnishing the transportation" referred to in the McCann case, supra, 9 Cal.2d at page 286, 70 P.2d 909, and must be termed compensation. The instant case cannot be distinguished from the case of Lerma v. Flores, 16 Cal.App.2d 128, 60 P. 2d 546, wherein the plaintiff was invited by the defendant to ride with him so that

he [plaintiff] might show the defendant which route they should follow. Nor does it differ materially from the case of Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170, in which the plaintiff, who had experience in selling oranges, was asked to accompany the defendant driver into town to aid the defendant in selling his crop of oranges. In each case there was a special tangible benefit passing from the occupant to the driver which was sufficient to be termed compensation within the meaning of section 403 of the Vehicle Code. The case of Mayer v. Puryear, 4 Cir., 1940, 115 F.2d 675, cited by respondents, is clearly distinguishable in that there the furnishing of transportation was not made conditional upon the sharing in the driving. We are, therefore, of the opinion that the trial court erred in finding that appellant was not a "passenger," but was riding in the automobile as "a guest without giving compensation for such ride". However, this conclusion is not sufficient to compel a reversal of the judgment unless it can be said that the trial court also erred in finding that the accident was not proximately due to the negligence on the part of respondent Dorothy Criley.

[2] In support of his contention that the trial court erred in finding that the respondent Dorothy Criley was free from negligence, the appellant urges that the doctrine of res ipsa loquitur should be applied to the instant situation. There is authority to the effect that this doctrine may be employed under circumstances similar to those existing in the present case. See Godfrey v. Brown, 220 Cal. 57, 64, 29 P.2d 165, 93 A.L.R. 1092; Cookson v. Fitch, 116 Cal.App. 544, 3 P.2d 27; Queirolo v. Pacific Gas & Elec. Co., 114 Cal.App. 610, 300 P. 487; Ireland v. Marsden, 108 Cal.App. 632, 291 P. 912; Crooks v. White, 107 Cal.App. 304, 290 P. 497; Brown v. Davis, 84 Cal.App. 180, 257 P. 877. However, the inference of negligence created by the application of the res ipsa loquitur rule does not compel the trial court, as the fact finding body, to find negligence as a matter of law. The application of such doctrine does not give a plaintiff an absolute right to a judgment in every case. Raymer v. Vandenbergh, 10 Cal.App.2d 193, 51 P.2d 104; Nicol v. Geitler, 188 Minn. 69, 247 N.W. 8; Sweeney v. Erving, 228 U.S. 233, 33 S.Ct. 416, 57 L.Ed. 815, Ann.Cas.1914D, 905. It does not shift the burden of proof from the plaintiff, and when applied, creates no more than an inference of negligence, from which the trier of the facts may find for a plaintiff. Ales v. Ryan, 8 Cal.2d 82, 99, 64 P.2d 409; Anderson v. I. M. Jameson Corp., 7 Cal.2d 60, 59 P.2d 962; Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Crooks v. White, supra. The appellant [citing Ales v. Ryan, supra] argues that the inference of negligence raised by the res ipsa loquitur rule cannot be arbitrarily disregarded and that respondent Dorothy Criley's explanation of the cause of the accident was insufficient to rebut the inference of negligence. The explanation of this respondent was as follows:

"Q. I want to know exactly how the accident occurred. A. I was driving about 50 or 55 miles an hour and came to a curve. I was sleepy, because we had not slept all night, and I blinked my eyes on the curve.

"Q. Was this curve a curve to the left or a curve to the right? A. I don't know whether it was left or right—you mean a curve towards the right?

"Q. What kind of a curve did you negotiate? Was it one in which you had to make a left-hand turn or a right-hand turn? A. A left-hand turn.

"Q. You then were on the outer lane of that curve? A. I was on the outer lane.

"Q. Well, did you negotiate that turn? A. No, I did not, because when I went around the curve there was a soft shoulder and I hit that and the car skidded and went out towards the center of the road and I lost control over it and went over the embankment."

Whether this explanation was sufficient and whether respondent Dorothy Criley was negligent in the operation of the car were for the trial court, as the trier of the facts, to determine. The trial court was apparently satisfied with the explanation and found there was no negligence; therefore, any inference of negligence that might have arisen was rebutted by such explanation. See Scarborough v. Urgo, supra; Ireland v. Marsden, supra.

The frank admission by the respondent Dorothy Criley that she was sleepy and tired should not of itself compel a finding of negligence. The cases cited by appellant in support of such contention all involved other factors not present in the instant case. In Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 44 A.L.R. 785, the driver actually fell asleep, and even under those circumstances the court held the question of negligence to be one for the jury. In Gower v. Strain, 169 Miss. 344, 145 So. 244, 246, the court states that "he [defendant] practically admitted that he consciously permitted himself to go to sleep, or, at least, that he did not make proper effort to avoid it," yet holds the question of negligence to be one for the jury. The court in the case of Rode v. Roberts, 11 Cal.App.2d 638, 54 P.2d 498, merely states that drowsiness might indicate negligence but not wilful misconduct. The defendant in the case of Stotts v. Blickle, 220 Cal. 225, 30 P.2d 392, was found to be guilty of gross negligence because he had dozed off at the time of the accident and because he had failed to have a defective steering apparatus repaired. There are situations in which continued driving while in a state of physical and mental exhaustion would be negligence as a matter of law, but such question is usually one of fact and is clearly such in the instant case.

The question of negligence being one of fact and the trial court having found against plaintiff on this issue, such finding cannot be disturbed by this court.

The judgment is affirmed.

I concur: PULLEN, Justice, pro tem.

We concur in the judgment: SHENK, J.; EDMONDS, J.

CARTER, Justice (dissenting).

I dissent.

I concur in that portion of the majority opinion which holds that plaintiff was a passenger and not a guest in defendant's automobile at the time of the accident which is the subject of this action, but I dissent from that portion of said opinion which holds that the finding of the trial court that the defendant was not guilty of negligence should be upheld. In my opinion the judgment should be reversed because the evidence establishes as a matter of law that the defendant, Dorothy Criley, was negligent in the operation of the vehicle and that such negligence was the proximate cause of the accident The occurrence of the accident speaks for itself. The evidence *without contradiction* shows the following: Defendant was operating the car on the paved highway between San Francisco and Los Angeles, at a speed of 50 to 55 miles per hour at the time of the accident, at 7:30 in the morning, the sun was shining and, insofar as appears from the record, the pavement was dry. The windshield on the car was clean and visibility ahead was clear. Defendant rounded a left-hand curve in the highway, the car left the pavement, struck a soft shoulder, and rolled down an embankment, turning over several times. No vehicle was approaching from the opposite direction. The highway was clear and unobstructed in the direction in which defendant was traveling. There is no evidence or even suggestion that there was any gravel or other substance on the pavement which would have caused the car to skid; that any tire on the car became flat or was in a condition other than normal; that the steering apparatus was not operating properly; or that the sun or anything else blinded defendant. Nevertheless, the car left the road with the result above-mentioned. Automobiles when driven with due care and caution do not leave the highway under these circumstances. The fact that the car did leave the road speaks for itself; the inescapable inference is that defendant was negligent. The majority opinion concedes that under the circumstances here presented, the doctrine of res ipsa loquitur is applicable; that cannot be denied. Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165, 93 A.L.R. 1092; Cookson v. Fitch, 116 Cal. App. 544, 3 P.2d 27; Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, 300 P. 487; Ireland v. Marsden, 108 Cal.App. 632, 291 P. 912; Crooks v. White, 107 Cal.App. 304, 290 P. 497; Brown v. Davis, 84 Cal. App. 180, 257 P. 877. But it invokes the rule that the doctrine raises merely an inference of negligence, not a presumption, and that the trial court is not bound to decide in favor of the inference. The trier of fact cannot, however, arbitrarily disregard the inference. In Ales v. Ryan, 8 Cal.2d 82, 99, 64 P.2d 409, 417, it is said: "The rule is well settled by a multitude of decisions of the appellate courts of this state to the effect that the inference of negligence which is created by the rule res ipsa loquitur is in itself evidence *which may not be disregarded by the jury* and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff. It is incumbent *on the defendant to rebut the prima facie case so created by showing that he used the care required of him under the circumstances.* The burden is cast upon the defendant to meet or overcome the prima facie case made against him. The defendant is not required to establish his defense by a preponderance of the evidence. All that is required is that he produce evidence which equals in evidentiary weight the inference which the doctrine creates in favor of plaintiff. The burden of proof as generally understood never shifts from the plaintiff to the defendant on the general issue of negligence. The inference of negligence unrebutted is actionable negligence coming within the doctrine of res ipsa loquitur and is sufficient to support a verdict for the plaintiff."

Once the inference of negligence arises and defendant produces evidence to rebut the inference or explain how the accident occurred, it is ordinarily a question of fact for the jury to determine whether or not the plaintiff has proven by a preponderance of the evidence that plaintiff was negligent. But if the defendant offers no explanation the trier of fact must follow the inference. Ales v. Ryan, supra. If the defendant adduces rebutting evidence, such evidence to be effective for that purpose must consist of a showing that he used due care. Ales v. Ryan, supra. Let us then examine the rebutting evidence produced by defendant in this case. It consists of her testimony that her driving speed was 50 to 55 miles per hour; that she was sleepy and blinked her eyes; that she went around a left curve in her right hand lane and the car left the pavement, hit a soft shoulder and rolled down an embankment. Manifestly that evidence rather than showing an exercise of due care on defendant's part unerringly points to negligence. It fortifies and strengthens rather than rebuts the inference of negligence. Its effect is no evidence at all in explanation of the accident or controverting the inference. Therefore the rule in Ales v. Ryan, supra, that the trier of fact may not disregard the inference, must be applied, and the finding of no negligence set aside. The only inference reasonably deducible from these facts is one of negligence. There are not two reasonable inferences, one of negligence and the other of due care, in which case the jury's finding is conclusive. When no explanation is given for the accident the verdict must be for plaintiff. Ireland v. Marsden, supra.

In my opinion it cannot be said that defendant was exercising ordinary care in the manner in which she operated her automobile at the time of the accident. Certainly, a reasonably prudent person would not close or blink his eyes while driving an automobile around a turn at a rate of speed from 50 to 55 miles per hour. This conduct in my opinion constituted negligence as a matter of law, and the finding to the contrary by the trial court should not be permitted to stand.

I concur: TRAYNOR, J.

WHITECHAT et al. v. GUYETTE.

L. A. 17813.

Supreme Court of California.

Aug. 4, 1941.

Rehearing Granted Sept. 3, 1941.

Automobiles 🔑244(20)

In action for death of occupant of automobile where question involved was whether occupant was a guest or a passenger, judgment for plaintiffs was reversed. Vehicle Code, § 403, St.1935, p. 154.

CARTER, J., GIBSON, C. J., and TRAYNOR, J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by David Michael Whitechat, etc., and another, against Ervine O. Guyette, for alleged wrongful death of David Whitechat as result of an accident involving automobile in which he was an occupant. From a judgment for plaintiffs for $8,000, the defendant appeals.

Judgment reversed.

For prior opinion, see, Cal.App., 107 P.2d 300.

Chester O. Hansen, of Fresno, for appellant.

Gray, Cary, Ames & Driscoll, of San Diego, amicus curiae for appellant.

Rae B. Carter and John D. Chinello, both of Fresno, for respondents.

CURTIS, Justice.

Defendant appeals from a judgment rendered by the trial court after a jury verdict awarding plaintiffs, as surviving widow and minor child, $8,000 damages for the alleged wrongful death of one David Whitechat. The death occurred when the automobile in which the deceased was riding overturned while being driven from Fresno to Stockton. The defendant owned and was driving the car at the time of the accident. The occupants of the car, other than defendant, were officers of the Fresno chapter of the Young Men's Institute and, as such, were going to Stockton to attend a business meeting of that organization. The defendant was a member of the Young Men's Institute but was not an officer required to attend the meeting. The only testimony offered at the trial with reference to the status of decedent in the automobile was that of defendant Guyette. From his testimony it is disclosed that the proposed Stockton meeting was discussed on Monday evening prior to the date of the accident at the regular meeting of the Fresno chapter. At that time the question of transportation was brought up and the defendant was asked if he would take the four officers, including Whitechat, in his car. After some hesitancy because of late working hours defendant consented. One of the occupants of the car was a grand officer of the organization and was allowed mileage, which would amount to approximately five dollars. After the defendant had agreed to take his car, this grand officer offered to turn the expense money he would receive from the Young Men's Institute as mileage over to defendant to defray his expenses. This offer was apparently accepted by defendant, but he made it clear that he was making the trip in the interest of the organization and because of his friendship for the men who were required to go, and not because of the promise of the five dollars to defray expenses.

A few miles north of Fresno, while driving at a speed of fifty miles per hour, defendant lost control of the car as the result of the flattening of the left rear tire, and the accident and death above referred to followed. The complaint alleged that Whitechat was riding as a passenger for compensation and that his death was the direct and proximate result of defendant's negligence. There were no allegations nor was there any proof offered of intoxication or wilful misconduct on the part of defendant.

Appellant argues that the evidence most favorable to the respondents shows, as a matter of law, that Whitechat was technically a "guest" and was not a "passenger for compensation", as alleged in the complaint, and that therefore the judgment cannot stand, as neither wilful misconduct nor intoxication was pleaded. Respondents argue that whether or not compensation was given was a question of fact for the jury, and that by returning a verdict in their favor, the jury impliedly found that there was compensation either because the relationship between the parties was of a business rather than a social nature and the transportation was supplied in pursuance thereof for their mutual benefit, or because of the special tangible benefit to the appellant for furnishing the ride, viz., the promise of the five dollars to defray expenses. The determinative question, therefore, on this appeal is whether Whitechat was a passenger or a guest, without having given compensation for the ride within the meaning of section 403 of the Vehicle Code, St.1935, p. 154.

In approaching this problem it is well to keep in mind the observation made in the case of McCann v. Hoffman, 9 Cal.2d 279, 282, 70 P.2d 909, to the effect that although the terms "passenger" and "guest" have for convenience been adopted for the purpose of distinguishing a person carried for hire or reward from one carried gratuitously, the chief concern of the courts should be the meaning of the phrase "without giving compensation" as used in section 403 of the Vehicle Code, and not a definition of the term "guest".

Since the enactment of the "guest law" in 1929 there have been numerous decisions both by this court and the district courts of appeal wherein it was determined that certain benefits passing from the occupant to the owner or operator of an automobile were or were not sufficient to be termed "compensation" within the meaning of what is now section 403 of the Vehicle Code. These cases have laid down certain general rules which may be used as a guide, but as noted in McCann v. Hoffman, supra, the nature of compensation as contemplated by the statute is as variable as the particular facts involved. Instead of attempting to formulate some new or further rule in the instant case, the better method would seem to be to place this case within one of the classifications of the previously decided cases, if we are justified in so doing by its facts.

As a starting point reference might be made to a situation in which a person driving along a highway picks up a hitchhiker. It is clear that the pleasure derived from the doing of such an act of kindness is not a benefit sufficient to be considered compensation, and, in fact, the only tangible benefit is enjoyed by the hitch-hiker. Nor is there any question of compensation involved if a driver of a car takes another to some social event which both desire to attend or to some other point of common destination solely for the pleasure derived from the taking. It is equally clear that the benefits of hospitality, companionship or goodfellowship accruing to the owner or operator of an automobile as the result of a simple pleasure trip are not benefits that may be considered compensation. Even if there is something tangible in the way of a contribution of money from the occupant to the driver, a sharing of expenses, or even in some cases full payment of gas and oil by the occupant, there is no benefit sufficient to be termed compensation if the trip is of a purely social nature. In the McCann case, supra, two couples were on a pleasure trip from San Mateo to Rio Del Mar, and there was a mutual understanding that the expenses of the trip would be shared equally. It was there held that such sharing of expenses was not compensation. See, also, Stephen v. Spaulding, 32 Cal.App.2d 326, 89 P.2d 683; Starkweather v. Hession, 23 Cal.App.2d 336, 73 P.2d 247; Rogers v. Vreeland, 16 Cal.App.2d 364, 60 P.2d 585; Chaplowe v. Powsner, 119 Conn. 188, 175 A. 470, 95 A.L.R. 1177; Morgan v. Tourangeau, 259 Mich. 598, 244 N.W. 173; Clendenning v. Simerman, 220 Iowa 739, 263 N.W. 248. On the other hand, if the parties are engaged in a business venture for their mutual advantage and the ride is an integral part of that business venture, then the driver may be said to be in receipt of benefits sufficient to be classified as compensation, and the occupant becomes a "passenger", who may recover for injuries suffered as a result of the negligence of the driver. In the case of Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914, the driver and occupant were business associates, and the trip was for the purpose of taking some material to carpenters engaged in construction work on property jointly owned by them, and for the purpose of supervising said construction and the renting of the property. Under such circumstances compensation was said to have been given. See, also, Jensen v. Hansen, 12 Cal.App.2d 678, 55 P.2d 1201; Parrett v. Carothers, 11 Cal.App.2d 222, 53 P.2d 1023; Woodman v. Hemet Union High School District, 136 Cal.App. 544, 29 P.2d 257. Another situation where the benefit received has always been held to be compensation is that in which the owner or operator invites another to ride with him with the hope of making some future profit as a result of such ride. One of the first and a typical example of this type of situation is the case of Crawford v. Foster, 110 Cal.App. 81, 293 P. 841, wherein a prospective purchaser of an automobile injured in an accident during a demonstration was held not to be a "guest" without having given compensation because of the hope of a future sale on the part of the driver. See, also, Piercy v. Zeiss, 8 Cal.App.2d 595, 47 P.2d 818; Riley v. Berkeley Motors, Inc., 1 Cal.App.2d 217, 36 P.2d 398. The final and most obvious situation in which it may be said that compensation has been given is that wherein an owner or operator is promised a money payment for transportation to a certain point. The clearest example of this is a passenger in a taxicab. Chaput v. Lussier, 132 Me. 48, 165 A. 573. If the person injured is one of a class which the owner or operator was paid to transport, then it is immaterial whether or not that particular person made the payment. Smith v. Fall River Joint Union High School District, 118 Cal.App. 673, 5 P.2d 930.

Having outlined the classifications made by the appellate courts of this and other states, there remains the question whether the facts in the instant case place it in one of the above-mentioned categories.

Respondents contend that the jury could have found the deceased to be a "passenger" or that the defendant received compensation, under the authorities for two different reasons: First, because the relationship between the parties was of business and the transportation was supplied in the pursuit thereof for their mutual benefit, and second, because of the promise of payment of the five dollars for furnishing the ride.

In order to uphold the respondents' first contention, it must be shown that the appellant and the deceased were engaged in a business venture for their mutual advantage and that the ride was an integral part of that business venture. No such showing has been made. It is true that all of the occupants of the car were members of the Young Men's Institute, and it might be said generally that the trip was being made for the purpose of attending a meeting of that organization, but specifically the four occupants of the car other than appellant were attending a business meeting which, as officers, they were required or at least expected to attend. The appellant, although a member, was not an officer and was not required to attend. Therefore, as between appellant and deceased it cannot be said that the trip was an integral part of a business venture for their mutual advantage, as in the case of Walker v. Adamson, supra, where the trip was being made for the purpose of taking material to carpenters who were working on property jointly owned by the driver and the injured occupant. Disregarding for the moment the promised money payment, the relationship between the appellant and the deceased may be said to be merely one of a social nature analogous to that existing in the case of McCann v. Hoffman, supra, wherein the parties were on a pleasure trip. From this standpoint then the benefit received by appellant was not sufficient to be termed compensation within the meaning of section 403 of the Vehicle Code.

Respondents' second contention is that whether the promise of payment of five dollars was compensation as in the case of Smith v. Fall River Joint Union High School District, supra, or merely a sharing of expenses as in the McCann case, supra, was a question of fact for the jury, and that body, by rendering a verdict for respondents, impliedly found that the payment was compensation, which finding is conclusive on this court. In answer to this contention appellant argues that in view of the evidence presented, the question is one of law, and as a matter of law under McCann v. Hoffman, supra, decedent was a "guest" and not a "passenger", or in other words, that the promise of payment of five dollars was merely a promise to share expenses and not compensation.

The record discloses that the only evidence in regard to the offer of the five dollars to appellant was the testimony of appellant himself. He testified that he agreed to take the officers to Stockton before the five dollar offer was made; that subsequent to that agreement, the grand officer told appellant that he would give him the five dollars which he could collect from the Young Men's Institute as mileage to defray appellant's expenses on the trip; and that he (appellant) accepted the offer but still insisted that he was going to take the men to Stockton because of his friendship for them and in the interest of the organization, and not because of the promised money payment. If this testimony were accepted as true, then it would necessarily follow that as a matter of law, the promise of payment to defray expenses was merely a promise to share expenses, and not a promise of compensation. However, relying on the general proposition that a jury is the sole judge of the credibility of a witness and may believe all of his testimony or believe a part and reject parts, as it might be convinced of the truth or falsity of such testimony (citing Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 503, 55 P.2d 870), respondents argue that the jury could disbelieve that part of appellant's testimony to the effect that he agreed to make the trip prior to any mention of money and could further refuse to accept appellant's statement that he was making the trip out of friendship for the men and in the interest of the organization, and not because of the promised five dollars. Having destroyed these two elements, there remained only the promise of the five dollar payment. From this one of two inferences could be drawn, viz., that the money promised was for a sharing of expenses or for compensation. Having developed their argument to this point, respondents then refer to the general rule that on appeal all legitimate and reasonable inferences must be indulged in support of the judgment and when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court or jury (citing Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183). It is then argued that the jury must have inferred that the promise was compensation and that such conclusion cannot be disturbed by this court.

The above argument as developed is a convincing one and the general rules supporting it are, as abstract propositions, undoubtedly correct. However, the respondents fail to take into consideration another rule in regard to inferences that has been equally well established by this court. The further and controlling rule is that an inference is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite party. Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Crouch v. Gilmore Oil Co., 5 Cal.2d 330, 54 P.2d 709; Johnston v. Black Co., 33 Cal.App.2d 363, 369, 91 P.2d 921; Maupin v. Solomon, 41 Cal.App. 323, 324-326, 183 P. 198. This rule was recognized in the case of Huddy v. Chronicle

Publishing Co., 15 Cal.2d 554, 103 P.2d 421, but the inference there with reference to the issue of employment was held not to be dispelled in that case because the opposition evidence was weakened by contradictions and uncertainty, and in view of the surrounding circumstances was open to doubt. See, also, Tsirlis v. Standard Oil Co., 32 Cal.App.2d 469, 476, 90 P.2d 128; Day v. General Petroleum Corp., 32 Cal.App.2d 220, 230-231, 89 P.2d 718. In the instant case the inference that the promised payment was compensation was rebutted by clear, positive and uncontradicted evidence to the contrary. The testimony of the appellant that he agreed to take the officers to Stockton before any mention was made of money, and that subsequent to the offer of the grand officer, he reiterated that the trip was being made because of his friendship for the men and in the interest of the organization is neither conflicting, vague, uncertain, contradictory nor improbable. The respondents offered no evidence to refute this testimony and none of the surrounding circumstances forces the conclusion that the testimony was in any way open to doubt. We are, therefore, of the opinion that the inference was dispelled as a matter of law and the implied finding that the promise of payment of the five dollars was "compensation" within the meaning of section 403 of the Vehicle Code was contrary to the only evidence produced.

The deceased being a "guest" without having given compensation for the ride, the judgment in favor of respondents cannot be upheld, as neither intoxication nor wilful misconduct was pleaded or proved.

The judgment is reversed.

We concur: SHENK, J.; PULLEN, Justice pro tem.

I concur in the judgment: EDMONDS, J.

CARTER, Justice (dissenting).

I dissent.

The sole issue presented in this case is whether the deceased, for whose death damages were awarded, was a guest or a passenger in the vehicle involved in the accident in which he met his death. It is essential to an affirmance of the judgment that the deceased was a passenger inasmuch as the action is predicated on negligence, rather than wilful misconduct or intoxication. Vehicle Code, sec. 403. The verdict of the jury in favor of plaintiffs carried the implied finding that deceased was a passenger rather than a guest. That finding cannot be disturbed if it has any evidentiary support. The evidence clearly establishes that for the trip during which the accident occurred, defendant was to receive the sum of $5 compensation. Suffice it to refer to defendant's testimony in that respect: "Q. He (the president of the lodge, the officers of which were making the trip) was willing to give it (the $5) for making this trip to Stockton? A. Yes, he was." The salient fact is therefore that it was agreed that defendant would be paid $5 for transporting the officers of the lodge, including the deceased to Stockton. Without further being said on the subject defendant did transport the deceased on that trip to the point where the accident occurred. It in effect was a unilateral contract of the kind which are an every day occurrence. A states to B that he will pay him $5 to drive him to a certain destination. B makes no reply either accepting or rejecting the offer but proceeds to performance by commencing the journey. It is unnecessary to indulge in any inferences. The performance itself is the acceptance of the offer and gives rise to a binding contract. That evidence standing alone is sufficient to support the jury's finding that the deceased was a passenger rather than a guest. The most that can be said of the evidence to the effect that defendant had agreed to transport the deceased before the offer of $5 compensation was made, is that it would create a conflict in the evidence which the jury has conclusively resolved in favor of plaintiffs. In any event the jury is sole judge of the credibility of a witness and may believe all of his testimony or believe part and reject part. Firth v. Southern Pacific Co., 44 Cal.App. 511, 186 P. 815. "The jury is the sole judge of the credibility of the witnesses, and may believe all of the testimony of a witness or believe a part and reject parts as it may be convinced of the truth or falsity of such testimony, whether it arises from willfulness or mistake." Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 503, 55 P.2d 870,882. The jury was therefore at liberty to disbelieve that portion of defendant's testimony in which he stated that he had agreed to transport deceased without charge before any mention was made of the $5 compensation. There is then left the above-quoted testimony that directly and unequivocally establishes that the defendant was to receive compensation for taking the deceased on the journey. Furthermore, the evidence as to the prior purported agreement, if believed, is not necessarily inconsistent with the later arrangement whereby defendant was to receive $5 compensation. At most the prior agreement was a mere unenforceable promise, being without consideration, concerning which defendant could change his mind with impunity. It is not unreasonable to conclude that the prior agreement was cancelled and revoked by the later agreement under which an offer was made to pay compensation for the trip, and under which performance was commenced.

Even if it is accepted that the evidence of the passenger relationship consists wholly of the inference that the transportation was made for compensation, arising from the unquestioned promise to pay $5 therefor, the result is the same. That inference is evidence which the jury is entitled to weigh with other evidence and use as the basis for its implied finding that the deceased was a passenger. An inference that may be drawn in support of a verdict is nonetheless available merely because other contrary inferences may be drawn. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183. The majority opinion concedes the above stated premises but invokes a purported rule to defeat the conclusions reached, that is, "an inference is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite party", citing Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Crouch v. Gilmore Oil Co., 5 Cal.2d 330, 54 P.2d 709; Johnston v. Black Co., 33 Cal.App.2d 363, 91 P.2d 921; Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198; Huddy v. Chronicle Publishing Co., 15 Cal.2d 554, 103 P.2d 421. Even if that rule be accepted, its very language establishes that it cannot control the case at bar. As stated in the Engstrom case [11 Cal.2d 64, 77 P.2d 1063], "if the opposition [opposed to the inference] evidence is conflicting, vague, or *uncertain,* or is weakened by contradictions, or improbabilities" the inference is not dispelled. Here the only opposition evidence is the *testimony of defendant* that he agreed to transport the officers without charge before any mention was made of the $5 compensation and that his purpose in so doing was his friendship for the officers and interest in the lodge. We have already seen that the prior agreement is not necessarily inconsistent with the arrangement whereby he was to receive compensation. There is not therefore a precise contradiction of the inference. Furthermore, that evidence is neither *positive nor direct* in contradiction of the inference. In order to be available as any evidence *it must itself depend upon inference.* Suppose such an agreement does exist followed by a promise to pay the $5 compensation. Thereafter the trip has been commenced. There is no *direct* evidence that the commencement of the journey was in performance of the first arrangement or the second. To conclude that the trip was made in fulfillment of his agreement so to do without compensation, it must be *inferred* that such performance was in response to that promise; there is no direct evidence positively and unequivocally connecting the two events. It is just as reasonable to infer that the performance was in compliance with and acceptance of the offer of $5 compensation for furnishing the transportation. To say therefore that there is *direct* evidence dispelling the inference here involved is obviously not true. An inference is being weighed against a contrary inference. The holding of the majority opinion is tantamount to a rule of law by which an appellate court may conclude contrary to a trial court's finding *that one inference has dispelled another inference.* That is not the law and is not the effect of the decisions in the Engstrom and other cases referred to. In regard to defendant's testimony as to his *purpose* in taking the deceased to Stockton, it cannot be denied that such evidence is not only weak and uncertain but is far from being free from doubt. When a person states his purpose or reason for certain conduct, he is relating something that must be gleaned from the secret recesses of his mind. No one but the relator can possibly know what is locked in his mind. There is no direct way of refuting such testimony. It may be fabricated with impunity. The one against whom it is invoked is practically helpless to protect himself. In reality it is nothing more than the witness' conclusion which may have been arrived at by a series of deductions in which any number of factors are involved. To say that that type of evidence is free from "doubt", is "certain", and is "positive and direct" is manifestly incorrect. It is not only doubtful evidence but it is evidence of the weakest sort.

Finally, it must be remembered that this evidence was the testimony of the defendant, the interested party. Testimony of that character is always subject to the criticism of bias and prejudice. It cannot be said to be strong or free from doubt as a matter of law.

In my opinion the judgment should be affirmed.

We concur: GIBSON, C. J.; TRAYNOR, J.

18 Cal.2d 399

GOLDENBERG v. WILNER et al.

L. A. 17897.

Supreme Court of California.
Aug. 7, 1941.

1. Limitation of actions 🔑112

Where pursuant to power contained in trust deed securing note executed in January, 1931, property was sold on April 24, 1935, before effective date of moratorium acts, action for deficiency instituted on April 1, 1938, was barred by statutes requiring action for deficiency to be brought within three months after foreclosure sale, since time for bringing action was not extended by moratorium acts which became effective subsequent to exercise of power of sale and benefits of which were not available to mortgagor. Code Civ.Proc. § 337, subd. 1; St.1935, p. 1214, § 19; St.1937, p. 60, § 19; p. 466, § 19; St.1939, p. 1051, § 20.

2. Limitation of actions 🔑112

A mortgage creditor is not entitled to an extension of time for bringing an action for deficiency where debtor has had no opportunity to invoke beneficial provisions of the moratorium act for reason that power of sale was exercised before the moratorium act became effective. Code Civ.Proc. § 337, subd. 1; St.1935, p. 1214, § 19; St.1937, p. 60, § 19; p. 466, § 19; St.1939, p. 1051, § 20.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Joe Goldenberg against Morris Wilner and others, to recover the balance due on a note for which a deed of trust with power of sale had been given as security wherein defendant filed a demurrer. From a judgment entered upon an order sustaining the demurrer without leave to amend, plaintiff appeals.

Affirmed.

For prior opinion, see 109 P.2d 763.

John M. Dvorin and Prentiss Moore, both of Los Angeles, for appellant.

Harriet Pugh, of Los Angeles, for respondents.

SHENK, Justice.

The plaintiff appealed from a judgment entered upon an order sustaining the defendants' demurrer to his complaint without leave to amend. The complaint shows the following:

On September 18, 1928, the defendants executed their note for $4,000 to the plaintiff's assignor. The note was due on September 12, 1930, and payment of the principal and interest was secured by a deed of trust on real property situated in Los Angeles county. The maturity date of the note was subsequently extended to March 12, 1932. The defendants defaulted in the payment of the principal, the amount thereof was declared due and payable, and on June 15, 1933, the property was sold pursuant to the provisions of the trust deed for the sum of $2,200, leaving a balance still due and unpaid of $2,033.50. On January 25, 1940, the plaintiff brought the present action to recover judgment for the deficiency. The defendants interposed the defense of the statute of limitations. § 337, subd. 1, Code Civ.Proc.

It was and is the plaintiff's contention that the time within which an action may be brought to recover a deficiency judgment was extended by the provisions of the Mortgage and Trust Deed Moratorium Acts of 1935, 1937 and 1939, Stats.1935, pp. 1208, 1214, § 19; Stats. 1937, pp. 57, 60, § 19; p. 460, 466, § 19; Stats. 1939, pp. 1045, 1051, § 20. The pertinent portion of those acts provided in substance that whenever the time within which an action might be commenced upon any obligation founded upon a written instrument secured by mortgage or deed of trust would expire by virtue of section 337 of the Code of Civil Procedure during the period commencing with the effective date of the particular act and ending on the date specified therein, the time was extended, so that if the provisions were applicable, the plaintiff's time for commencing the action herein would not expire until October 1, 1941.

[1, 2] The recent decision of this court in Rust v. Hill, 110 P.2d 657, is determinative of the question in this case. There the facts involved were the same, namely, the sale of the encumbered property took place prior to the effective dates of the moratorium acts relied upon, and the plaintiff sued to recover the deficiency after the expiration of the time limitation provided by section 337, subdivision 1, of the Code of Civil Procedure, and after the moratorium acts went into effect. It was held that the moratorium acts as adopted by the legislature were not applicable to extend the time for the bringing of an action to recover a deficiency judgment in such a case. In view of the express objects to be attained by the moratorium acts it was determined that the creditor was not entitled to an extension of the time for bringing an action for a deficiency where the debtor had not had an opportunity to invoke the beneficial provisions of the act for the reason that the power of sale was exercised before the acts became effective.

The demurrer was properly sustained. The judgment is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.; PULLEN, J. pro tem.

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18 Cal.2d 389

EVERETT v. DAVIS et al.

L. A. 16618.

Supreme Court of California.

July 31, 1941.

1. Waters and water courses 🔑115

"Surface waters" are those falling on, arising from, and naturally spreading over, lands as result of rainfall, melting snow, or springs.

See Words and Phrases, Permanent Edition, for all other definitions of "Surface Water".

2. Waters and water courses 🔑115

"Surface waters" continue to be such until they percolate through ground or flow vagrantly over surface of land into well-defined water courses or streams in obedience to laws of gravity.

3. Waters and water courses 🔑38

Surface waters become "stream waters" after being gathered into natural channel.

See Words and Phrases, Permanent Edition, for all other definitions of "Stream Water".

4. Waters and water courses 🔑115

"Floodwaters" are those which escape from a stream or other body of water and overflow adjacent territory.

See Words and Phrases, Permanent Edition, for all other definitions of "Floodwater".

5. Waters and water courses 🔑116

Floodwaters are common enemy, against which one may protect his land even to detriment of his neighbor.

6. Waters and water courses 🔑115, 116

The rule that property owner may divert floodwaters to others' lands applies only to "floodwaters" in strict sense, that is, waters escaping because of their height from confinement of a stream and running over adjacent property.

7. Waters and water courses 🔑115

The element of abnormality is implicit in definition of "floodwaters", which are such because of their escape from usual channels under conditions which do not ordinarily occur.

8. Waters and water courses 🔑115, 177(1)

Waters of seasonal stream, which spread over large area after building alluvial cone and eventually reached highway ditch in some measure, were not "surface waters", which do not include waters which have once become part of stream, nor "floodwaters", as element of abnormality of escape from stream was not present, so that landowners building fences which confined waters of such stream to narrow channel, through which they flowed with such increased acceleration that they reached ditch in full volume and overflowed adjoining land, instead of sinking into earth or being carried away by ditch as before, were properly enjoined from maintaining fences in suit by adjoining landowner.

9. Waters and water courses 🔑115

As "floodwaters" are those which break away from a stream under conditions which do not usually occur, they can never be the flow of a stream at end of its channel.

10. Waters and water courses ⚷119(3)

One may gather and discharge surface waters into a stream which is their natural means of drainage.

11. Waters and water courses ⚷119(3)

Landowners' erection of fences creating narrow channel, through which practically all water which had theretofore naturally dispersed over land and flowed in part into highway ditch at different points over wide area was brought to such ditch at one point with destructive force, resulting in overflow of adjoining land, was not justified on ground that ditch was natural means of drainage.

◆

In Bank.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Clarence A. Everett against John A. Davis and others, to enjoin erection or maintenance of certain fences and embankments. From a judgment granting an injunction on a determination that surface waters were diverted by such fences and embankments to adjoining landowner's damage, defendants appeal.

Affirmed.

For prior opinion, see, Cal.App., 107 P.2d 650.

Chas. F. Blackstock, of Oxnard, for appellants.

Durley & Downes and Henry C. Downes, all of Oxnard, for respondent.

EDMONDS, Justice.

The appellants were enjoined from erecting or maintaining certain fences and embankments, upon a determination that by their use surface waters had been diverted to the damage of the adjoining landowner. In challenging the correctness of this decree, they assert, contrary to the court's findings, that these were flood waters, a common enemy against which they had a right to protect their property.

The land of the respondent, upon which there is a valuable orchard, lies on each side of a public road. On the northerly side of this road, and adjoining it on the east, is the property of the appellant Davis. To the east of the Davis land is that owned by Mary Estes, who is not a party to the action. South of the road and opposite the land of Davis is the property of the appellant Hitch. North of the road, the Southern Pacific Company maintains railroad tracks which run somewhat parallel with it across the lands of Estes, Davis and Everett. Beyond the railroad to the north, the country is hilly and rolling. It drains into a ravine or canyon known as "Estes Wash", which, the parties concede, is a natural water course having no flow except in times of rain.

According to the trial court's findings, prior to the construction of the railroad, which was built in 1902, the mouth of this watercourse was more than 100 feet northerly of the present location of the tracks, at which point the waters did not run in any defined channel or watercourse and spread out over the lower lands. When the railroad was constructed, a bridge was built in Estes Wash at a point about 300 feet west of the easterly boundary of the land belonging to Davis. Since that time, and until the construction of the fences complained of, the waters flowing down Estes Wash have been controlled so that they passed under this bridge and then spread over the land of Davis without flowing in any channel or watercourse. In so spreading, these waters deposited gravel and sand forming a debris cone practically uniform in its slope having its apex at the bridge and extending to the road, a distance of about 1,000 feet. The deposit of gravel and sand was built up to such an extent that its depth, at a point 200 feet south of the railroad bridge, was more than seven feet.

In 1916, a ditch was constructed on the northerly side of and parallel with the road; thereafter and until the appellants built the fences which caused the damage to the Everett orchard, the waters coming from Estes Wash flowed over the Davis land to the ditch and were carried off by it in a westerly direction. During the year 1932, Southern Pacific Company, without any objection from Davis, constructed a woven wire fence commencing at its bridge and extending to the south for about 250 feet. The purpose of this fence was to protect the railroad tracks by changing the natural flow of the waters, which is to the southeast, and sending them in a southwesterly direction. But the court found that the railroad's acts in this regard had not caused any damage to the respondent's land, and will not cause any such damage in the future.

However, according to the court's findings, the effect of the fences built by the appellants Davis and Hitch was quite different. They erected two fences, about 15 feet apart, extending from the end of the railroad company's fence to the road. There was no natural watercourse at this point, the court determined, and after the fences were built, the waters flowing under the bridge were confined to the narrow channel between them and carried sand, gravel and silt to the ditch along the road in such quantity that it filled and overflowed. The waters then ran across the road and over the respondent's land, causing considerable damage. The court also found that the maintenance of these fences will cause the Everett orchard to become covered with worthless materials and will injure or destroy the land's productivity.

The trial court's finding that there was no natural watercourse across the Davis land is not sustained by the evidence, say the appellants. The court also erred, they assert, in its determination that the Everett orchard was damaged by the wrongful diversion of surface waters. According to their theory, these were flood waters and Davis had the right to take them across his land by the most direct route and put them into a ditch north of Los Angeles avenue, which was a natural watercourse draining his land. The respondent takes the position that the waters, after passing through the railroad culvert did not flow in any defined channel or watercourse and that the finding of the trial court in this respect is supported by the evidence; that the waters flowing under the culvert are surface waters; and that the appellants did not have the right to gather and discharge them through a narrow channel into the highway ditch.

The finding that there is no natural watercourse upon the Davis land is supported by the testimony of a number of witnesses. Before the construction of the fences built by Davis and Hitch, these witnesses said, the waters passing under the tracks spread out in a fanlike shape over the land of Davis and were not confined in any channel. Other witnesses called by the appellant stated that they had observed conditions from which a contrary conclusion might be drawn, but their testimony only created a conflict in the evidence which the court resolved in favor of the respondent.

The nature of the waters flowing in Estes Wash presents a more difficult question. The parties concede that if these are flood waters, the appellants had a right to prevent them from coming upon their land, even if the fences built by them caused them to flow over the property of the respondent. Horton v. Goodenough, 184 Cal. 451, 194 P. 34. The rights of the parties therefore turn upon the legal classification of waters which, after having been confined in a natural watercourse, disperse and sink into the ground by reason of the formation of an alluvial cone.

[1-3] Surface waters are those falling upon, arising from, and naturally spreading over lands produced by rainfall, melting snow, or springs. They continued to be surface waters until, in obedience to the laws of gravity, they percolate through the ground or flow vagrantly over the surface of the land into well defined watercourses or streams. LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336; San Gabriel V. C. Club v. Los Angeles, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200; Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024; Mogle v. Moore, 16 Cal.2d 1, 104 P. 2d 785. After they have been gathered into a natural channel, however, they become stream waters. Horton v. Goodenough, supra; San Gabriel V. C. Club v. Los Angeles, supra; Mogle v. Moore, supra.

[4-7] "Flood waters are those which escape from a stream or other body of water and overflow the adjacent territory." Le Brun v. Richards, supra [210 Cal. 308, 291 P. 828]. Such waters are said to be a common enemy, against which one may protect his land even to the detriment of his neighbor. But the drastic rule which allows a property owner to divert such waters to the lands of others only applies to flood waters in the strict sense, that is, waters escaping because of their height from the confinement of a stream and running over adjacent property. Implicit in the definition of flood waters is the element of abnormality; they are flood waters because of their escape from the usual channels under conditions which do not ordinarily occur.

[8] The waters which flowed out of Estes Wash at the time the appellants constructed the devices to control them were not surface waters, because such waters do not include those which have once become a part of a stream. Horton v. Goodenough, supra. Neither were they flood waters, as the element of abnormality of escape from a stream was not present. They were the

waters of a typical seasonal stream which, after having built an alluvial cone, spread over a large area and, in some measure, eventually reached the highway ditch. The fences built by the appellants interrupted the natural habits of this stream whose waters, confined to a narrow channel, flowed with such increased acceleration that they reached the ditch at the road in full volume.

Under these circumstances, the situation of the parties is substantially the same as that shown in the case of Thomson v. La Fetra, 180 Cal. 771, 183 P. 152, where a flume was built to carry off the water which originally flowed out of a canyon and became diffused in the native vegetation a few hundred feet away. It was held that the rule concerning flood waters applies only "to waters escaping because of their height from the confinement of a stream and running over the adjacent country", and one who changed the course of the waters brought through the flume and cast them upon the land of another was guilty of a trespass. Applying the same principle, the appellants were properly enjoined from maintaining the fences which concentrated and accelerated the waters flowing in Estes Wash so that they reached the respondent's land instead of either sinking into the earth or being carried away by the ditch, as they had done before.

[9] In Mogle v. Moore, supra, this court adopted an opinion written in the District Court of Appeal, which defined surface waters, stream waters and flood waters in the same terms which have been used for many years. The rights of landowners in regard to each of such waters was also stated in connection with the controversy which was then before the court. That case arose when the defendants protected their property from waters which came from West Cucamonga Creek, and it was held that these were flood waters which a landowner might obstruct.

This conclusion was based upon findings of fact, the correctness of which was not challenged. It appears that, in 1916, the waters flowing out of Cucamonga canyon were diverted and spread over the land at the foot of the mountains. Since that time West Cucamonga creek has carried not only surface waters, which reach it by natural flow, but also some of the stream from Cucamonga canyon which comes to it "infrequently in times of storm and when the waters break over or out of the check dams in said spreading ground, or at such infrequent times as the waters are turned into . . . [it] through flood gates". So far as the findings disclose, some of the waters which the defendants obstructed were therefore flood waters within the accepted definition of that term, and the court's decision must be considered as based upon this fact. However, in pointing out that waters which overflow a channel do not become surface waters when they escape over the stream banks, the qualification "or at the end of the channel" was incorrectly added. As flood waters are those which break away from a stream under conditions which do not usually occur, they can never be the flow of a stream at the end of its channel.

[10, 11] The appellants also seek to justify their actions upon the ground that the highway ditch was the natural means of drainage; that all of the water from Estes Wash flows into it at one point or another, and therefore they were entitled to concentrate these waters by a channel and bring them to the ditch at one point. Of course, one may gather and discharge surface waters into a stream which is their natural means of drainage. San Gabriel V. C. Club v. Los Angeles, supra. But before the acts complained of in the present case, the water naturally dispersed over the land, and that part of it which reached the ditch had lost much of its force. After the appellants constructed their fences, the waters were sent through a narrow channel in a manner quite different from the natural flow. Theretofore only some of these waters had flowed into the ditch at different points over a wide area; the channel contrived by the appellants brought practically all of the flow of Estes Wash to one point with destructive force. Under these circumstances the principle relied upon by the appellants has no application.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; PULLEN, Justice pro tem.

CARTER, Justice (concurring).

I concur in the judgment of affirmance, but I do not agree with the analysis of the case of Mogle v. Moore, 16 Cal.2d 1, 104 P.2d 785, 788, contained in the majority opinion and I am not in accord with the views expressed in said opinion with respect to the character of the waters which are the subject of this action.

The majority opinion states that the waters involved in the case of Mogle v. Moore were flood waters because the trial court found that some of the waters which constituted the flow in West Cucamonga creek came from check dams which infrequently overflowed, which dams were situated a distance of approximately six miles from where these waters were diverted from West Cucamonga creek and conveyed to plaintiff's property. In the Mogle case the trial court found that West Cucamonga creek was a natural stream or watercourse with a well defined channel, and that "all of the waters so flowing in said channel, flow in a well-defined body from a point where they enter the said channel at or near the city of Upland, California, to the defendants' property, and that none of the said waters once having reached said channel escape therefrom from the time that they enter therein until they reach the intersection of Comet Avenue and the north line of the defendants' property". The court also found that the waters of West Cucamonga creek were diverted from said creek by artificial means and into an artificial channel and conveyed thereby a distance of approximately one mile to defendant's property and then discharged onto plaintiff's property by artificial means provided by defendant.

Notwithstanding these findings by the trial court in the Mogle case, this court held that the waters so diverted and discharged by defendant onto plaintiff's property, constituted flood or enemy waters which defendant was entitled to divert away from his property and that any injury suffered by plaintiff as the result of such diversion was damnum absque injuria.

I disagreed with the majority opinion in the Mogle case and set forth my views at length in a dissenting opinion at the time said case was decided by this court.

The majority opinion in the case at bar now concedes that the statement of this court in the majority opinion in the Mogle case that waters escaping "at the end of the channel", was incorrectly added. This statement in the majority opinion does not cure the erroneous pronouncements in the majority opinion in the Mogle case. It simply leaves the Mogle case standing as authority for the proposition that waters which constitute the natural and normal flow of a stream, when artificially diverted from said stream, and conveyed a distance of over a mile away from said stream by means of an artificial watercourse, then become flood waters, and that an owner of land affected thereby has the right to discharge such waters upon the land of his neighbor with such destructive force as to cause irreparable damage to the latter, and that a person so damaged has no recourse either by injunction or action for damages.

The Mogle case was a much weaker case than the case at bar so far as the rights of the respective defendants are concerned, but this court reversed the judgment of the trial court in that case granting an injunction and awarding damages to the plaintiff, and is affirming the judgment in the case at bar which awards similar relief to the plaintiff. The two conclusions are absolutely inconsistent, and there is no logical basis upon which they can be reconciled.

There can be no question but that the majority opinion of the District Court of Appeal in the case at bar (Everett v. Davis, —— Cal.App.2d ——, 107 P.2d 650) was the result of the confusion created by the decision of this court in the Mogle case, and in my opinion the majority opinion in the case at bar simply adds to that confusion.

It appears from the record in the case at bar that the waters which are the subject of this action, during certain periods of each year flow for a number of miles within a well defined watercourse down what is known as Estes Wash to the natural end of said watercourse located on appellant's lands, which have been adapted to the growing of ordinary field crops. There the waters spread out and mostly disappear, and such was the condition for many years. That by means of artificial structures appellants began diverting the water from the end of the watercourse over and across their land in such a manner as to cause said waters to discharge onto respondent's land, upon which there is a valuable growing orchard resulting in great damage thereto.

The legal proposition involved is whether or not appellants have the right to so divert the water flowing onto their land from Estes Wash that it discharges onto and causes damage to plaintiff's property without responding in damages to plaintiff as the result of such diversion.

Under rules of law which should be regarded as settled in this state by numerous decisions of this court, the defendants did not have the right to discharge such waters onto plaintiff's land to the latter's damage unless it can be said that said waters were flood or enemy waters as defined in the decisions of this court. Barnes v. Marshall, 68 Cal. 569, 10 P. 115; Lamb v. Reclamation District No. 108, 73 Cal. 125, 126, 14 P. 625, 2 Am.St.Rep. 775; De Baker v. Southern California Railway Co., 106 Cal. 257, 39 P. 610, 46 Am.St.Rep. 237; Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am.St.Rep. 169; Horton v. Goodenough, 184 Cal. 451, 194 P. 34; Thompson v. La Fetra, 180 Cal. 771, 183 P. 152.

I think it is clear from the facts appearing in the record in this case that the waters discharging from Estes Wash onto defendants' property which they diverted and caused to discharge onto plaintiff's property with such destructive force that plaintiff was caused to suffer damage thereby, were not flood waters as defined in the above-mentioned authorities. Obviously, they were stream waters until they diffused out over the flat lands and ceased to be confined in a channel. In my opinion these waters did not then become surface waters as such waters are defined in the decisions of this court. Heier v. Krull, 160 Cal. 441, 117 P. 530.

Regardless of what definition may be given to waters of the character here involved, in my opinion the law should be that where a natural stream ends and the natural flow therefrom spreads out over land without a definite channel, whether we call such waters after leaving the stream, surface waters or stream waters, the owner of such lands should not be permitted to accumulate or concentrate the same into a ditch or channel and discharge the same upon his neighbor's property with such destructive force that damage results therefrom without responding in damages and being restrained from the commission of such acts which will cause further damage to his neighbor's land. My conclusion on this proposition is based upon the maxim that one should not be permitted to so use his own property as to cause damage to another. This rule should be applicable to a situation where the person causing the damage acquired his property in the light of the physical situation existing at the time of its acquisition, and if his property was then subjected to the burden of the run-off of a natural stream such as Estes Wash, he should not be permitted to change the natural conditions to the damage of his neighbor's property, as the latter is entitled to the maintenance of the natural conditions which existed at the time he acquired his property, or at the time the respective properties were developed and devoted to beneficial uses.

For the foregoing reasons the judgment of the trial court in my opinion should be affirmed.

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46 Cal.App.2d 328

LAMB v. SHERIFFS' RELIEF ASS'N OF LOS ANGELES COUNTY.

Civ. 2749.

District Court of Appeal, Fourth District, California.

Aug. 4, 1941.

Hearing Denied Oct. 2, 1941.

1. Insurance 🔑744

A county motorcycle patrol officer, whose service with county was severed because of his permanent total disability as result of injuries sustained while employed in such service, was not dismissed therefrom within provision of by-laws of county peace officers' relief association, of which he was member, that membership therein should cease on member's "dismissal" from county service, and hence he was entitled to continue to receive benefit payments from association during continuance of such disability.

See Words and Phrases, Permanent Edition, for all other definitions of "Dismissal".

2. Insurance 🔑744

A county motorcycle patrol officer, whose name was stricken from rolls of county civil service employees and transferred to state's rolls on date of county board's ordinance abolishing county motor patrol department and induction of such patrol into state service by statute while he was permanently disabled because of injuries sustained while employed in county service, was never legally "inducted" into state service within provision of by-laws of county peace officers' relief association, of which he was member, that membership of persons inducted into any other public service than that of county should cease, and hence he was entitled to continue to receive benefit payments from association during continuance of such disability. Gen.Laws 1937, Act 5841.

See Words and Phrases, Permanent Edition, for all other definitions of "Induct".

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Truman O. Lamb against the Sheriffs' Relief Association of Los Angeles County for declaratory relief. From a judgment determining that plaintiff is entitled to continue to receive cash benefit payments from defendant during continuance of disability from which he suffers, defendant appeals.

Affirmed.

Chas. E. R. Fulcher, of Los Angeles, for appellant.

Holbrook & Tarr, of Los Angeles, for respondent.

GRIFFIN, Justice.

This is an appeal from a judgment in an action for declaratory relief rendered in favor of plaintiff and respondent determining that he is entitled to continue to receive certain cash benefit payments from defendant and appellant (hereinafter called the association) during the continuance of a disability under which he is suffering. There is no material conflict in any of the essential facts in the case. Practically all of the facts were stipulated. The questions pertain solely to the law applicable to those facts.

In March, 1924, the appellant association, an unincorporated benefit association, was established, and its constitution and by-laws were adopted. In 1928, respondent became a member thereof and the by-laws of the association provided in part as follows:

"The membership of this association shall be confined to the sheriff, undersheriff and all regular civil service appointees, acting as peace officers of Los Angeles County and actually employed, * * *.

"Membership in this association shall cease upon the resignation or dismissal of said member from the service, and thereafter such member shall have no claim whatsoever upon any fees or dues or contributions which may have been paid into the treasury of the association, provided, however, that any member in good standing who has completed fifteen years' continuous service, and resigns or retires, may retain his membership in this association by compliance with the constitution and by-laws of this association. * * *

"This association may make additional by-laws, or amend its by-laws by a favorable vote of three-quarters of the membership voting; * * *."

On June 13, 1927, the Board of Supervisors of Los Angeles County adopted an ordinance which established the motor patrol department of that county, under the control and direction of the board of supervisors. September 1, 1927, respondent became employed as a motorcycle officer in the department of motor patrol, and was classified as such under the civil service regulations of that county. On April 30, 1928, respondent made application for membership in appellant association and was duly admitted to membership therein. Ever since that time respondent has paid or tendered his dues to the association.

In 1929 the by-laws of appellant association were amended and among other things increased the amount of benefits payable under the disability clause. On August 14, 1930, respondent, while engaged in the performance of his duties, was totally and permanently physically disabled and the Industrial Accident Commission of the state duly found that he sustained his injuries arising out of and occurring in the course of his employment as a motorcycle officer of Los Angeles County, and awarded him compensation for life. The appellant association also paid the respondent the amounts provided by its by-laws to be paid from the sick and disability benefit fund, from the date of respondent's injuries until April 1, 1938, when it, by resolution, declined to make further payments, claiming that he was not entitled thereto, since his membership in said organization had ceased in 1932.

On April 5, 1932, the by-laws of the association were amended by adding a proviso, the pertinent portion of which is as follows:

"Provided further that, should any person or group of persons who may at the time of the ratification and adoption of these by-laws, or who may thereafter become, members under the provisions thereof be thereafter inducted into any other public service than that of Los Angeles County, the membership of such person or group of persons shall cease and terminate as of the date of such induction into such other service."

It is admitted that the above amendment was adopted but respondent did not personally give his consent thereto or vote therefor. On April 30, 1932, the board of supervisors passed an ordinance which abolished the motor patrol department and repealed the ordinance establishing the salaries for the employees of that department, and on that same date the respondent's name, together with the names of other members of the motor patrol, was stricken from the rolls of the civil service employees of that county. On that date, while respondent was still suffering from his physical disability, the motor patrol of Los Angeles County was inducted into the service of the State of California, by legislative enactment and, by reason of the fact that respondent had been employed as a motorcycle officer by the County of Los Angeles in the department of motor patrol, his name was transferred to the rolls of the State of California. In this particular the court found:

"That plaintiff has never performed any services for * * * and has never received any compensation from the State of California * * * that after his name appeared upon the rolls in the bureau of personnel of the State of California from July 1st, 1932, until May 8, 1936, the director of personnel caused to be placed upon the roster card of said plaintiff a notation that the reason for separation was as follows: 'Resignation by reason of absence without leave for more than ten consecutive days.' * * * that plaintiff has never performed any services either for the State of California or for the County of Los Angeles since the said disability occurred, and by reason of the said disability, is now and has been at all times thereafter, unable to draw regular salary. * * *"

In addition to this voluntary unincorporated association the county of Los Angeles maintains a County Employees' Retirement System, in pursuance of the provisions of Act 5841 Deering's General Laws (1937), Volume 2, p. 2743, and, by virtue of its compulsory provisions respondent was, during the time he was employed by the county of Los Angeles, a member of this fund or system and made his payments to the fund in accordance with the provisions thereof. That act provides in substance that when a member separates from the service of the county, all moneys which shall have been paid into the fund by him shall be refunded to him, with regular interest on such deposits. On June 30, 1932, respondent filed with the board of retirement his application for the deposits made by him, which application reads in part as follows:

"Gentlemen:

"On the 30th day of June, 1932, I permanently severed my connection with the County of Los Angeles as an employee in the Motor Patrol Department and do not anticipate re-employment in any department of the County of Los Angeles.

"I hereby make demand for return and payment to me of total amount deposited by me * * * waiving any future claims to any prior service rights that may be due me."

In pursuance of this application the sums so paid in by respondent were repaid to him. On May 13, 1938, the trustees of appellant association purported to adopt a resolution canceling respondent's membership in the association and so advised him.

The trial court found that respondent was never expelled, suspended, dismissed, resigned, or retired voluntarily from the services of the County of Los Angeles or from appellant association; that respondent was not actually inducted into the service of the state although his name was placed on the rolls; that respondent has a vested right to the benefits provided by the terms of the constitution and by-laws of the association as they existed at the time he was permanently and totally disabled; that the association could not alter the constitution and by-laws without respondent's consent subsequent to the occurrence of his disability so as to deprive him of the benefits to which he was then entitled; that he is and was a member of the appellant association; and that the constitution and by-laws do not contemplate the cessation of membership in the association when the connections with county service are severed by reason of the occurrence of a total and permanent physical disability, but contemplate that the disabled members shall continue to draw sick benefits provided for therein during the period of their disability.

It is conceded by appellant that respondent "did not voluntarily resign from the Motor Patrol nor from the service of the County of Los Angeles" but it is argued that he was dismissed from the service within the meaning of the section of the by-laws above quoted. It is contended that the term "dismissal", as used in the by-laws, is not limited to any type of dismissal; that if a person is dismissed for any cause whatever his membership in the association ceases, and his rights to any benefits therein simultaneously terminate; and that respondent ratified and confirmed his dismissal by filing his application with the board of retirement. Appellant relies upon Ulmer v. Minster, 16 Misc. 42, 37 N.Y. S. 679.

It is further argued that even though respondent may not have been legally dismissed from the service, the by-laws adopted April 5, 1932, providing that upon any person or group of persons being inducted into any other service, his or their membership in the association shall cease as of the date of the induction, would apply, and respondent, as well as the group of persons above named, having been inducted into the state motor patrol service, were no longer entitled to any benefits from the association, citing Stohr v. San Francisco Musical Fund Society, 82 Cal. 557, 22 P. 1125; and Bowie v. Grand Lodge of Legion of the West, 99 Cal. 392, 34 P. 103.

It is further claimed that the association being voluntary and unincorporated, the constitution and by-laws constituted the entire contract between the parties and that the same rules are not applicable to it as are applicable to corporations, citing Levy v. Magnolia Lodge, I. O. O. F., 110 Cal. 297, 42 P. 887. It is therefore argued that under the by-laws respondent expressly agreed that any by-laws adopted in the future would be binding upon him regardless of their reasonableness.

[1] It is clear from the evidence, as contended by respondent, that respondent was, under the by-laws of appellant association at the time he became a member thereof, a member of the motor patrol and a regular civil service appointee, acting as a peace officer of Los Angeles county and actually so employed; that he paid the necessary dues therein and complied with all of the requirements essential to its membership, and was entitled to the benefits thereof. The by-laws, at the time respondent's disability occurred, specifically provided that "Any member of this association who, by reason of sickness or disability, may be rendered incapable of performing his or her regular duties, when such sickness or disability shall have continued for more than five (5) days from the date on which such member does not draw regular salary on account thereof, shall receive and be paid from the sick and disability fund the following benefits: Beginning on the first day that such member does not draw regular salary on account of sickness or disability, such member shall be paid * * *; after that time, and still being unable on account of such sickness or disability to return to and perform his regular duties, such sick or disabled member shall be paid at the rate of Forty Dollars ($40.00) per month during the remainder of such sickness or disability. * * *"

Appellant's position is that respondent must be a member of the association all the time he is drawing such benefits; that to be a member thereof he must then be in the county service; and that respondent, having been dismissed from the service, was no longer a member of the association. The only provision of the by-laws in this regard is that membership shall cease upon the resignation or dismissal of the member from the service of the county. It is apparent, and appellant concedes, that respondent did not resign. We find no record or facts sufficient to constitute a dismissal of respondent (within the meaning of that term as used in the by-laws) from the service of the county. Respondent was, at the time of the injury, in such service, and was permanently disabled while so employed. It would be unreasonable to contend that the parties intended that if any member of the association became totally and permanently disabled, and by reason thereof he was unable to render services to the county, his membership in the association and its liability to pay benefits ceased merely because he was no longer able to render services to the county. His eligibility or ineligibility ceased to be a factor after the disability since the provision for benefits applied upon the happening of such contingency and continued definitely "during such sickness or disability".

Without defining respondent's particular status after his service with the county was severed by reason of his permanent total disability, it is sufficient to say that he was not dismissed from such service nor did he resign therefrom. Therefore, the quoted portion of the by-laws was ineffective to cause a cessation of his membership in the association. In this respect the finding of the trial court must be sustained.

[2] We will next consider the effect of the by-laws adopted in respect to the induction of any person or group of persons into another public service, and its effect upon respondent's right to receive benefits from appellant association. It becomes im-

mediately apparent that respondent did not apply to be inducted into any other service. The board of supervisors abolished the motor patrol department and on that date the respondent's name, together with the names of other members thereof, was stricken from the rolls of the civil service employees of the county and transferred to the rolls of the state. Respondent was still permanently disabled, which fact was well known by the board, appellant association, and the bureau of personnel of the state. He never performed any service for the state nor received any compensation from it. The trial court's finding that respondent was never legally inducted into that service must be upheld. This conclusion is fortified by his unsuccessful attempt to receive a retirement allowance. See Lamb v. Board of County Peace Officers Retirement Commission of Los Angeles County, 29 Cal.App.2d 348, 84 P.2d 183.

It must therefore follow that respondent was not one of the group of persons which was inducted into the service of the state within the meaning of the by-law. The question whether respondent's right to benefits was a vested right, of which he could not be divested by such by-law, becomes unnecessary to determine, and causes the authorities cited by appellant to become inapplicable.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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46 Cal.App.2d 285

THOMPSON v. STOAKES et al.

Civ. 11517.

District Court of Appeal, First District,
Division 1, California.

Aug. 4, 1941.

Hearing Denied Oct. 2, 1941.

1. Principal and agent 🔑48

An agent is duty-bound to disclose to his principal all material facts and circumstances of the transaction handled by him.

2. Principal and agent 🔑48, 69(1)

An agent must exercise the utmost good faith and must acquire no secret interest adverse to his principal, and he cannot lawfully make a secret personal profit out of the subject of the agency.

3. Principal and agent 🔑69(5)

An agent who conceals his interest in property sold to principal is liable to principal for all secret profits made by agent.

4. Principal and agent 🔑69(5)

Where agent falsely represents figure at which property can be purchased and then purchases it himself at a lower figure, charging principal larger price and pocketing the difference, he will be compelled to disgorge the secret profit, and fact that principal was willing to pay the larger amount, or that property may have been worth such amount, is immaterial.

5. Principal and agent 🔑78(8)

In principal's action against agents for amount of secret profits made by agents on exchange of principal's residence for apartment house, price paid by principal would be computed by ascertaining cash value of residence plus amount of mortgage on apartment house which principal was required to assume as part consideration for exchange.

6. Principal and agent 🔑78(6)

In principal's action against agents for amount of secret profits made by agents on exchange of realty, evidence that agreement executed by principal stated that she was to exchange her property for property "controlled by" partnership with which agents were connected, and required principal to deed her property to partnership, but that agreement also contained several references to partnership as agent, and that principal, on inquiry, was told by agents that it was necessary for her to give deed to partnership to obtain loan secured by mortgage on principal's property, which loan principal needed to consummate exchange, authorized finding that principal did not know that partnership was acting as a principal in the transaction.

7. Principal and agent 🔑75

Circumstances which might put principal on inquiry when dealing at arm's length should not have that effect in transactions with a trusted agent.

8. Escrows 🔑8(1)

Where principal, believing that agents had consummated agreement for exchange of principal's property for third person's property, deposited deed in escrow, and deed from third person to partnership with which agents were connected was also placed in escrow with the same escrow holder, but the two escrows were entirely separate and principal was a party to only one of them, principal was not charged with imputed knowledge that partnership was acting as a principal in the transaction, so as to bar principal's recovery of amount of secret profits made by agents on exchange.

9. Escrows 🔑8(1)
Principal and agent 🔑177(1)

As between two innocent parties, notice to agent of one is notice to principal, but as between principal and fraudulent agent, notice of another agent should not be imputed to principal, and this rule applies where the notice in question is the notice of an escrow holder.

10. Evidence 🔑113(16)

In principal's action against agents for amount of secret profits made by agents on exchange of realty, refusal to permit experts to testify on direct examination as to how much principal's property sold for subsequent to exchange was not erroneous.

11. Evidence 🔑113(16), 142(1)

On direct examination, witnesses called to testify regarding value of certain property may not testify as to particular transactions such as sales of similar or of the same property.

12. Appeal and error 🔑1058(2)

In principal's action against agents for amount of secret profits made by agents on exchange of realty, refusal to permit experts to testify on direct examination regarding how much principal's property sold for subsequent to exchange was not prejudicial to agents where experts testified at length as to value of property.

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Anita H. Thompson against Milton V. Stoakes and others, to recover secret profits allegedly made by defendants while acting as plaintiff's agent. From a judgment for plaintiff, defendants appeal.

Affirmed.

Breed, Burpee & Robinson, of Oakland, for appellants.

J. W. O'Neill, of Oakland, for respondent.

PETERS, Presiding Justice.

Defendants Stoakes and Osmundsen are partners engaged in the real estate business in Oakland under the name of Highland Realty Co. Defendant Jenkins is a real estate salesman employed by the partnership. Plaintiff, Anita H. Thompson, brought the present action to recover from defendants a secret profit alleged to have been made by them in a real estate transaction in which defendants represented plaintiff as agent. From a judgment for $2,494, based on a jury verdict, the defendants appeal.

Disregarding all conflicts in the evidence, and giving to the evidence of respondent the weight to which it is entitled in an appellate court, there can be no doubt that the evidence produced by respondent supports the implied finding of the jury that appellants committed a fraud upon respondent. Respondent owned, free from all encumbrances, a three-bedroom house in Piedmont which she valued at $7,500, and for which, some fourteen years before, she had paid $9,750, and which was rented for $60 per month. She desired to trade this house for an equity in a small apartment house. Appellants, as her agents, sought to secure such a trade for her. On July 12, 1939, appellant Jenkins told respondent that he had discovered a four-unit apartment house owned by a Mrs. Anderson; that Mrs. Anderson desired to secure a three-bedroom house; that the apartment was subject to a $7,200 encumbrance; that he thought he could secure a trade by getting Mrs. Anderson to accept the house, and respondent to accept the apartment subject to the encumbrance; that Mrs. Anderson wanted $15,000 for the apartment house. When respondent questioned Jenkins as to the value of the apartment house, he stated, "Mrs. Thompson, I could look the town over and I couldn't find a better buy for you than that house at $15,000." On July 13, 1939, respondent told Jenkins she would take the apartment house if Mrs. Anderson would take her house at $7,500. On the very next day, on July 14, 1939, according to Jenkins' testimony, he secured from Mrs. Anderson an exclusive option conferring upon the Highland Realty Co. the right to purchase the Anderson property for a total amount of $11,400. Admittedly, this fact was never communicated to respondent. On the day the option was secured Jenkins learned that the mortgage on the Anderson property was for $7,519.31 instead of $7,200 as previously represented. On July 15, 1939, respondent had two meetings with Jenkins. In the first, he told her the mortgage to be assumed was in the larger amount, and that respondent would have to pay $375 to the Highland

Realty Co. as commission for selling her house. The commission was based on 5 per cent of $7,500. Respondent refused to go on with the deal if she had to assume the larger mortgage. Jenkins again represented that the Anderson property was fully worth $15,000. Respondent refused to go ahead on the basis of the larger mortgage. Thereupon, Jenkins suggested that a $500 mortgage be placed on the respondent's property, and that this would more than take care of the increase in the Anderson mortgage and would give respondent the cash with which to pay the Highland Realty Co. its commission. He told respondent that Mrs. Anderson would have to accept this proposition. Later the same day Jenkins returned with a form of exchange agreement. This agreement was partly typewritten and partly printed. It provided that respondent agreed to exchange her property for the apartment house in question. Mrs. Anderson's name did not appear thereon. In the space where the apartment house property was described, the agreement had the words, "owned by" printed thereon, but this was crossed out and the words, "controlled by Highland Realty Co." were typed above. Under the terms of this agreement, respondent was to trade her home for the apartment and assume the $7,519.31 mortgage, and respondent was to receive $500 in cash. Thus, the price of the apartment house to respondent was the value of her home, fixed by her, and by the Highland Realty Co. in its agreement for a commission, at $7,500, plus the mortgage of $7,519.31, less the $500 credit, making a total of $14,519.31. The agreement further provided that the agent and broker were released from all responsibilities regarding valuations; that the principals had each investigated the properties to be exchanged; that Highland Realty Co. was authorized to act as agent for all parties and accept a commission from each; that respondent agreed to pay her agent, The Highland Realty Co., $375 commission for its services. Respondent testified that when she observed that Mrs. Anderson's name did not appear on the agreement and that the property was described as "controlled by" Highland Realty Co., she asked Jenkins about it; that he told her that Highland Realty Co. had an exclusive listing of the property; that this was the meaning of the words "controlled by" Highland Realty Co.; that they were acting for Mrs. Anderson in the transaction. She also asked Jenkins why she was to deed her property to Highland Realty Co. instead of to Mrs. Anderson. Jenkins told her this was necessary in order to place upon respondent's property the $500 mortgage. With this explanation, she signed the agreement. That same day Jenkins took respondent to the title company to arrange the escrow. She was there requested to sign a deed to her property naming appellant Stoakes and his wife as grantees. When she asked Jenkins as to the identity of Stoakes she was told that he was one of the owners of Highland Realty Co., and that it was necessary to take the deed in this form in order to take care of the $500 mortgage, and that after this was done her property was to be turned over to Mrs. Anderson. Respondent thereupon entered into an escrow numbered 269096. The escrow instructions contained substantially the same provisions set forth in the exchange agreement. Apparently the transaction by which appellants secured title to the Anderson property was handled by the same title company in an escrow numbered 269100. Respondent testified that after the deal was closed she took possession of the apartment house; that Mrs. Anderson had left some of her belongings therein; that, while cleaning the apartment formerly occupied by Mrs. Anderson, she found a copy of a document which disclosed that Mrs. Anderson had sold the apartment house to the realty company for $11,400; that she immediately got in touch with appellant Stoakes and told him she believed she had been "defrauded"; that he stated, "Don't use the word defrauded, just say you were high pressured, I don't like the word defrauded"; that, thereafter, she had several meetings with appellants; that, being unable to secure a satisfactory settlement of the matter, she instituted the present proceeding. The theory of respondent is that the difference between the $11,400 paid for the Anderson property by defendants, and the $14,519.31 charged her for the property, or $3,119.31, represents a secret profit which the agents should disgorge. In the complaint she prayed for $3,619, which does not allow for the $500 credit. In her brief, however, it is conceded that the correct figure is $3,119.31. This last figure is based on the assumption that respondent's residence had a value of $7,500. Since the verdict of the jury was for $2,494, the jury must have placed a lower valuation on that property. Since respondent has not appealed, the propriety of the lower figure need not be discussed.

[1-5] It is elementary, of course, that an agent is duty-bound to disclose to his

principal all material facts and circumstances of the transaction handled by him; that the agent must exercise the utmost good faith; that he must acquire no secret interest adverse to his principal; that he cannot lawfully make a secret personal profit out of the subject of the agency; that if an agent conceals his interest in the property sold he is liable to his principal for all secret profits made by him; that where an agent falsely represents the figure at which property can be purchased and then purchases it himself at a lower figure, charging his principal the larger price and pocketing the difference, he will be compelled to disgorge the secret profit; that the fact that the principal was willing to pay the larger amount or that the property may have been worth the amount charged the principal, is immaterial. Langford v. Thomas, 200 Cal. 192, 252 P. 602; Williams v. Lockwood, 175 Cal. 598, 166 P. 587; Calmon v. Sarraille, 142 Cal. 638, 76 P. 486; Whiting v. Delozier, 82 Cal.App. 525, 255 P. 861; see cases collected in 1 Cal.Jur., p. 788, et seq. In the present case, the principal, instead of paying cash, turned in her residence property and assumed a mortgage on the apartment. She urges that, under such circumstances, the price paid by her is to be computed by ascertaining the cash value of the property turned in by her, plus the amount of the mortgage. This theory is undoubtedly sound, and is supported by Langford v. Thomas, supra.

Appellants do not challenge these well-settled principles, but contend that they have no application to the facts of this case. They urge that if the principal knows that the agent is himself acting as a principal in the transaction he is without right to hold the agent for a profit made by him, and that the evidence shows that respondent had actual, as well as constructive, knowledge that appellants owned the Anderson property.

[6, 7] So far as actual knowledge is concerned, it is contended that the exchange agreement signed by respondent, disclosed that Highland Realty Co. was acting as a principal in the transaction. The general provisions of the agreement have already been summarized. While it is true that the agreement states that respondent is to exchange her property for the apartment "controlled by" Highland Realty Co., and that Mrs. Anderson's name does not appear thereon, and, while it is also true that the agreement required her to deed her property to the Highland Realty Co., the agreement also contains several references to the Highland Realty Co. as agent, and, furthermore, it contains a provision authorizing the Highland Realty Co. to act as agent for all parties, and to accept a commission from both parties. Moreover, as already pointed out, before respondent signed the agreement, in response to her question as to what the words "controlled by Highland Realty Co." meant, she was told by Jenkins that the firm had an exclusive agency on the Anderson property, and when she asked why she was not deeding her property to Mrs. Anderson she was told that this was necessary to enable the Highland Realty Co. to place the $500 encumbrance against her property. It would seem too plain to require further comment that the jury was not required to find that by the terms of the exchange agreement respondent was informed that Highland Realty Co. was acting as a principal in the transaction. Admittedly, and the agreement expressly so provided, the Highland Realty Co. was being paid a commission to act as respondent's agent. Respondent was entitled to place trust and confidence in Jenkins. Circumstances which might have put her on inquiry had she been dealing at arm's length, should not have that effect in transactions with a trusted agent. In fact, it seems quite clear to us that the jury was entitled to believe, as it did, that the very form of the exchange agreement, when coupled with the representations of Jenkins, was calculated to deceive the respondent, and was part of the plot to defraud her.

Appellants next contend that respondent had constructive knowledge of the facts by reason of the escrow instructions. It is urged that the title company, as escrow holder, acted as respondent's agent, and that notice to the agent is notice to the principal. It is therefore urged that respondent is charged with constructive notice of all the papers in escrow. The evidence shows that, in connection with this transaction, there were two escrows handled by the title company. One, numbered 269096, was the escrow in which respondent placed her deed. The other escrow, numbered 269100, was the escrow between Highland Realty Co. and Mrs. Anderson. There is no evidence in the record that respondent was a party to escrow 269100—in fact, the inference is that she was not. The instructions in that escrow were not introduced into evidence. It is true that early in the trial counsel for respondent stated to the jury that respondent had placed her deed in escrow 269100, but it is obvious that this statement was in error. The record shows that later in the trial this error was cleared up. Apparently the title company placed all the money involved in the two transactions in escrow 269100, and paid respondent the $500, less the various deductions, out of that escrow. But the fact remains that respondent deposited her deed and signed instructions in escrow 269096, and was never a party to, nor did she sign instructions in, escrow 269100. The implied finding of the jury that there were two separate escrows, and that respondent was not a party to escrow 269100, is amply supported by the evidence.

[8, 9] Under these circumstances, it is obvious that the doctrine of imputed knowledge has no application to the facts. As a matter of substantive law, where a positive fraud has been perpetrated by one agent, appellants herein, such fraud does not become non-actionable because of the knowledge of another agent, the escrow holder, of facts not communicated to the common principal. As between two innocent parties, notice to the agent of one is notice to the principal, but, as between the principal and the fraudulent agent, notice of another agent should not be imputed to the principal. It is true that in Early v. Owens, 109 Cal. App. 489, 293 P. 136, the court held that an escrow holder was the agent of both parties to the escrow, and that knowledge of the agent was imputed to the principals. The case seems to be predicated on the assumption that all parties to an escrow have the legal right to examine all the papers deposited in the escrow. But, at most, the rule of that case simply means that all parties to an escrow are chargeable with notice of the papers in that escrow. Where there are two escrows, the doctrine of imputed knowledge has no application to documents deposited in the escrow to which the party sought to be charged with notice was not a participant. In Anderson v. Geo. L. Barney Co., Inc., 1 Cal.App.2d 340, 36 P.2d 717, the same court that had written the Early case, supra (in fact, the same justice is the author of both opinions), held that the rule of the Early case had no application where there are two escrows, and where the facts disclosing the fraud of the real estate agent do not appear in the escrow to which the complaining principal is a party. That is exactly the situation involved in the present case. Moreover, it should be pointed out that in Early v. Owens, supra, the appellate court expressly held that the finding that the principal had actual knowledge was supported by the evidence.

[10-12] The last major contention of appellants is that the trial court committed error in excluding evidence of the price at which they sold respondent's property after the transaction here was closed. Respondent placed a value of $7,500 on her property. This was also the value placed upon the property by appellants because they charged her a commission based upon that figure. Respondent brought the present action for the purpose of recovering the difference between the price appellants paid for the Anderson property and the amount they charged respondent. Since respondent paid the price not in cash but with her residence property, appellants argue that the value of the residence was in issue in determining the price paid by respondent for the apartment house. The trial court sustained objections to several questions asked by appellants on direct examination of their own witnesses as to the price at which the appellants had sold the residence property after securing title thereto. The refusal of the trial court to permit expert witnesses to testify on direct examination as to how much the property sold for subsequent to the transaction here involved was not error. Whatever the rule may be in other states, the rule is well settled in this state that on the direct examination of witnesses called to testify as to value, they cannot be permitted to testify as to particular transactions, such as sales of similar or the same property. Estate of Ross, 171 Cal. 64, 151 P. 1138; Central Pac. R. Co. v. Pearson, 35 Cal. 247; Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 284 P. 1072; see, also, 10 Cal.Jur., p. 1027. Appellants attack that rule and contend that it should be limited to sales of other properties, but should not apply to sales of the very property the value of which is in issue. The above cases stated the rule as applying to such a situation. Moreover, the record shows that experts for appellants testified at length as to value, so that the exclusion of this evidence, even if erroneous could not have prejudiced appellants.

The other contentions of appellants are without merit.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

46 Cal.App.2d 278

BROPHY v. INDUSTRIAL ACC. COMMISSION.

Civ. 11650.

District Court of Appeal, First District, Division 1, California.

July 31, 1941.

1. Attorney and client ⚷48

Where order to show cause, which was the pleading on which the industrial accident commission was required to predicate its claim to jurisdiction in proceeding in which the commission suspended an attorney from practicing before the commission for a 30-day period, was not served on attorney until five minutes after time that the order was returnable, the order had spent its force before it was served and commission secured no jurisdiction over the attorney.

2. Contempt ⚷40
Witnesses ⚷300

A contempt proceeding is not a "civil action" but is a "criminal proceeding" of a "summary" character and in which the accused cannot be compelled to be sworn as a witness.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Action", "Criminal Proceeding" and "Summary".

3. Witnesses ⚷300

An accused can be compelled to be sworn and testify in a proceeding involving his right to practice law.

4. Action ⚷48(1)

The industrial accident commission was without authority to join contempt proceeding against attorney based on attorney's failure to comply with the commission's rule relating to filing of medical reports in compensation case, with disciplinary proceeding against the attorney based upon such failure, and the two proceedings should have been segregated. St.1937, p. 288, § 4907; p. 292, § 5307.

5. Attorney and client ⚷38

Where the industrial accident commission joined contempt proceedings against attorney based on attorney's failure to comply with commission's rule relating to filing of medical reports in a compensation case, with disciplinary proceedings against the attorney based on such failure, an order of the commission suspending the attorney for 30-day period because of his refusal to be sworn and testify in the proceeding was void, since attorney had constitutional right to refuse to be sworn as a witness in the contempt proceeding, and the procedure followed by the commission necessarily deprived the attorney of hearing to which he was entitled on the disciplinary proceeding. St.1937, p. 288, § 4907; p. 292, § 5307.

Proceeding by D. R. Brophy, an attorney at law, against the Industrial Accident Commission, to annul an order of the commission suspending D. R. Brophy from practicing before the commission for a period of 30 days.

Order annulled.

Burbank, Laumeister & Littler, of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondent.

PETERS, Presiding Justice.

By this proceeding D. R. Brophy, an attorney at law, seeks to annul an order of the respondent Industrial Accident Commission entered on January 3, 1941, suspending him from practicing before the Commission for a period of thirty days. The order further provided that, should petitioner, on a future hearing, continue to refuse to be sworn and answer questions relating to his fitness to practice before the Commission, and to his failure to comply with a certain rule of the Commission, he should thereupon be permanently disbarred from practicing before the Commission.

The circumstances leading up to the issuance of the challenged order are as follows:

On October 16, 1940, the Commission, purporting to act under the provisions of section 5307 of the Labor Code, St.1937, p. 292, adopted a rule, designated as rule 18, subdivision 3. That rule reads as follows:

"In all cases where an industrial injury occurs, the injured employee and his authorized agents, including attending or examining physicians and attorney, shall be given access to all medical reports, hospital records and x-rays whether in the possession of the attending or examining physicians, the employer, the hospital, or the insurance carrier, and they may make copies of the same. The employer or insurance carrier shall file promptly with the Industrial Accident Commission all reports of all physicians appointed by the employer or insurance carrier and send one copy of each of said reports to the applicant's attorney or other representative, and if there be no attorney or other representative, to the employee. Medical reports and x-rays, obtained by or on behalf of the injured employee, shall likewise be made available to the employer, or his insurance carrier. All such reports shall be filed with the Industrial Accident Commission and a copy thereof with the employer or his insurance carrier. The employer and insurance carrier and the employee shall, on request of the Industrial Accident Commission or referee thereof, file all x-rays with the Industrial Accident Commission."

On November 19, 1940, one Arvin E. Rose filed with the Commission an application against his employer, J. H. Mohr, Incorporated, and its insurance carrier, the Industrial Indemnity Exchange, claiming compensation and disability benefits for an alleged industrial injury. D. R. Brophy appeared in that proceeding as attorney for the insurance carrier.

On December 4, 1940, P. H. McCarthy, Jr., attorney for Rose, wrote a letter to the Commission requesting that he be furnished with the insurance carrier's medical reports on Rose and also with certain X-rays. On December 6, 1940, the chief of the compensation bureau of respondent wrote a letter to McCarthy stating that he knew of no reason why the carrier would not comply with the request. A copy of this letter was sent to petitioner. Under date of December 12, 1940, Brophy wrote to the Commission, and a copy of the letter was sent to McCarthy, to the effect that the X-rays had been furnished to the applicant's doctor many weeks before December 6th, and further stating:

"Relative to filing and serving medical reports on the applicant, may we advise that we believe such premature disclosure is contraindicated in this particular case for reasons that need not be stated in this communication. We believe our reasons would be approved and acceptable to the Commission as the rule, being general in its terms could not maintain, within itself, specific exceptions. We trust that you will not prejudge our action in the premises."

The hearing of Rose's application for compensation came before the referee of the Commission on December 16, 1940. At that hearing, petitioner produced, served and filed all of the medical reports in his possession. At 2:35 p. m. on that day respondent caused to be served on petitioner an order to show cause addressed to petitioner and to his client, the Industrial Indemnity Exchange. The order to show cause was supported by an affidavit of McCarthy, setting forth in general terms the facts above-mentioned. This order was made returnable on December 16, 1940, at 2:30 p. m., five minutes before it was served. This order directed Brophy and the Industrial Indemnity Exchange to show cause (1) why they should not be punished for contempt in refusing to furnish the medical reports; (2) why their right to appear before the Commission should not be suspended under section 4907 of the Labor Code; and (3) why they should not be required to reimburse the applicant for his expenses and costs occasioned by their refusal to comply with the rule.

The hearing on this order to show cause was continued to December 27, 1940. Before this date, in fact on December 16, 1940, Brophy, as already stated, had served and filed the requested medical reports. At the continued hearing Brophy filed an answer to the order to show cause, denying its material allegations, and denying statements contained in the McCarthy affidavit. There was introduced into evidence the medical reports, McCarthy's letter of December 4, 1940, the Commission's letter to Brophy of December 6, 1940, and Brophy's reply of December 12, 1940, and several other letters not necessary to describe. The referee then called Brophy and requested that he take the stand and be sworn. Counsel for Brophy objected on the ground that "this is a criminal procedure and he cannot be made to testify against himself". The referee again ordered Brophy to be sworn, but, on advice of counsel, the witness refused to comply with the request. The referee then told the witness that the objection was not sound because "this is a disciplinary proceeding as well as contempt proceeding", and that in a disciplinary proceeding an accused cannot properly refuse to be sworn as a witness. After some discussion between the referee and the attorney for Brophy, the referee again directed the accused to be sworn, and again, on advice of counsel, he refused on the ground that the proceeding was criminal in nature. The referee then stated that: "In view of the fact that no other witnesses are present, no other witnesses apparently subpoenaed in these proceedings, which is one of contempt against the Industrial Indemnity Exchange and/or Mr. Brophy, and one of disciplinary action, to-wit, suspension of Mr. Brophy from practice before this Commission. * * * The matter is submitted."

Thereafter, the Commission made the order challenged in this proceeding. The order is supported by certain findings of fact. The Commission finds the facts set forth above, and particularly finds that on the hearing of the order to show cause Brophy refused to be sworn as a witness and refused to answer any question relating to his fitness to practice before the Commission; that such refusal was misconduct; that such misconduct was calculated to and did impede the Commission in the exercise of its jurisdiction, and in determining whether Brophy was a fit and proper person to practice before the Commission. By its order, based on the above findings, it is provided that Brophy is suspended for thirty days; that, upon the further hearing of the order to show cause, should he fail to appear, or refuse to be sworn, or refuse to answer relevant questions relating to his fitness to practice before the Commission, he should be disbarred from further practice before the Commission.

There can be no doubt that the order of suspension was based solely on the refusal of Brophy to be sworn and testify as a witness at the hearing of December 27, 1940, and was not based on the failure of the petitioner to comply with rule 18, supra. This necessarily follows from the express language used in the findings and order. Moreover, the respondent, in its brief, concedes that this is the proper interpretation of the order. It is there stated: "It is the position of respondent Commission that Mr. Brophy was suspended for his refusal to testify with regard to what appeared to the Commission to be a violation of its rule. * * *"

Petitioner first challenges the validity of rule 18, supra. We do not find it necessary to pass on this contention at the present time. In view of the fact that the Commission concedes that its order is predicated upon the refusal of petitioner to be sworn as a witness, and not upon his failure to comply with the rule, it is not necessary to pass upon the question of the validity and interpretation of the rule in this opinion.

The respondent also contends that it has disciplinary power over those who practice before it by virtue of section 4907 of the Labor Code. That section provides that: "The privilege of any person, including attorneys admitted to practice in the Supreme Court of the State to appear in any proceeding as a representative of any party before the commission, or any of its referees, may, after a hearing, be removed, denied, or suspended by the commission for a violation of this chapter *or for other good cause.*" (Italics added.) It is admitted that the respondent's power to discipline Brophy must be found in the clause conferring such power "for other good cause". Petitioner argues that this section is too uncertain to be valid, and argues that such a general grant of power is void. The Commission contends that the statute is valid. We do not find it necessary to pass on this question at the present time, because there are other reasons why, in our opinion, the challenged order is void.

[1] In the first place, the order to show cause was, by its very terms, made returnable at 2:30 p. m. on December 16, 1940. It is an admitted fact that it was not served on petitioner until 2:35 p. m. of that day. It would appear that the order to show cause had spent its force before it was served. Since the order to show cause is the pleading upon which the Commission must predicate its claim to jurisdiction, it would seem that no jurisdiction had been secured over petitioner.

[2-5] In the second place, and of far more importance, the order to show cause involved two separate matters. Petitioner was ordered to show cause why he should not be punished for contempt in refusing to furnish the medical reports, and, secondly, why his right to appear before the Commission should not be suspended. In so far as the contempt proceeding is concerned, it is clear that this was a criminal proceeding in which the petitioner, as the accused, could properly refuse to be sworn as a witness. The rule is well-settled that a contempt proceeding is not a civil action, but is a proceeding of a criminal and summary character, and in which the accused cannot be compelled to be sworn as a witness. Hotaling v. Superior Court,

191 Cal. 501, 217 P. 73, 29 A.L.R. 127; Ex parte Gould, 99 Cal. 360, 33 P. 1112, 21 L.R.A. 751, 37 Am.St.Rep. 57; Boyd v. United States, 116 U.S. 616. Respondent concedes that an accused cannot be compelled to testify against himself in a contempt proceeding, but urges that the order to show cause also involved a disciplinary proceeding, and contends that the accused can be compelled to be sworn and testify in such a proceeding involving his right to practice law. This is undoubtedly the law. In re Vaughan, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858; Johnson v. State Bar, 4 Cal.2d 744, 52 P.2d 928; Fish v. State Bar, 214 Cal. 215, 4 P.2d 937. However, this does not constitute a sound answer to the contentions of petitioner. As already pointed out, at the hearing of December 27, 1940, the referee made no attempt to segregate the two charges. On two different occasions he designated the proceeding as both a contempt and a disciplinary proceeding. He ordered the petitioner to be sworn. Petitioner refused on the ground that the proceeding was one for contempt in which he could not be compelled to be sworn. The referee took the position that, since it was also a disciplinary proceeding, the objection was not sound. It seems too clear to require further discussion that to fail to segregate the two proceedings, and to attempt to unite them, exceeded the powers of the respondent. As already pointed out, the order of suspension is based solely on the failure of petitioner to be sworn. The Commission, by joining a proceeding to suspend petitioner with the contempt, both being based on the same charges, could not take from him the right to refuse to testify. It follows, therefore, that the adjudication here challenged based on such refusal is void. Any other rule would be highly unfair to the accused. In the present case, when petitioner was ordered to be sworn he was told that the hearing was dual in nature. He was placed in the position that, if he refused to be sworn, the referee would take the position, which he did take, as evidenced by the order thereafter made, that his failure to be sworn and testify would justify an inference of guilt in the disciplinary proceeding, and that he would be subject to suspension. On the other hand, if he obeyed the order and did testify, he was in jeopardy of being fined or sent to jail, or both, for the contempt. Such procedure necessarily deprived petitioner of the hearing to which he was entitled on the disciplinary proceeding. No witness other than petitioner was called on the hearing. Obviously, it was the intent of the referee to prove, if he could, both the contempt and disciplinary charge by the testimony of petitioner. It is the same as if the petitioner had been sued civilly and had been prosecuted criminally based on charges involving the same transaction, and the trial court ordered both proceedings to be heard together, without segregation. Such procedure is not countenanced by the law. In adopting such procedure the Commission clearly exceeded its jurisdiction, and violated the constitutional rights of petitioner.

The order of January 3, 1941, is annulled.

I concur: WARD, J.

KNIGHT, Justice (concurring).

Inasmuch as the referee at the opening of the proceedings initiated by the order to show cause stated that the proceeding was one in contempt as well as a disciplinary proceeding brought under the authority of section 4907 of the Labor Code, and the commission as respondent herein concedes that the order of suspension is based solely on the refusal of petitioner to be sworn and testify, and not on his refusal to file the medical reports in compliance with subdivision 3 of rule 18, it seems evident that the order of suspension should be annulled, for under the authorities cited in the majority opinion a person cited for contempt may not be compelled to be sworn and to testify in a proceeding initiated by such a citation. In my judgment, however, under constitutional and statutory enactments, it was entirely within the rule making power of the commission to adopt said rule, and under the provisions of article 20, section 21 of the Constitution the legislature was vested with full authority to enact section 4907 of the Labor Code in its present form, empowering the commission, in the exercise of its judicial functions, "for * * * good cause", to suspend temporarily or permanently the privilege of any person to practice before it; and that the commission is entitled to a decision to that effect in the present proceeding, for the reason that manifestly in view of what has here happened, the question of the right of the commission to enforce both the rule and the statute is a matter of vast importance to the orderly and effective administration of the workmen's compensation law.

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46 Cal.App.2d 257

ROSEBOROUGH v. CAMPBELL et al.

Civ. 2737.

District Court of Appeal, Fourth District, California.

July 30, 1941.

1. Judgment 🔑161

Where notice of motion to set aside default and vacate default judgment was served and filed within six months after entry of default and judgment, and notice, as served and filed, was accompanied by copy of proposed answer and affidavits, there was sufficient compliance with statute respecting relief from judgments taken by mistake or excusable neglect, and trial court had jurisdiction to pass upon motion after expiration of six months' period mentioned in statute and could permit technical defects, if any, such as affidavits and copy of answer being sworn to before a justice of the peace in Massachusetts and not before a notary, to be corrected after expiration of six months' period. Code Civ.Proc. § 473.

2. Judgment 🔑153(2), 161

All that is required by statute respecting relief from judgments taken by mistake or excusable neglect is that application for relief be actually made and called to trial court's attention within six months after judgment was taken and that a copy of proposed answer be presented. Code Civ.Proc. § 473.

3. Judgment 🔑161

While an answer to a verified complaint must be verified at time of filing, there is nothing in statute respecting relief from judgments taken by mistake or excusable neglect which requires that copy of proposed answer which must accompany application for relief shall, at that time, be properly verified. Code Civ.Proc. § 473.

4. Judgment 🔑153(1)

When an application for relief from a default judgment is actually presented to trial court within prescribed time, it is sufficient even though such is done on the last day of the period before notice to adverse party has been or could be given. Code Civ. Proc. § 473.

5. Judgment 🔑153(1), 161

The only requirements necessary to give trial court jurisdiction to act on an application for relief against a default judgment are that application be actually presented to trial court and called to its attention within time prescribed by statute and that application be accompanied by a copy of proposed answer. Code Civ.Proc. § 473.

6. Judgment 🔑159

Where trial court had jurisdiction to pass upon application for relief against default judgment after expiration of the six months' period, the form and manner of proof that was necessary was then subject to rules of law other than those set forth in statute respecting relief from judgments taken by mistake or excusable neglect, and the court had a reasonable discretion respecting proof. Code Civ.Proc. § 473.

7. Judgment 🔑136

The statute respecting relief from judgments taken by mistake or excusable neglect should be liberally construed to the end that justice be done, and technical requirements, which were not put in statute by Legislature, should not be read into statute. Code Civ.Proc. § 473.

8. Judgment 🔑159

Where trial court had jurisdiction to pass upon application for relief from default judgment, at hearing on application the court could have received oral evidence which did not accompany original application and could have received and considered additional affidavits, especially when additional affidavits were merely corrections in form of original affidavits. Code Civ.Proc. § 473.

9. Judgment 🔑154

Plaintiff could not complain that defendant's notice of motion for relief against default judgment was served on plaintiff alone and not on codefendants where defendant was seeking relief against plaintiff and not against codefendants, and no codefendant was complaining, and plaintiff had not been injured. Code Civ.Proc. § 473.

10. Judgment 🔑163

It was not an abuse of discretion for trial court to set aside a default and vacate default judgment where proposed answer filed with notice of motion for relief against judgment set forth a good defense to complaint, irrespective of whether defense could be supported by evidence. Code Civ.Proc. § 473.

11. Judgment ⚿101(1)

A default judgment entered against defendant in her own name in action wherein she was not named in complaint as defendant and was served as Jane Doe was irregularly entered, where complaint, when judgment was entered, had not been amended as required by statute respecting when a party may be sued by a fictitious name, and pleadings, as they existed when judgment was entered, would not support judgment. Code Civ.Proc. § 474.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Joseph Roseborough, etc., against Myrna Campbell and others for personal injuries. From an order setting aside a default and vacating a default judgment which had been entered in favor of plaintiff and against Elizabeth P. Liljeholm, etc., plaintiff appeals, opposed by Elizabeth P. Liljeholm, etc.

Affirmed.

Ben B. Rubin, of San Diego, for appellant.

Withington, Cross, Proctor & Park, of Boston, Mass., and Gray, Cary, Ames & Driscoll, of San Diego (John M. Cranston, of San Diego, of counsel), for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order setting aside a default and vacating a default judgment which had been entered in favor of the appellant and against the respondent.

The action was one for personal injuries in which the drivers and owners of several automobiles were named as defendants. The respondent was not named as a defendant but was served as one of the Jane Does, although the complaint was never amended to set forth her true name.

On November 29, 1939, the respondent's default was entered by the clerk and on December 9, 1939, default judgment was entered against her. Notice of a motion to set aside the default and default judgment was served on May 24, 1940, and noticed for hearing on May 27, 1940, an order shortening time having been secured. On May 27, 1940, respondent's attorney presented the matter and moved the court to grant the relief sought. He then informed the court that appellant's counsel, who was not present, had requested a continuance in order that he might obtain a counter-affidavit. The court continued the hearing of the motion for one week and, thereafter, at the request of counsel for the appellant, continued the hearing to July 1, 1940. At that time an objection was made on behalf of the appellant to a consideration of the affidavits and answer, copies of which had been served and filed with the original notice of motion, on the ground that the affidavits had not been properly sworn to and that the copy of the answer was not properly verified. The court continued the hearing to July 15, 1940, for the purpose of allowing the respondent to file affidavits subscribed to before a notary public. On July 15, 1940, additional affidavits similar in substance to those previously filed but sworn to before a Massachusetts notary public were filed, and the motion was thereupon heard and granted. This appeal followed.

The appellant first contends that the court had no jurisdiction to make the order in question. It is argued that the affidavits and copy of the proposed answer which were served and filed in connection with the notice of motion were not sufficient and could not be considered by the court because they were sworn to before a justice of the peace in Massachusetts and not before a notary public; that since the complaint was verified and since the copy of this answer was not properly verified no copy of the answer was presented as required by section 473 of the Code of Civil Procedure; and that the court had no power to consider the affidavits and copy of the answer which were subsequently filed since these were not presented and filed within the six months' period allowed by section 473, C.C.P. This contention cannot be sustained for the following reasons.

[1] The notice of motion, as served and filed, was accompanied by a copy of the proposed answer and several affidavits. The copy of the answer and some of the affidavits had been sworn to before a justice of the peace in Massachusetts. The parties devote a considerable portion of their briefs to a discussion of whether such a verification and swearing was sufficient to

permit these papers to be used and considered in this proceeding, under various sections of the Code of Civil Procedure. It is unnecessary to consider the issue thus raised since it appears that section 473 was sufficiently complied with and the court, having jurisdiction, could permit purely technical defects of this nature, if any, to be corrected after the expiration of the six months' period provided for in section 473.

[2, 3] The appellant would have us read into section 473 much that is not there. It has been frequently held that all that is required by the portion of that section which is material here is that application for relief be actually made and called to the attention of the court within six months and that a copy of the proposed answer be presented. While another code section provides that the answer to a verified complaint must be verified this applies to the time of filing, and there is nothing in section 473 which requires that the copy of the proposed answer which must accompany the application shall, at that time, be properly verified. In Williams v. Thompson, 60 Cal.App. 658, 213 P. 705, 706, the court affirmed an order setting aside a default although the proposed answer to a verified complaint, which accompanied the motion, was not verified. The court there said: "It may fairly be presumed that when the court granted the motion, the answer filed would have been verified. If the answer, which pursuant to that order has been filed, is not verified, it would have been easy to establish the fact in preparing the record on this appeal."

[4] It has even been held that when such an application for relief is actually presented to the court within the prescribed time it is sufficient even though this be done on the last day of the period before notice to the adverse party has been or could be given. In Re Estate of Grivel, 208 Cal. 77, 280 P. 122, 124, the court said:

"To constitute an application, the action of the court must be invoked in some appropriate manner before the expiration of the prescribed period. Bell v. Krauss, 169 Cal. 387, 391, 146 P. 874; In re Morehouse, 176 Cal. 634, 169 P. 365; In re Yoder, 199 Cal. 699, 702, 251 P. 205. But, when this is done even though it be done on the last day of the period, and before notice to the adverse party is or could be given, it is nevertheless sufficient. Brownell v. Superior Court, 157 Cal. 703, 709, 710, 109 P. 91.

"In this case, as above pointed out, nothing is shown to warrant the conclusion that the party did not appear and move the court for the relief sought. On the contrary, all existing evidence tends to confirm the conclusion that it was done. This observation brings the case squarely within the holding of this court in Re Yoder, supra, wherein, at page 702 of 199 Cal. (251 P. 206), it is said: 'Though the petition did not come on for hearing until after the expiration of the six-months period, there is nothing in the record herein to indicate that said petition was not brought to the attention of the court below prior to the expiration of said six-months limitation. The "petition and motion" having been filed within said period and no showing having been made that the matter was not called to the attention of the lower court prior to the expiration of said period, it will be presumed that the application was seasonably made.'"

[5-9] The only requirements in such a case, in order to give the court jurisdiction to act, are that application for relief be actually presented to the court and called to its attention within the time prescribed and that the application be accompanied by a copy of the proposed answer. These requirements were here complied with and the court had jurisdiction to consider and pass upon the application after the expiration of the six months' period. The form and manner of the proof that was necessary was then subject to rules of law other than those set forth in section 473, and the trial court had a reasonable discretion in that connection. It has frequently been held that section 473 should be liberally construed to the end that justice be done, and there are no good reasons for reading into that section technical requirements which were not put there by the legislature. Affidavits and a verified copy of the answer were served and presented in connection with the notice of motion and if we assume that any technical defects existed in connection with the manner in which they were sworn to the court had the power and could properly permit such defects to be corrected after the time had expired, the court then having acquired full jurisdiction of the matter. The court could have received oral evidence which had not accompanied the original application had it desired, and

there is no reason why it could not receive and consider additional affidavits. This is especially true when these were merely corrections in the form of the original affidavits. The application for relief was here made and directly called to the court's attention within the time allowed, and no lack of jurisdiction appears. The appellant further contends that another jurisdictional requirement of section 473, Code of Civil Procedure, was not met, it being stated that the notice of motion was served on the appellant alone and not on the respondent's codefendants. The respondent was seeking relief against the appellant and not against his codefendants (Schart v. Schart, 116 Cal. 91, 47 P. 927) and, moreover, no codefendant is complaining and the appellant has not been injured. McDonald v. Severy, 6 Cal.2d 629, 59 P.2d 98. Moreover, there is no record here to sustain the appellant in this connection. The appeal is presented upon a bill of exceptions in which it does not appear that the codefendants were not served.

[10] Appellant's final contention is that the court abused its discretion in making the order from which this appeal is taken. In support thereof it is argued that the proposed answer which the court permitted to be filed is made up largely of hearsay statements and matters alleged upon information and belief, and that the same "presented no evidence upon which the court was authorized to exercise a legal discretion".

The complaint in this action alleged that at a certain time and place the drivers of five described automobiles so negligently operated these vehicles that the appellant, who was riding a motorcycle, collided with one of the five cars which was driven by one McQuaid. Another of these five cars was owned by this respondent and was being driven at the time, with her permission, by her son. The respondent was not present on that occasion and could not know of her own knowledge just what then occurred. In so far as this point is concerned we are concerned with a matter of pleading and not with evidence. The answer in question sets forth a good defense and we are not now concerned with whether or not it can be supported by evidence. No abuse of discretion appears.

[11] It may also be observed that the default judgment against the respondent was irregularly entered at a time when the complaint did not justify such a judgment. Although the complaint did not name the respondent as a defendant, after she was served as one of the Jane Does a judgment was entered against her in her own name without the complaint having been amended as required by section 474 of the Code of Civil Procedure, and the pleadings as then existed would not support that judgment. Baldwin v. Morgan, 50 Cal. 585; McKinlay v. Tuttle, 42 Cal. 570; Farris v. Merritt, 63 Cal. 118.

For the reasons given the order appealed from is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

MILLER v. McKINNON et al.

Civ. 11696.

District Court of Appeal, First District, Division 1, California.

Aug. 5, 1941.

Rehearing Denied Sept. 4, 1941.

Hearing Granted Oct. 2, 1941.

1. Appeal and error 🔑854(3)

Where grounds of general and special demurrers were separately stated and judgment for defendants entered pursuant to an order sustaining without leave to amend the demurrers to the complaint showed that the order sustaining the demurrers was in general terms, if demurrers were well taken as to any of the grounds stated therein, judgment was required to be affirmed.

2. Appeal and error 🔑236(2)

Plaintiff could not complain of an order sustaining demurrers without leave to amend where no leave to amend was ever requested.

3. Counties 🔑196(6)

Under statute making it imperative duty of district attorneys to maintain actions in behalf of the county to recover county funds illegally expended, a taxpayer alleging that district attorney after full knowledge of the facts refused to file an action in behalf of the county for the recovery of moneys alleged to have been illegally paid could not maintain in his own name an action against county supervisors and others with whom the county was joined as a party defendant to recover moneys alleged to have been illegally paid, since such an action must be instituted in the name of the county. Pol. Code, § 4005b.

4. Pleading ⚷254

Where taxpayer sought to recover from county supervisors and others moneys alleged to have been illegally paid as result of alleged conspiracy and court in sustaining a demurrer to third amended complaint granted leave to amend on condition that in filing the fourth amended complaint plaintiff should join as additional parties defendant all members of the board of supervisors who voted in favor of any motion to issue any of the county warrants referred to by the plaintiff in his action and taxpayer in fourth amended complaint failed to name all of members of board of supervisors, and there was no allegation disclosing reason why one member should not have been named as codefendant, order sustaining demurrer to fourth amended complaint and denying further leave to amend was proper. Code Civ.Proc. § 389.

5. Counties ⚷196(6)

A taxpayer's action to recover moneys alleged to have been illegally paid by county board of supervisors as result of alleged conspiracy could not be maintained against less than all of the board of supervisors on the ground that supervisors voting for the issuance of the warrants were joint tortfeasors and that the liability of joint tortfeasors is joint and several, since the alleged tort, if committed at all, was committed by the board which must be treated as one tort-feasor.

6. Counties ⚷196(6)

Where taxpayer sued in behalf of county to recover moneys alleged to have been illegally expended by the board of supervisors as result of alleged conspiracy, taxpayer could not refuse to name one of the members of the board of supervisors as a party defendant, since taxpayer was acting for benefit of all the taxpayers of the county and could not waive the right of the county to recover from the supervisor which he refused to name as a defendant.

7. Counties ⚷196(7)

In taxpayer's action in behalf of county to recover moneys illegally expended by board of supervisors in connection with the repair, alteration and enlargement of certain structures and equipment at a quarry owned and operated by the county, allegations that payments authorized to be made by the supervisors were exorbitant and that the claims were padded and included work never performed and materials never furnished on the job should have been supported by the items, bills, claims or warrants upon which general allegations were based, and taxpayer could not say that such information was not available to him where he alleged with exactness claims alleged to have been illegally paid.

Appeal from Superior Court, Santa Clara County; Warren V. Tryon, Judge.

Action by J. Lester Miller, as a citizen and taxpayer, against J. M. McKinnon and others, to recover on behalf of the county sums allegedly illegally expended by the Board of Supervisors in connection with the repair, alteration and enlargement of certain structures and equipment at a quarry owned and operated by the county. From a judgment for the defendants, plaintiff appeals.

Affirmed.

George F. Sharp, of Oakland, for appellant.

Louis Oneal, Maurice J. Rankin, and Duncan Oneal, all of San Jose, for respondents Lyle R. Nash and Thomas J. Gavin.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for respondent J. M. McKinnon.

Peckham & Peckham, of San Jose, for respondent E. P. Flood.

C. C. Coolidge, of San Jose, for respondent Emma Allegrini.

KNIGHT, Justice.

The plaintiff, J. Lester Miller, as a citizen and taxpayer of Santa Clara county, brought this action in his name to recover on behalf of the county approximately $60,000, which he alleged had been illegally expended by the board of supervisors in connection with the repair, alteration and enlargement of certain structures and equipment at a quarry owned and operated by the county; and he has appealed from the judgment in favor of the defendants entered pursuant to an order sustaining without leave to amend the demurrers interposed to the fourth amended complaint.

The parties defendant named in the fourth amended complaint were four members of the board of supervisors, the county purchasing agent, the superintendent of the quarry, Lyle R. Nash and Thomas J. Gavin, copartners doing business under the firm name of Nash Englehardt Silva Mfg. Co., and the County of Santa Clara. It appears from the allegations of the complaint that the construction work was done by the Nash firm and included the repair of bunkers, moving and repairing hoists, extending the power line, repairing a motor, building a tunnel and foundation, construction of a conveyor, and erecting a new steel tower; that the board of supervisors did not call for competitive bids to do the work, or to furnish the materials therefor, but merely ordered the Nash firm to proceed with the work as directed. It further appears that it took approximately a year to complete the improvements; that several times each month during the progress of the work the firm submitted bills for labor performed and materials furnished; and that thereupon warrants were drawn on the county treasury in favor of the firm in payment of said bills.

The fourth amended complaint set forth two causes of action. The first was directed against the Nash firm for the recovery of the sum of $42,151.90, which represented the total amount it received from the county, and is based upon the theory that the law required competitive bidding. Pol. Code, § 4041.18. The second cause of action was directed against all other defendants except the county and the Nash firm for the recovery of the sum of $17,847.68, and was based upon allegations to the effect that one of the defendant supervisors, J. M. McKinnon, the purchasing agent, the superintendent of the quarry, and the Nash firm, conspired to allow said firm to do the work and furnish the labor and materials without competitive bidding and at a grossly exorbitant price; that in furtherance of said conspiracy bills and invoices were accepted and paid which were "padded" and not itemized as required by law; and upon information and belief it was alleged that the other members of the board of supervisors voted for the issuance of the warrants in payment of said bills without knowledge that they were illegal and improper; and that said bills included the sum of $17,847.68 for labor never performed and materials never delivered on the job.

In each count it was alleged also that the district attorney of the county after full knowledge of the facts and although required so to do, had refused for more than seven months to file an action in behalf of the county for the recovery of said moneys alleged to have been so illegally paid. The prayer of the complaint was that judgment be had against the defendants Nash and Gavin individually and as copartners for the sum of $42,151.90, plus 20 per cent thereof for the use of the money; and that judgment be had against the other defendants except the county for the sum of $17,847.68 and costs, and that all of said sums of money be paid to the county treasurer of Santa Clara county for the benefit of the county.

[1, 2] The demurrers were based on many grounds, both general and special, which were separately stated, and it appears from the judgment that the order sustaining the demurrers was in general terms. Therefore, if the demurrers were well taken as to any grounds stated therein the judgment must be affirmed. Haddad v. McDowell, 213 Cal. 690, 3 P.2d 550, and cases cited therein. Nor may the plaintiff complain that the demurrers were sustained without leave to amend, because so far as the record shows no leave to amend was ever requested. Haddad v. McDowell, supra.

[3] Regarding the first cause of action, plaintiff's right, as a citizen taxpayer to sue in behalf of the county for the recovery of moneys paid to the Nash firm, is admittedly based on section 4005b of the Political Code. It is definitely so stated several times in plaintiff's briefs, and the allegations of the first cause of action so show; but it has been held, as defendants contend, that in conformity with the express terms of that code section such an action must be instituted "in the name of the county". Gray v. White, 5 Cal.App.2d 463, 43 P.2d 318, 320. Here that was not done; as stated, the action was instituted and plaintiff seeks to maintain the same in his own name, the county having been joined as a party defendant. The decision in Gray v. White, supra, is therefore directly in point. It is there said: "In a proper case, when a district attorney with adequate knowledge of the illegal expenditure of county funds by supervisors or other county officers, refuses to institute an action to recover the money, such an action may be commenced, *in the name of the county*, by a citizen taxpayer therein, for the benefit of the county. Section 526a, Code Civ.

Proc.; Hansen v. Carr, 73 Cal.App. 511, 238 P. 1048; 6 McQuillin's Mun. Corp., p. 680, § 2747; 44 C.J., p. 1375, § 4550. This suit was not brought in the name of the county. The county of Butte was improperly joined as a party defendant. For the reason that a municipality may be subject to a multiplicity of suits and unnecessary expense at the caprice of individuals, it has been held that where a statute makes it the imperative duty of a specified officer to maintain such actions in behalf of the county, a taxpayer may not do so in behalf of the county except upon specific allegations and proof that the officer, with adequate knowledge of the misappropriations, refuses or neglects to institute the action. Even under such circumstances, the action should be brought in the name of the county, which is the real party in interest. Section 367, Code Civ.Proc. Section 4005b of the Political Code vests the authority to maintain such an action with the district attorney and provides that it shall be brought in the name of the county." Obviously, therefore, a citizen taxpayer may exercise no greater rights under the authority of said section than are conferred upon the district attorney.

Plaintiff concedes that the case of Gray v. White, supra, holds adversely to his contention, but he argues that the decision therein is contrary to decisions rendered by the Supreme Court in earlier cases, the two cited and relied upon by him being Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826, and Osburn v. Stone, 170 Cal. 480, 150 P. 367. An examination of those cases shows, however, that neither was brought under the authority of section 4005b of the Political Code. They involved the financial affairs of cities; and section 4005b has no application to cities. It is made part of the county government act, and as will be seen from its terms it applies exclusively to counties. Plaintiff's right to institute and maintain the first cause of action in his name was challenged by the demurrers to the third as well as the fourth amended complaint. Therefore in view of the express terms of said section 4005b and the decision in Gray v. White, supra, the trial court was justified in sustaining the demurrers to the first cause of action without leave to amend.

[4] We are of the opinion also that the demurrers to the second count were properly sustained without leave to amend, upon the ground, among others, that plaintiff refused to comply with the condition imposed by the trial court in granting leave to file the fourth amended complaint. As already pointed out, the cause of action set forth therein was of a type entirely different from the one stated in the first count. It was directed against all defendants except the construction firm and the county. The amount sought to be recovered thereunder was $17,847.68, and the cause of action was founded on the theory that as a result of the alleged conspiracy the defendants sued therein had caused the board of supervisors to pay to the construction firm illegally the amount sought to be recovered. No claim was made therein that any of the defendants against whom the second cause of action was directed ever received any part of said money. The third amended complaint named but one member of the board of supervisors as party defendant; and attached to said complaint and made part thereof was a list of all warrants drawn in favor of and paid to said construction firm. However, in said third amended complaint it was alleged in positive terms "that *all* members of the board of supervisors voted for the issuance of said warrants" (italics ours); and in sustaining the demurrer to said third amended complaint the court granted leave to amend on condition that in filing the fourth amended complaint plaintiff join as additional parties defendant all members of the board who voted in favor of any motion to issue any of the county warrants referred to by plaintiff. This condition was imposed under the authority of section 389 of the Code of Civil Procedure, which provides in part that "* * * when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings * * *." Plaintiff did not comply with such condition. In filing his fourth amended complaint he added as parties defendant only three of the four remaining supervisors, and then alleged merely that all members of the board "named herein as defendants" voted for the issuance of said warrants. There is no allegation that the fifth member did not so vote nor is any reason alleged for refusing to name him as a codefendant. In that state of the record the trial court was warranted in sustaining the demurrer to the fourth amended complaint and denying plaintiff further leave to amend.

[5, 6] Plaintiff contends, however, that all supervisors voting for the issuance of said warrants were joint tort feasors; that the liability of joint tort feasors is joint and several; and that therefore he had the right to sue any one or more of them. But that rule does not apply in a case such as this where the alleged tort, if committed at all, was committed by a board. By no possibility could any of the warrants here involved have been issued by one supervisor; and since it was alleged in positive terms in the third amended complaint that "all members of the board" voted for the issuance of said warrants, the board as a whole must be treated as one tort feasor. That being so, the trial court acted entirely within the law in granting leave to amend only upon the condition that plaintiff join as parties defendant all supervisors voting for the issuance of said warrants. In other words, the cause of action here is the same as one brought by a stockholder in behalf of his corporation to recover alleged illegal expenditures authorized to be made by the board of directors, and must be governed by the same general rules. Osburn v. Stone, supra; Harvey v. Meigs, 17 Cal.App. 353, 119 P. 941; Fornaseri v. Cosmosart Realty, etc., Corp., 96 Cal.App. 549, 274 P. 597. Moreover, inasmuch as plaintiff sued in the capacity of a taxpayer in behalf of the county, that is, for the benefit of all taxpayers of the county, the law will not permit him to select and sue four of the alleged tort feasors and waive the right of the county to recover from the fifth.

[7] In support of one of the special grounds of demurrer it is pointed out that the second cause of action is based upon general allegations that many of the payments authorized to be made were "exorbitant", and that the claims were "padded" and included work never performed and materials never furnished on the job. Defendants contend, therefore, that it was necessary for plaintiff to specify in his complaint the items, bills, claims or warrants upon which those general allegations were based. This contention finds ample support in the decisions rendered in Gray v. White, supra, and Hansen v. Carr, 73 Cal. App. 511, 513, 238 P. 1048. Plaintiff is not in a position to say that this information was not available to him, because he has alleged to the cent the amount he claims was illegally paid, to-wit, $17,847.68.

There are other special grounds of demurrer upon which the trial court's ruling in our opinion may be properly sustained, but in view of the conclusions reached on the points already mentioned, the others do not require discussion.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

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46 Cal.App.2d 372

HELMUTH v. FRAME et al.

FRAME v. JULIO et al.

JULIO v. FRAME et al.

Civil No. 11603.

District Court of Appeal, First District, Division 1, California.

Aug. 6, 1941.

Rehearing Denied Sept. 5, 1941.

Hearing Denied Oct. 2, 1941.

1. **Automobiles 🔑192(8)**

A conditional sale vendor of an automobile, to be relieved of liability under statute imposing liability on owner of an automobile driven by another with owner's consent or permission and providing that if an automobile is sold under a conditional sale contract whereby title remains in vendor, vendor is not deemed to be owner within provisions imposing liability on owner, must strictly comply with statute providing that a dealer upon transferring, except to another dealer, an automobile subject to registration shall immediately give notice of transfer to Department of Motor Vehicles. Vehicle Code, §§ 177, 178, St.1935, p. 115; § 402, St. 1937, p. 2353.

2. **Automobiles 🔑192(1)**

In determining title to an automobile for purposes of statute imposing liability on the owner of an automobile driven by another with owner's consent or permission, it is to be deemed that the transfer of an interest in automobile is incomplete until a new certificate of registration has been issued. Vehicle Code, § 402, St.1937, p. 2353.

3. **Automobiles 🔑192(1)**

The word "owner", as used in statute imposing liability on the owner of an automobile driven by another with owner's consent or permission, refers to the registered owner. Vehicle Code, § 402, St.1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "Owner".

4. Automobiles ⇨244(32), 245(36)

In an action against alleged owner of an automobile for injuries sustained while automobile was being operated by another, with owner's consent, evidence of the transfer of an interest in automobile may justify the denial of a motion for nonsuit or warrant a finding of legal ownership, and a jury need not accept as true evidence offered contradictory thereof. Vehicle Code, § 402, St.1937, p. 2353.

5. Automobiles ⇨192(1)

The true owner of an automobile, although he may not be registered as such in records of the Motor Vehicle Department, may be liable in damages upon theory of permissive use of automobile by another at time of accident, and such owner can not escape liability imposed on him in that capacity simply because he has inadvertently neglected or deliberately failed to comply with registration provisions of the Vehicle Code. Vehicle Code, § 178, St.1935, p. 115; § 402, St.1937, p. 2353.

6. Automobiles ⇨192(8)

Where motor company which sold automobile on conditional sales contract sold contract to a finance company which appeared as legal owner of automobile on pink slip certificate of ownership, and motor company subsequently reacquired automobile from finance company on vendee's default, but did not then notify Department of Motor Vehicles respecting change in ownership, and motor company later borrowed money from finance company using pink slip as security and then sold automobile on a second conditional sales contract, motor company had a duty to comply with Vehicle Code by notifying department of second sale, irrespective of whether motor company or finance company held pink slip as conditional sale, vendor, and failure of motor company to perform such duty rendered it liable as conditional sales vendor for injuries sustained by plaintiff in accident occurring while automobile was being operated by second vendee. Vehicle Code, §§ 177, 178, St.1935, p. 115; § 402, St.1937, p. 2353.

7. Trial ⇨139(1)

The trial court may not weigh evidence on a motion for directed verdict.

8. Trial ⇨178

In the determination of a motion for directed verdict, evidence of adverse party and reasonable inferences that may be drawn therefrom must be conceded as true.

9. Automobiles ⇨245(36)

In action against alleged owner of automobile for injuries sustained while automobile was being operated by another, a motion for directed verdict should be denied if there is any evidence contradictory to an inference of legal ownership. Vehicle Code, § 178, St.1935, p. 115; § 402, St.1937, p. 2353.

10. Automobiles ⇨245(36)

If the inference of legal ownership is contradicted by direct evidence or by other inferences reasonably drawn from proven facts in an action against alleged owner of an automobile for injuries sustained while automobile was being operated by another, jury should be permitted to pass upon merits of issue respecting ownership. Vehicle Code, § 178, St.1935, p. 115; § 402, St.1937, p. 2353.

11. Trial ⇨178

A "motion for directed verdict" is in the nature of a "demurrer to evidence" and is governed by same rules.

See Words and Phrases, Permanent Edition, for all other definitions of "Demurrer to Evidence" and "Motion for Directed Verdict".

12. Automobiles ⇨192(8)

Where motor company sold automobile on conditional sale contract, and a finance company bought contract and appeared as legal owner of automobile on pink slip certificate of ownership, and motor company subsequently reacquired automobile from finance company after paying such company for loss sustained under contract when vendee defaulted, if pink slip was returned to motor company when company made settlement with finance company the latter company was no longer legal "owner" and had no duty in connection with a subsequent sale of automobile by motor company under a second conditional sales contract, and was not subject to liability for operation of automobile by second vendee. Vehicle Code, §§ 177, 178, St.1935, p. 115; § 402, St.1937, p. 2353.

13. Automobiles ⇨245(36)

In personal injury action against conditional vendee, as operator, and conditional vendor and finance company, which was not a dealer, as alleged owners of automobile involved in accident, evidence was sufficient to dispel any inference of ownership, at time of accident, in finance company, which had appeared as legal owner of automobile on pink slip certificate of ownership issued in connection with a prior conditional sale of automobile by vendor, and was sufficiently clear and undisputed that ownership liability at time of accident rested with vendor and that company was not the title "owner" as contemplated by statute so as to justify directing verdict for company. Vehicle Code, §§ 177, 178, 180, St.1935, pp. 115, 116; § 402, St.1937, p. 2353.

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Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Katherine Helmuth against Kemp Frame and others for personal injuries sustained in an automobile accident, wherein Kemp Frame filed a cross-complaint against plaintiff and Frank Julio, who filed a cross-complaint for personal injuries and property damages against Kemp Frame and Angelus Motors, Inc., and the Commercial Credit Company, a corporation. From a judgment in favor of plaintiff, and in favor of cross-defendant and cross-complainant Frank Julio, Angelus Motors, Inc., appeals.

Affirmed.

See, also, Cal.App., 115 P.2d 852.

Bronson, Bronson & McKinnon, of San Francisco, for appellant.

Thornton Wilson, of Oakland, for respondents Helmuth and Julio.

Weinmann, Quayle & Barry, of Oakland, for respondent Commercial Credit Co.

John D. Martin, of Oakland, for respondent Frame.

WARD, Justice.

This is an appeal by defendant and cross-defendant Angelus Motors, Inc., a corporation, from a judgment rendered by a jury in favor of the plaintiff and cross-defendant Katherine Helmuth and in favor of cross-defendant and cross-complainant Frank Julio in an action for personal injuries arising out of an automobile accident. The only point raised upon appeal is the question of the ownership, at the time of the accident, of the automobile driven by defendant Kemp Frame and the resulting responsibility for injury or damage arising from its use.

Plaintiff Katherine Helmuth, a guest in an automobile operated by Frank Julio, filed an action to recover damages for personal injuries sustained by her as the result of a collision between the Frame and Julio automobiles. She named Frame as the defendant operator of one of the cars, and Angelus Motors, Inc. and Commercial Credit Company, corporations, as its owners. California Vehicle Code, § 402, St. 1937, p. 2353. Both of these companies by answer denied negligence and their respective ownership of the Frame car. Frame filed a cross-complaint against plaintiff and Julio, and Julio in turn filed a cross-complaint for personal injuries and property damage against Frame and the two corporations.

The facts appear as follows: In 1937 Angelus Motors, Inc., sold the car, operated at the time of the accident herein by defendant Frame, to Phil Larsen on a conditional sales contract. The Commercial Credit Company, a finance company, bought the contract and appeared as legal owner on the "pink slip" certificate of ownership. On February 14, 1938, the car was repossessed by the finance company and turned over to the Angelus Motors, Inc., the latter company being required to pay the former's loss in connection with the contract. This loss was fully paid on March 31, 1938, the Angelus company thus becoming the legal owner and entitled to registration as such. Whether or not the finance company endorsed and delivered the pink slip to the Angelus company at the time is a question of fact. The department of motor vehicles was not notified of the change of ownership. On April 7, 1938, the Angelus company obtained a loan from the finance company on the car, executing a promissory note and trust receipt in this connection. The finance company thus became entitled to the pink slip, but not as a conditional vendor. Vehicle Code, § 402. On June 2, 1938, the Angelus company sold the car to Frame on a conditional sales contract. The accident occurred the next day. Some days thereafter, on June 13, 1938, the Angelus company presented the Frame contract to the finance company to be discounted, and paid off its loan to that company as evidenced by the promissory note. The finance company then sent the certificate of ownership and an undated endorsement by it to the motor vehicle department and caused registration in its name as legal owner under certificate issued on June 22, 1938. Later the Frame contract was rejected by the finance company for credit reasons. On the date of the accident the registration certificate was in the name of Larsen, the finance company being indicated as the legal owner. The actual possession of the car and the ownership was in Frame, subject to any rights of the Angelus company as conditional vendor.

The trial court granted a motion for a directed verdict in favor of the finance company, and denied a similar motion made by the Angelus company. It refused certain instructions offered by the latter relating to an endorsement, or lack thereof, and delivery of the pink slip by the finance company following the car's repossession by the Angelus company on Larsen's default. During the instructions referring to the subject of ownership, and the motion for a directed verdict, the court stated: "The motion being granted upon the ground that the evidence was uncontradicted with reference to the facts surrounding the ownership of the automobile in question and by virtue of that fact it becomes a matter of law for the court to decide and the court has ruled as a matter of law that the Commercial Credit Company at the time of this accident was not the owner of the automobile and ownership was in Angelus Motors." The jury returned verdicts in favor of plaintiff Helmuth against Frame and Angelus Motors, Inc.; and in favor of cross-complainant Julio against the same defendants. In the present appeal the Angelus company contends that the question of whether ownership was in it or in the finance company should have been submitted to the jury. The finance company has not filed a brief on this appeal but appears as respondent in a separate appeal taken by plaintiff Helmuth and cross-complainant Julio from the judgment in its favor. See Helmuth v. Frame, Cal. App., 115 P.2d 852.

[1] Vehicle Code, section 402 imposes liability on the owner of an automobile driven by another with the consent or permission of such owner. The section also provides that if a motor vehicle is sold under a conditional sales contract whereby title remains in the vendor, the vendor is not deemed to be the owner within the provisions imposing liability on the owner. Section 177 of the same code, St.1935, p. 115, provides that a dealer upon transferring, except to another dealer, a vehicle of a type subject to registration shall immediately give notice of such transfer to the department of motor vehicles. The conditional sale to Frame was made on a Saturday and the accident occurred on the following day. Whatever may be said of the harshness of the rule, it has been held that a conditional sale vendor, to be relieved of liability under the provisions of section 402, must strictly comply with section 177. Guillot v. Hagman, 30 Cal.App. 2d 582, 86 P.2d 865, application for hearing in the Supreme Court denied; Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744. Section 178, St.1935, p. 115, provides: "Whether notice of a transfer be given or not as hereinbefore required an owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser and has made proper endorsement and delivery of the certificate of ownership as provided in this code shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another."

In the first instance, notice of transfer and change of ownership was not given to the motor vehicle department at the time the Angelus company paid the indebtedness guaranteed the finance company in connection with the Larsen contract. It may be conceded that at such time, March 31, 1938, there was a bona fide transfer of the vehicle to the Angelus company. However, that company contends that the evidence is insufficient as a matter of law to show an endorsement and delivery of the certificate of ownership at that time; but that, regardless of this, by reason of its subsequent loan to the Angelus company on the car, the finance company became entitled to the certificate even if it was not already the holder thereof. In the appeal as presented by the Angelus company, this is the heart of the case, namely, that the finance company never ceased to be the owner within the meaning of the Vehicle Code provisions.

[2-4] The Angelus company cites cases involving various facts where the record registration is conclusive as to rights and liabilities, or, as held, gives rise to an inference in accord with the registration. Irwin v. Pickwick Stages System, Inc., 134 Cal.App. 443, 25 P.2d 998; Collard v. Love, 17 Cal.App.2d 72, 61 P.2d 458; Coca Cola Bottling Co. v. Feliciano, 32 Cal.App.2d

351, 89 P.2d 686; Hammond v. Hazard, 40 Cal.App. 45, 180 P. 46; De Puy v. Shay, 127 Cal.App. 476, 16 P.2d 158; Redwine v. Trowbridge, 99 Cal.App. 762, 279 P. 666; Huddy v. Chronicle Pub. Co., 15 Cal.2d 554, 103 P.2d 421. These cases hold that in determining title it shall be deemed that the transfer of an interest in a vehicle is incomplete until a new certificate of registration has been issued; that the word "owner" generally refers to the registered owner; that evidence of such transfer may justify the denial of a motion for a nonsuit or warrant a finding of legal ownership and that a jury need not accept as true evidence offered contradictory thereof.

[5] It has also been held that the true owner, although he may not be registered as such in the records of the vehicle department, may be liable in damages upon the theory of permissive use. The true owner should not escape liability imposed on him in that capacity simply because he has inadvertently neglected or deliberately failed to comply with the registration provisions of the Vehicle Code. Schmidt v. C. I. T. Corporation, 14 Cal.App.2d 92, 57 P.2d 1016, exemplifies the doctrine that the code provisions were not enacted for the benefit of those who fail to obey the law. At page 95 of 14 Cal.App.2d, at page 1017 of 57 P.2d, the court said: "It is true that appellant was never the *registered* owner of the automobile, but we are of the opinion that it became the owner within the meaning of section 1714¼ of the Civil Code immediately upon the transfer from Paul Kunde. Its failure to comply with said subdivision (b) constituted a misdemeanor (Vehicle Act, § 153, St.1923, p. 565, as amended by St.1925, p. 547), and appellant cannot take advantage of its own wrong. Civ.Code, § 3517. In other words, it must bear the burden of ownership under said section 1714¼ of the Civil Code in the same manner as though it had complied with the provisions of said subdivision (b) of section 45 of the Vehicle Act upon purchasing the automobile from Paul Kunde." Appellant Angelus company contends that the Schmidt case is distinguishable because there the endorsed certificate of ownership was delivered by the vendor, which fact it contends does not appear in the present case as a matter of law.

[6] Here the Angelus company did not cause the car to be registered in its name when it paid the finance company the balance due on the Larsen contract and became the legal owner and entitled to possession. It subsequently "floored" the car, that is, borrowed money on it with the use of the pink slip as security, offered it for sale, actually sold it to Frame by conditional sale on the strength of its ownership, and eighteen days thereafter notified the vehicle department of such sale. In the meantime, as above stated, the accident had occurred. Irrespective of whether the Angelus company or the finance company held the pink slip as the conditional sales vendor, it was the duty of the Angelus company to comply with the provisions of the Vehicle Code by notifying the department of the Frame transaction. Its failure to do so renders it liable as conditional sales vendor.

[7-10] Relative to appellant's contention that the question of ownership between it and the finance company was not proven as a matter of law, but should have been submitted to the jury, and that the order for a directed verdict was erroneous, it has been held that a trial court may not weigh the evidence on a motion for a directed verdict; that in the determination thereof the evidence of the adverse party and reasonable inferences that may be drawn therefrom must be conceded as true. Estate of Lances, 216 Cal. 397, 14 P.2d 768. The rule is that if there is any evidence contradictory to an inference of legal ownership, the motion for a directed verdict should be denied. The language used in Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 70, 77 P.2d 1059, 1063, that "an *inference* is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side" and that "if the opposition evidence is conflicting, vague, or uncertain, or is weakened by contradictions or improbabilities, an inference is not dispelled as matter of law", is simply emphatically expressive of the thought and the principle that if any contradictory evidence appears the inference is not dispelled and the motion for a directed verdict should be denied. To hold that the words "not open to doubt" mean "not open to reasonable doubt" or "not open to any doubt, reasonable or otherwise" would be placing a false construction upon the intent of the writer of that opinion. Such a construction would impose upon the trial court the duty of weighing the evidence of the adverse party, which is

specifically prohibited. Estate of Lances, supra. If the inference is contradicted by direct evidence or by other inferences reasonably drawn from proven facts, the jury should be permitted to pass upon the merits of the issue.

[11, 12] In Hunt v. United Bank & Trust Co., 210 Cal. 108, 117, 291 P. 184, 188, approved in Estate of Lances, supra, the court said: A motion for a directed verdict "is in the nature of a demurrer to the evidence, and is governed by practically the same rules". If the evidence herein on the subject of ownership had been averred as facts in a pleading, and objections thereto interposed, could it be said that as a matter of law a conclusion is reasonably deducible that the finance company was in fact the legal holder of the pink slip? In other words, is there any evidence contradicting an inference of legal ownership? The manager of the finance company testified that the pink slip was returned to the Angelus company at the time of the settlement by them of the Larsen contract. If so, the finance company was no longer the legal owner and therefore no duty was imposed upon it in connection with the subsequent sale to Frame, and it was not subject to liability for the operation of the vehicle. Up to this point the inference of the finance company's liability as legal owner had been rebutted by "clear, positive" testimony. Likewise the testimony was "uncontradicted". The manager of the Angelus company testified that he had no knowledge on the subject. The testimony of the manager of the finance company was not "vague, or uncertain" and up to this point not "weakened by contradictions or *improbabilities*." (Italics added.) Engstrom v. Auburn Auto Sales Corp., supra. The inference of ownership in the finance company had been dispelled even adopting a strict construction of the language of Engstrom case.

On further examination it developed that the manager of the finance company had not personally delivered the pink slip to the Angelus company at the time of the Larsen settlement; that certain notations of transactions were often made in the finance company's office records, in some instances by accountants, clerks or by the office manager himself. The statement of the manager of the finance company that under the date of March 31, 1938, the "folder" bore the notation, marked by the manager, "P to Dlr" (interpreted to mean "Pink Certificate to Dealer"), could hardly be classified as "opposition evidence" of an "improbability", upon which it could be reasonably claimed that the inference was not dispelled as a matter of law. On the contrary, it appears as evidence tending to corroborate the manager's original statement. Without weighing the evidence, in the sense of the credibility of the witnesses, there appear in the record certain factual matters from which deductions could reasonably be drawn that there was a delivery by the finance company to the Angelus company of the pink certificate. These facts appear as follows: There was no direct denial of its delivery; no good reason has been advanced why the finance company, at that time without any interest in the vehicle, should have retained the pink slip; there was a good reason why the Angelus company should obtain its possession; ordinarily dealers do not "floor" a car unless they have possession of the ownership certificate; to obtain the loan on the "floored" car it would have been necessary that the Angelus company deliver the slip to the finance company. There was no evidence of sufficient substantiality to raise a conflict against the inference drawn from proven facts that the certificate was delivered to the Angelus company at the time of the Larsen default. Any suggestion that the notations on the folder might have been inserted after the accident with the thought of making a case of freedom from liability by the finance company is a mere conjectural possibility, and from the evidence presented there is no basis upon which to declare it a probability.

Assuming an inference of ownership in the finance company, and assuming that such company at the time of the payment of the Larsen contract by the Angelus company failed to actually deliver the pink slip to the latter, we are confronted with the fact that not only was the finance company not a "dealer", Vehicle Code, § 180, St.1935, p. 116, but it was not the conditional sales vendor in the contract with Frame, nor, according to the record, did it have any information regarding such contract until about ten days subsequent to the sale of the car.

[13] The evidence is sufficiently clear, positive and undisputed that ownership liability at the time of the accident rested with the Angelus company; that the finance company was not the title owner as contemplated by the provisions of the Vehicle

Code. The order directing a verdict in favor of the finance company was proper, and no prejudicial error appears in the court's instruction that appellant was the owner of the car.

For a further consideration of the question of the propriety of the directed verdict, see Helmuth v. Frame, supra, decided this date.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

46 Cal.App.2d 381

HELMUTH v. FRAME et al.

FRAME v. JULIO et al.

JULIO v. FRAME et al.

Civ. 11751.

District Court of Appeal, First District, Division 1, California.

Aug. 6, 1941.

1. Automobiles 🔑242(6)

In action against alleged owner of automobile for personal injuries sustained in accident occurring while automobile was being operated by another, plaintiff had burden of proving that automobile was being used with owner's permission. Vehicle Code, § 402, St.1937, p. 2353.

2. Automobiles 🔑244(22)

Where, on date of conditional sale of automobile, the vendor, a dealer, had possession of automobile under a trust receipt executed in favor of a finance company as security for payment of a note, and, as additional security, the company held pink slip certificate of ownership, and trust receipt provided that dealer should not encumber automobile but might, upon company's consent, sell automobile for cash, and record did not show that company gave permission to vendee or vendor to use automobile except as designated in receipt or knew on date of accident that automobile had been sold to vendee, the mere fact that at time of accident vendee was driving automobile was not sufficient to establish that vendee was driving with permission of company, so as to render company liable to plaintiff for injuries. Vehicle Code, § 402, St.1937, p. 2353.

3. Automobiles 🔑192(1)

Permission to drive an automobile, implied as well as express, such as is necessary to bring case within statute imposing liability on the owner of an automobile driven by another with owner's consent or permission, can only exist when owner had knowledge or at least reason for believing that automobile would be driven by the person with whose negligence it is sought to charge the owner. Vehicle Code, § 402, St.1937, p. 2353.

4. Automobiles 🔑192(8)

Where vendor under a conditional sales contract covering an automobile, without complying with Vehicle Act respecting registration and in violation of a trust receipt held by finance company on automobile, permitted use of automobile by conditional vendee, and there was no evidence that finance company expressly or impliedly approved such permission, company was not liable for injuries sustained by plaintiff in accident occurring while automobile was being operated by vendee. Vehicle Code, §§ 177, 178, St.1935, p. 115; § 402, St.1937, p. 2353.

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Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Katherine Helmuth against Kemp Frame and others for personal injuries sustained in an automobile accident, wherein Kemp Frame filed a cross-complaint against plaintiff and Frank Julio, who filed a cross-complaint for personal injuries and property damages against Kemp Frame and Angelus Motors, Inc., and the Commercial Credit Company, a corporation. From a judgment in favor of the Commercial Credit Company, a corporation, Katherine Helmuth and Frank Julio appeal.

Affirmed.

Thornton Wilson, of Oakland, for appellants.

Weinmann, Quayle & Berry, of Oakland, for respondent Commercial Credit Co.

WARD, Justice.

The facts are stated in the opinion filed this date in Helmuth v. Frame, Civil No. 11603, Cal.App., 115 P.2d 846, wherein Angelus Motors, Inc., a corporation, is the appellant. The Commercial Credit Company, a corporation, did not appear in that appeal. Out of an abundance of caution, plaintiff Helmuth and cross-complainant Julio have taken this appeal from the judgment in favor of the Commercial Credit Company. Angelus Motors, Inc., is not a party to this appeal.

Appellants' position is stated as follows: "Should the said appeal 1 Civil No. 11603 result in an affirmance of the judgment heretofore rendered against Angelus Motors, Inc. it would follow that the present appeal must be decided in favor of the respondent. On the other hand, should the court grant a new trial upon the sole question raised in said appeal 1 Civil No. 11603, i. e., the issue of ownership liability, appellants should have their rights reserved as to the respondent herein, Commercial Credit Company; hence this appeal." A stipulation was entered into between the parties in part as follows: "It is further stipulated that the grounds upon which the defendant, Commercial Credit Company, asked for and received a directed verdict were as follows: That there was no evidence legally sufficient to show that the Commercial Credit Company was, on June 3, 1938, the owner of the car in question, within the meaning of section 402 of the Vehicle Code, St.1937, p. 2353, and the further ground that there was no evidence proving, or tending to prove, that the defendant, Kemp Frame, at the place of the accident on June 3, 1938, was using or operating the car in question with the permission, express or implied, of the defendant, Commercial Credit Company." A certificate by the trial judge to the effect that the transcript contains a full, true and fair report of the "rulings, acts or statement of the court" is attached to the transcript.

The only point necessary to be considered herein, not disposed of in the Angelus appeal, is that in the present record it appears that the motion for a directed verdict was sustained not only upon the ground that there was no substantial evidence that at the time of the accident Commercial was the owner of the Frame automobile, but in addition thereto that there was no substantial evidence that at the time of the accident the automobile was operated with the permission of that company.

[1] Section 402 of the Vehicle Code provides: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." The record is lacking of any evidence that there was express or implied permission given Frame by the finance company to use the automobile. The burden is on the opposing side to prove permission. Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051.

[2-4] On the date of the sale to Frame, the Angelus company had possession of the automobile under a trust receipt executed in favor of the finance company as security for the payment of a promissory note. As additional security the finance company held the pink slip. The trust receipt contained the following provision: "Dealer shall not lend, rent, mortgage, pledge, encumber, operate, use or demonstrate said Cars, but may drive them, at Dealer's own risk, from the place where delivery or custody is taken hereunder direct to Dealer's place of storage where Dealer shall keep the same properly housed without expense or liability to Commercial Credit, and free from all claims for taxes, liens or other encumbrances. Dealer, upon consent of Commercial Credit, may sell said Cars for cash. * * *" The record does not show that the finance company ever gave permission to Frame or the Angelus company to use the car except as designated in the trust receipt, or knew on the date of the accident that the car had been sold to Frame. The mere fact that at the time of the accident Frame was driving the automobile is not sufficient to establish that he was driving with the permission of the finance company. Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Sommers v. Van Der Linden, 24 Cal.App.2d 375, 75 P.2d 83; Di Rebaylio v. Herndon, 6 Cal.App.2d 567, 44 P.2d 581; Bradford v. Sargent, 135 Cal.App. 324, 27 P.2d 93. In Howland v. Doyle, 6 Cal.App.2d 311, 315, 44 P.2d 453, 455, the court said: "Permission to drive a motor vehicle, implied as well as express, such as is necessary to bring the case within section 1714¼, can only exist when the owner had knowledge or at least reason for believing that the vehicle would be driven by the person with those negligence it is soug

to charge him. A person cannot be said to have permitted that of which he had no knowledge or information." In the present case the vendor Angelus company under a conditional sales contract, without complying with the vehicle act respecting registration and in violation of the trust receipt, permitted the use of the vehicle by Frame. There is no evidence in the record that the finance company expressly or impliedly approved this permission.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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46 Cal.App.2d 347

PRUSSING v. BATES.

Civ. 2807.

District Court of Appeal, Fourth District, California.

Aug. 4, 1941.

1. Trusts 🔑371(2)

A complaint alleging that executrix did not foreclose mortgage which was asset of estate but wrongfully accepted deed to mortgaged property to herself individually, that owners intended to convey to her only as executrix and for use and benefit of estate, that she paid no consideration for property, and that conveyance was made by owners with expectation that note and mortgage would be extinguished, was sufficient to allege existence of "involuntary trust", notwithstanding absence of confidential relationship between executrix and owners, since there was such a relationship between executrix and estate. Civ.Code, § 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Trust".

2. Trusts 🔑110

Evidence was sufficient to establish trust in mortgaged property which owners conveyed to executrix of estate of which the mortgage was an asset, on ground that executrix knew that owners intended to convey property to her only as executrix and for use and benefit of estate and with expectation that note and mortgage would be extinguished. Civ.Code, § 2224.

3. Limitation of actions 🔑103(3)

An action instituted on January 20, 1940, to establish trust in mortgaged property which owners conveyed on October 31, 1932, to executrix of estate of which the mortgage was an asset, was not barred by four-year statute of limitations, where executrix accounted to estate for rentals received from the property and charged the estate with taxes paid thereon as late as April, 1936, and executrix did not wrongfully claim the property as her own until after May 1, 1936, and the action was instituted less than four years after such date. Code Civ.Proc. § 343.

4. Election of remedies 🔑3(1), 11

The general rule that a person cannot pursue inconsistent remedies is not applicable where no prejudice to rights of defendant would result, or where it does not appear that the prior attempted remedy was in fact available to the party attempting to pursue it.

5. Election of remedies 🔑12

A prior action by successor administrator against former executrix for damages for executrix' alleged negligence in allowing deceased's note secured by mortgage to be barred by statute of limitations, did not, under doctrine of "election of remedies", "estop" administrator from bringing action against executrix to establish trust in mortgaged property which had been conveyed to executrix, where executrix lost nothing to which she was entitled through filing of action for damages, and judgment in such damage action adverse to executrix had been reversed on ground that such action had been prematurely brought.

See Words and Phrases, Permanent Edition, for all other definitions of "Election of Remedies" and "Estop".

6. Trusts 🔑373

In action to establish trust arising by operation of law, findings as to duration of trust and interest of beneficiary and duties of trustee were unnecessary.

7. Trusts 🔑373

In action by successor administrator against former executrix of estate, of which mortgage was an asset, to establish trust in mortgaged property which owners conveyed to executrix, findings of wrongful acts on part of executrix supported implied finding that she secured a conveyance of the property in violation of her trust as executrix, as against contention that there was no finding that the property was procured by executrix through fraud, accident, mistake, undue influence or other wrongful act. Civ.Code, § 2224.

8. Trusts ⚷**373**

In action by successor administrator against former executrix of estate of which mortgage was an asset, to establish trust in mortgaged property which owners conveyed to executrix, inconsistency between conclusion of law that executrix had held legal title to property in trust for estate since May 8, 1936, and statement in judgment that executrix had held legal title in trust for estate since 1932 was immaterial, where statement in judgment was surplusage and was not essential to the judgment.

9. Trusts ⚷**365(5)**

A prior executrix of estate of which mortgage was an asset could not complain that successor administrator who was appointed on March 26, 1936, was "estopped" by "laches" from bringing action on January 20, 1940, against executrix to establish trust in mortgaged property which owners conveyed to executrix, where administrator proceeded shortly after his appointment in an endeavor to realize something from the mortgage, and without undue delay filed three separate actions in which innumerable technicalities were raised by executrix to prevent recovery.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

Appeal from Superior Court, Los Angeles County; Harry R. Archibald, Judge.

Action by Peter E. Prussing, etc., against Anita Prussing, to establish and enforce a trust with respect to certain real property standing in the name of Anita Prussing. From a judgment for the plaintiff, the defendant appealed. Pending the appeal, Anita Prussing died, and George L. Bates, as administrator of her estate, was substituted as the appellant.

Affirmed.

McFadden & Coomber, of Anaheim, for appellant.

Sharpless Walker and James E. Walker, both of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action to establish and enforce a trust in favor of the plaintiff with respect to certain real property standing of record in the name of the original defendant, Anita Prussing. The court found in all respects in favor of the plaintiff and this appeal is from the judgment which followed. Pending the appeal Anita Prussing died and George L. Bates, as administrator of her estate, has been substituted herein. For convenience we will refer to Anita Prussing as the defendant and appellant.

On February 5, 1932, the appellant was appointed executrix of her deceased husband's estate. Among the assets of the estate was a note for $6,750, secured by a mortgage on the real property here in question. The note was payable September 17, 1929, and the mortgagor had conveyed the property to M. R. Cobb and three other persons. The decedent, in his lifetime, had signed a written agreement with M. R. Cobb purporting to extend the due date of the note to September 17, 1932. The validity and sufficiency of this extension agreement has been and is attacked but is not material on the present appeal.

On October 31, 1932, the property was deeded by Cobb and the other owners to the appellant individually, and the deed was recorded on May 8, 1936. On March 20, 1936, she was removed as executrix and on March 26, 1936, this respondent was appointed as administrator with the will annexed of that estate. On April 8, 1936, the appellant filed a report as executrix accounting for rentals received from the property and charging the estate with taxes she had paid thereon.

On September 16, 1936, this respondent filed an action in the superior court of Los Angeles county to foreclose the mortgage above referred to. Before any issue in that action was determined another action was filed in Orange county by this respondent against this appellant seeking damages on the ground that she had negligently allowed the note secured by the mortgage to be barred by the statute of limitations. In that action the court held that she had been negligent and was liable for damages but withheld final judgment pending further proceedings in the foreclosure action which were directed to be taken. Thereafter, in the foreclosure action, a demurrer filed by R. M. Cobb was sustained on the ground that the agreement for an extension of time entered into by Cobb and the decedent was void for want of consideration and that the cause of action was barred by the statute of limitations. Thereafter, a final judgment was entered in the Orange county action awarding damages in favor of the plaintiff and against this appellant. On appeal, that judgment was reversed by this court on the ground that this action for damages was premature since this appellant might not interpose the statute of limitations as a defense in the foreclosure action and it did not then appear that the estate had lost its right of recourse against the real property described in the mortgage. Prussing v. Prussing 35 Cal.App.2d 508, 96 P.2d 128. As was pointed out in the decision in that case this appellant had answered therein alleging that title to the property was conveyed to her individually by mistake and that she held the legal title to the property in trust for the estate.

On January 20, 1940, after the going down of the remittitur in the damage action, the instant action was begun. The complaint, as filed, contained two causes of action. The first was based upon the claim that the appellant held title to the property in trust for the benefit of the estate and the second was for a foreclosure of the mortgage. The appellant demurred to the second cause of action on the ground that the same was barred by the statute of limitations, and this demurrer was sustained without leave to amend. The action then proceeded to trial and judgment on the first cause of action.

It now appears, from the record before us, that the mortgage securing the note belonging to the estate cannot be foreclosed; that the appellant holds legal title to the property covered by the mortgage; that she paid nothing for it; that she obtained such title while acting as executrix of the estate, and because she happened to be such executrix; that title was conveyed to her by the then owners of the property with the understanding, belief and expectation that it was to be taken in full payment of the note and mortgage, and that no attempt would be made to collect the note for the estate or otherwise; that the appellant accepted the conveyance of the property knowing that the grantors were conveying it for that purpose and with that expectation; that about the time of her removal as executrix she accounted to the estate for rentals she received for the estate and charged the estate with taxes thereon; and that in the prior action in Orange county she stated under oath that the property had been conveyed to her individually by mistake and that she held the legal title to it in trust for the estate. In spite of the fact that she received title to the property in this manner while she was acting in such trust capacity, she now takes the position that the mortgage is outlawed and cannot be foreclosed against her and claims to be the owner of the property freed from the debt and, relying on innumerable technicalities, now seeks to have her claim confirmed by a court of equity. The mere statement of the proposition should be sufficient to indicate the result that should follow.

[1] The appellant first contends that the complaint did not state a cause of action for the establishment of a trust. The complaint alleged most of the facts above set forth and alleged that this appellant neglected to foreclose the mortgage and wrongfully accepted a deed to the property to herself individually; that the owners intended to convey the property to her only as executrix and for use and benefit of the estate; that she paid no consideration for the property; that the conveyance was made by the owners with the expectation that the note and mortgage would be extinguished; that she wrongfully concealed the fact that she had received said deed; that upon her removal as executrix she wrongfully placed the deed of record; and that she now wrongfully claims title and possession to the property.

The appellant argues that the complaint does not allege accident, mistake or undue influence, and that no violation of trust is alleged or could be alleged since the appellant did not stand in a confidential relation to the owners of the property who conveyed it to her. The complaint alleges some half-dozen wrongful acts done by the appellant while acting as executrix of the estate, and the fact that there was no confidential relationship between her and her grantors is not material since there was very plainly such a relationship between her and the estate. The allegations of the complaint were sufficient to allege the existence of an involuntary trust. Civil Code, § 2224; Burns v. Ross, 190 Cal. 269, 212 P. 17.

[2] It is next contended that the evidence is not sufficient to establish a trust. Not only had the appellant formerly admitted that the deed was made to her individually by mistake and that she held title to the property in trust for the estate, but it was here stipulated that she had not col-

lected any part of the note and had not foreclosed the mortgage; that she received a deed from the owners of the property which they made in expectation that she would not collect from them for the estate, or at all, any part of the interest or principal due on the note and mortgage; that she did not inform this respondent or anyone interested in the estate that she had received such a deed; that the conveyance to her was made without consideration; that the owners of the property conveyed it to her with the expectation that the note and mortgage would be forthwith extinguished; and that at the time of her removal as executrix of the estate she accounted to the estate for rentals she had received from the property, and charged the estate with taxes she had paid thereon. Her sworn answer in the other action was introduced in evidence and much other evidence was received. The evidence justifies the inference that the appellant received the deed to the property well knowing the intention and expectation of the owners in conveying it to her. It clearly appears that she obtained this deed because she was executrix of this estate; that she would not have obtained it except for that fact; and that if she had not violated her trust the estate would have had the property. The facts are squarely within the purview of section 2224 of the Civil Code, and the evidence amply supports the findings and judgment.

[3] It is next urged that if a constructive trust arose it arose at the time the appellant received a conveyance of the property on October 31, 1932, that the statute of limitations had run, and that this action was barred by section 343 of the Code of Civil Procedure. The court found that from November, 1932, until her removal as executrix the appellant held possession of this property as such executrix and that sometime after May 1, 1936, she wrongfully claimed the property as her own. This finding is sustained by the evidence. The appellant accounted to the estate for rentals received from the property and charged the estate with taxes paid thereon as late as April, 1936, and it clearly appears that her violation of her trust and the confidential relationship between her and the estate did not occur prior to that time. This action was begun less than four years later and was not barred by the section relied upon.

[4, 5] It is next contended that by filing the action for damages the respondent elected his remedy and is now estopped from seeking equitable relief through an action to establish a trust. The appellant relies mainly upon Martin Music Co. v. Robb, 115 Cal.App. 414, 1 P.2d 1000. It appears, however, that the defendant in that case had been prejudiced by the filing of a former action, and also that full and complete relief could have been obtained in the other action.

While it is a general rule that one may not pursue inconsistent remedies this is subject to a number of exceptions, of which two are particularly applicable here. One exception is where no prejudice to the rights of the defendant would result. Campanella v. Campanella, 204 Cal. 515, 269 P. 433; Commercial Center R. Co. v. Superior Court, 7 Cal.2d 121, 59 P.2d 978, 982, 107 A.L.R. 714. In the last case cited, the court said: "The doctrine of election of remedies is but a specific application of the equitable doctrine of estoppel, and it has been frequently held that a change in remedies does not bring about an election of remedies unless the change involves a prejudice to the opposing party." In the instant case, the appellant lost nothing to which she was entitled through the filing of the action for damages. The judgment in that action was reversed because the action had been prematurely brought, and no prejudice appears. Another exception to the general rule is applied in those cases where it does not appear that the prior attempted remedy was, in fact, available to the party attempting to pursue it. Agar v. Winslow, 123 Cal. 587, 56 P. 422, 69 Am. St.Rep. 84; Dickinson v. Electric Corp., 10 Cal.App.2d 207, 51 P.2d 205, 208. In the last of these cases, it was said: "It was an attempt to assert a right which did not exist; and one asserting such supposed right is not thereby estopped from later pursuing his rightful remedy." That the remedy which the respondent sought in the prior action for damages was not then available to him clearly appears in this court's decision in the appeal in that action.

[6-8] The appellant further contends that the judgment is not supported by the findings. It is argued that the court failed to find as to the duration of the trust, as to the interest of the beneficiary, and as to the duties of the trustee. The trust here in

question arose by operation of law and no such findings were necessary. It is also argued that there was no finding that the property was procured through fraud, accident, mistake, undue influence or any other wrongful act coming within the provisions of section 2224 of the Civil Code. There were several findings of wrongful acts on the part of the appellant while she was acting as executrix of her husband's estate which necessarily lead to and support the implied finding that she secured a conveyance of the property in violation of her trust as such executrix. It is also argued that the conclusions of law are inconsistent with the judgment since one conclusion was that the respondent, since May 8, 1936, had held the legal title to the property in trust for the respondent while the judgment contains the statement that the respondent had held the legal title in trust for the respondent since 1932. Not only is this inconsistency immaterial but this statement in the judgment is surplusage, is not essential to the judgment, and may be disregarded.

[9] The appellant's final contention is that the respondent was barred by laches from prosecuting this action. It is argued that there was an agreement extending the due date of this note to September 17, 1932; that this agreement was held valid by the trial court in the prior damage action; that the note did not outlaw, therefore, until September 17, 1936; that the respondent administrator had nearly six months after he was appointed in which to file an action to foreclose the mortgage; that he failed to do this; and that he is therefore estopped to proceed against this appellant in this action. It may first be observed that any such finding in the damage action was wiped out by the reversal of the judgment in that case. The only adjudication as to the validity of that extension agreement now appearing is the decision in the foreclosure action in Los Angeles county holding that that agreement was void. However, it does appear from the record before us that the respondent administrator did file an action to foreclose the mortgage in Los Angeles county on September 16, 1936. This entire matter is not material here. The respondent proceeded shortly after his appointment as administrator in an endeavor to realize something from this asset of the estate. Without undue delay he has filed three separate actions in which innumerable technicalities have been raised to prevent a recovery. We agree with the trial judge in his observation in this connection:

"The evidence here does not show laches on the part of plaintiff. Under the facts of this case it would be the greatest travesty of justice to so hold, and it would seem that to avail herself of an equitable defense defendant should be blameless. She certainly is in no position to take advantage of her own wrong by pleading such an equitable defense, even if it were available."

The judgment is affirmed.

We concur: MARKS, J.; MUNDO, J. pro tem.

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46 Cal.App.2d 411

PEOPLE v. DERENZO.

Cr. 3441.

District Court of Appeal, Second District, Division 2, California.

Aug. 7, 1941.

Hearing Denied Sept. 4, 1941.

1. Conspiracy 🔑47

Conspiracy to burglarize and rob could be established by circumstances from which its existence could be reasonably inferred.

2. Burglary 🔑45
Robbery 🔑26

Whether alleged robbery and burglary were the natural and probable consequences of unlawful design of conspirators was within province of jury to determine from all the evidence.

3. Conspiracy 🔑40

Conspirator was liable for all natural and probable consequences incident to commission of act which he had advised.

4. Burglary 🔑41(1)
Robbery 🔑24(1)

Evidence that defendant conspired with two others to burglarize and rob victim, that he drove automobile to place of crime, pointed out house to be entered and directed the others to enter and that he disposed of property taken in robbery after his co-conspirators had entered the house and taken it by force sustained conviction of robbery and burglary.

5. Criminal law ⚷878(3)

Receiving stolen property was not necessarily included in crimes of robbery and burglary but was a separate and distinct offense, and dismissal of count charging crime of receiving stolen property did not bar conviction under counts charging burglary and robbery, particularly in view of statute providing that an information may charge two or more different offenses connected together in their commission and that acquittal of one or more shall not be deemed an acquittal of any other. Pen.Code, § 954.

6. Criminal law ⚷511(2)

The prosecution need not corroborate every statement made by an accomplice and need not produce strong corroborative testimony, if the corroborative evidence, though circumstantial and slight, tends to connect accused with commission of offense.

7. Criminal law ⚷508(1)

Prosecution was not required to establish, without aid of the testimony of an accomplice, that defendant committed alleged burglary and robbery.

8. Criminal law ⚷511(7)

The statements and admissions of defendant, in connection with other testimony, could afford sufficient proof corroborating testimony of accomplice, to sustain conviction.

9. Criminal law ⚷511(7)

In prosecution for burglary and robbery, admissions by defendant to police officers concerning his participation in the crimes, and testimony of witness who told of the faked purchase of property taken from victim sufficiently corroborated testimony of accomplice.

10. Criminal law ⚷407(1)

Generally, evidence of accusatory statements made to a defendant out of court are admissible only when the conduct of defendant in relation thereto indicates his guilt, but if the conduct of defendant fails to indicate his guilt, the evidence should not be admitted.

11. Criminal law ⚷407(1), 1169(2)

Where prosecution called as witness a police officer who testified concerning conversation in which officer told defendant that accomplice had made statements connecting defendant with the crime, but officer further testified that defendant promptly denied his complicity, admission of police officer's testimony was error but did not require a reversal in view of fact that accomplice himself testified as a witness and his accusatory statements were presented to jury under oath.

12. Criminal law ⚷789(2)

The reading to jury of statute on subject of presumption of innocence, reasonable doubt and burden of proof was sufficient to inform jury on subjects covered therein but court was not restricted to such reading and could in exercise of its discretion amplify the definition of reasonable doubt by an instruction that the law does not require demonstration or that degree of proof which, excluding all possibility of error, produces absolute certainty and that there was required only that degree of proof which would convince the mind and satisfy the conscience of those who were bound to act conscientiously upon it. Pen.Code, § 1096.

13. Criminal law ⚷598(2)

Where participant had been theretofore sentenced to prison for complicity in burglary and robbery with which defendant was accused, reasonable diligence on part of defendant would have prompted an interview with participant and issuance of an order for his attendance if his testimony would be helpful to the defense, and motion during the trial for a continuance for purpose of securing presence of participant was properly denied, since due diligence was not exercised to secure his attendance at the trial.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Andrew Derenzo was convicted of robbery and burglary, and he appeals.

Affirmed.

William Klein and William F. Herron, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged in counts I and II of the information with the crimes of robbery and burglary. The information contained three other counts which were dismissed during the trial on motion of the district attorney. A jury returned verdicts of guilty on counts I and II and defendant has appealed from the judgments of conviction and from the order denying his motion for a new trial.

It is now contended that the evidence is insufficient to justify the verdicts. From the evidence presented it appears that on April 27, 1940, defendant was the proprietor of the Patio cafe on Pico boulevard in the city of Los Angeles. He became acquainted with Anthony Ardolino and Jack Magusin and told them that he had had some trouble with "his girl" and that if they would go to her house and ask her for the furs and jewelry that he had bought for her she would deliver them because she would be scared. Defendant telephoned and assured them that the "girl" was at home. Thereupon defendant drove in his Cadillac automobile to the residence of Mrs. Lloyd Knechtel, 1326 Londonderry place in Los Angeles. Ardolino and Magusin followed in a Ford car owned by defendant. Upon arriving at Mrs. Knechtel's residence defendant pointed to the house and said, "go on in". Ardolino and Magusin then entered Mrs. Knechtel's apartment on the ground floor "with guns", and by putting her in fear, robbed her of clothing, furs and jewelry of the value of several thousand dollars. After leaving Mrs. Knechtel's apartment Magusin got into the Cadillac car which was driven away by defendant, followed by the Ford car driven by Ardolino. They arrived at a private garage in Beverly Hills. Defendant unlocked the door of the garage with a key and placed the jewelry and furs in the garage.

An hour later defendant met Ardolino at the cafe and told him that they did not get all the furs. The next day defendant told Ardolino that he could get $100 for the jewelry and furs.

In the meantime, defendant had contacted one Birrell, a real estate dealer with whom he had had business transactions for a number of years. He asked Birrell to do a favor for him and told him that he had a friend from San Francisco who was in straitened financial circumstances and wanted to sell his wife's jewelry, but that he, the defendant, did not want to appear to buy the jewelry and make a profit on it. He suggested to Birrell that he could appear to be the purchaser of the jewelry and gave to Birrell $100 to use in the purchase. Later he presented Ardolino to Birrell and Birrell purchased from Ardolino a watch and two rings, which had been taken from the Knechtel apartment, for the sum of $90. A few minutes later defendant returned to Birrell's office and secured the jewelry and the $10 remaining of the original sum which he had given to Birrell. Several days later defendant gave $40 each to Ardolino and Magusin, claiming that he had received a total of $140 for the jewelry and furs.

When questioned by police officers on July 16, 1940, defendant denied that he had sold stolen property, denied that he knew Ardolino and denied that he had sold any articles to Birrell. On the next day a police officer had a conversation with defendant in the presence of Birrell, at which time Birrell repeated the story of the transaction with regard to the jewelry, whereupon the police officer turned to defendant and defendant said, "yes, it is a fact". Defendant later admitted to the officers that he had had the jewelry and that he had sold it to a man named Garvel. He also told the officers that he had parked his car "on the street", that Magusin had put the furs into the car, that he had driven to a rented garage and had placed the furs in the garage until Ardolino had left and had later hidden them in the trunk of a car in the garage; and that he had later sold them to a man named Jerry Golindo.

[1-4] The jury could reasonably draw the conclusion that defendant conspired with Ardolino and Magusin to burglarize and rob Mrs. Knechtel. Defendant told the other two that Mrs. Knechtel would be scared, drove his automobile to the place of the crime, pointed out the house to be entered and directed them to enter it. He disposed of the property taken in the robbery after his co-conspirators had entered the house and taken it by force. It was not necessary to prove the conspiracy by direct evidence, but it could be established by circumstances from which its existence could be reasonably inferred. It was within the province of the jury to determine from all the evidence whether the crimes charged were the natural and probable consequences of the unlawful design of the conspirators. As a conspirator, defendant was liable for all the natural and probable consequences incident to the commission of the act which he had advised. People v. King, 23 Cal.App. 259, 137 P. 1076. The evidence is ample to support the verdicts.

[5] In count V defendant was accused of the crime of receiving stolen property

and it is now claimed that the dismissal of this count during the progress of the trial was tantamount to an acquittal and that the acquittal on count V is inconsistent with the convictions on counts I and II. The charge contained in count V, receiving stolen property, is not necessarily included in the crimes of robbery and burglary. It is a separate and distinct offense composed of elements different from the elements which constitute robbery or burglary and, if it be assumed, without deciding, that the dismissal of count V was tantamount to an acquittal, it was not a bar to the conviction on counts I and II. People v. Bevans, 19 Cal.App.2d 288, 65 P.2d 92. Moreover, a complete answer to the contention is to be found in section 954 of the Penal Code which, as amended in 1927, provides that an information may charge two or more different offenses connected together in their commission and that a verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count. People v. Ranney, 123 Cal.App. 403, 11 P.2d 405.

[6-9] Much of the evidence relied upon by the prosecution to sustain the convictions is to be found in the testimony of Ardolino, an admitted accomplice, and it is argued that there was not sufficient corroboration of Ardolino's testimony. The prosecution is not required to corroborate every statement made by an accomplice. Strong corroborative testimony is not necessary but the corroborative evidence, even though circumstantial and slight, is sufficient if it tends to connect the accused with the commission of the offense. The prosecution is not required to establish without the aid of the testimony of an accomplice that the defendant committed the offenses. The statements and admissions of defendant, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a conviction. People v. Negra, 208 Cal. 64, 280 P. 354. Here we have corroboration of the testimony of the accomplice in the admissions made by defendant to the police officers concerning his participation in the crimes. Corroboration of the accomplice is to be found also in the testimony of the witness Birrell, who told of the faked purchase of property taken from Mrs. Knechtel.

[10, 11] The prosecution called as a witness a police officer who testified concerning a conversation with defendant in which the officer told defendant that Ardolino had made statements connecting defendant with the crime. The officer further testified that defendant had made prompt denial of his complicity in the crimes. The court erred in admitting this testimony but the error does not call for a reversal of the judgment. As a general rule evidence of accusatory statements made to a defendant out of court are admissible only when the conduct of the defendant in relation thereto indicates his guilt, but if the conduct of the defendant fails to indicate his guilt the evidence should not be admitted. The objection to the admission of such evidence lies in the fact that hearsay evidence may improperly be presented to the jury. In the case before us, however, it appears that defendant was not prejudiced by the testimony of the officer in which the hearsay accusations of Ardolino were related, for the reason that Ardolino himself testified as a witness and his accusatory statements were presented to the jury under oath.

[12] In its instructions the trial court read to the jury section 1096 of the Penal Code, on the subject of presumption of innocence, reasonable doubt and burden of proof. Defendant now complains that the court erred in also giving to the jury this instruction: "The law does not require demonstration or that degree of proof which, excluding all possibility of error, produces absolute certainty, for such degree of proof is rarely possible. Only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it." Although the reading of section 1096 was sufficient to inform the jury on the subjects covered therein, the court was not restricted to the reading of the section but could in the exercise of its discretion amplify the definition of reasonable doubt. People v. Medalgi, 94 Cal.App. 543, 271 P. 552. The additional instruction correctly states the rule which has long been followed in this state. Defendant relies upon the decision in People v. Soldavini, 45 Cal.App.2d 460, 114 P.2d 415, but the reversal in that case was based upon the fact that the trial court failed to instruct the jury on the essential elements of the presumption of innocence and the burden of proof. These elements were covered in the instructions given in the case now before us.

[13] In support of his motion for a new trial defendant presented the affidavit

of the accomplice Magusin, who states that at the time of the making of the affidavit he was incarcerated in the state prison of San Quentin for the robbery of the apartment of Mrs. Knechtel on April 27, 1940. He states that he was present at the robbery but that defendant did not participate therein and did not know of the participation in the crime by the affiant "by any information or knowledge conveyed to him by your affiant". During the trial, when Ardolino related as a witness the participation of Magusin in the robbery, defendant asked for a continuance for the purpose of securing the presence of Magusin but the court denied the motion for a continuance. It is now contended that the court erred in refusing the continuance and in denying the motion for a new trial based upon the statements contained in the affidavit of Magusin. It is apparent that defendant did not exercise due diligence in the matter of securing the attendance of Magusin at the trial. It appears from the record that when the trial commenced Magusin had been sentenced to San Quentin for complicity in the crimes of which defendant was accused. Reasonable diligence on the part of defendant would have called for an interview with Magusin and the issuance of an order for his attendance if his testimony would be helpful to the defense. We find no error in the action of the trial court in denying the continuance or in denying the motion for a new trial.

The judgment and the order denying a new trial are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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42 Cal.App.2d 32

SCARPEL v. EAST BAY ST. RYS., Limited, et al.

No. 11576.

District Court of Appeal, First District, Division 1, California.

Dec. 16, 1940.

1. Appeal and error 🔑786

Where examination of judgment roll demonstrates that appeal is frivolous, reviewing court has inherent power to dismiss appeal.

2. Appeal and error 🔑786

Where judgment roll demonstrated to a certainty that time for preparing any kind of record had long since expired, appeal was "frivolous" and dismissible.

See Words and Phrases, Permanent Edition, for all other definitions of "Frivolous Appeal".

3. Attorney and client 🔑76(1)

Where notice of attorney's retirement from case was not filed until after notice of denial of new trial had been served on attorney, service was valid, notwithstanding attorney's alleged retirement from case before service. Code Civ.Proc. §§ 284, 285.

4. New trial 🔑163(1)

Affidavits established that notice of denial of motion for new trial was properly served on movant's attorney.

◆

Proceeding between one Scarpel and the East Bay Street Railways, Limited, and others. On motion to dismiss the appeal.

Motion granted.

Alfred J. Hennessy, of San Francisco, for appellant.

Robert Bruce Wachob, of Oakland, for respondents.

PETERS, Presiding Justice.

[1-4] In view of what has transpired here this morning and in view of the record, the court will make the following order: The appellant makes three points as to why the appeal from the order terminating should not be dismissed: First, that the court has no power to dismiss a frivolous appeal. Although that is sometimes stated to be the usual rule, that rule has a well-recognized exception applicable here; that is, where a mere examination of the judgment roll demonstrates that the appeal is frivolous the court has inherent power to dismiss. Sonoma Magnesite Company v. National, etc., Corporation, 189 Cal. 433, 208 P. 962. Here the record demonstrates that the time for preparing any kind of a record has long since expired. Secondly, it is urged by the appellant, that at the time the notice of entry of judgment was served on Sullivan, he was not the attorney for the appellant, having ceased to be such on April 9th, 1940, and that notice of denial of motion for a new

trial was not served until July, 1940. But the record shows that Sullivan did not retire by filing a notice to that effect until September 24, 1940. Under Sections 284 and 285 of the Code of Civil Procedure, service on Sullivan was a valid service. The third point urged is, that the notice was not properly served on Sullivan. Affidavits now on file demonstrate that this contention is without merit.

It is therefore ordered, in view of the affidavits now on file and in view of what the record shows that the appeal from the order terminating be dismissed; that in view of the fact that the judgment roll demonstrates to a certainty that no record may now be prepared, the appeal on the merits is obviously frivolous, and for that reason the appeal on the merits should be likewise dismissed. It is so ordered.

46 Cal.App.2d 399

WOODS v. WATSON et al.

Civ. 2778.

District Court of Appeal, Fourth District, California.

Aug. 6, 1941.

Rehearing Denied Aug. 28, 1941.

Hearing Denied Oct. 2, 1941.

1. Appeal and error 🔑907(3)

Where appeal was taken on judgment roll alone, findings were conclusively presumed to be supported by the evidence, were to receive if possible such construction as would uphold rather than defeat the judgment thereon, were to be liberally construed, and if possible any ambiguity or inconsistency would be resolved in favor of sustaining the judgment.

2. Appeal and error 🔑907(3)

Where appeal was taken on the judgment roll alone, judgment would be sustained unless some reversible error concerning a matter of law appeared on face of the record.

3. Appeal and error 🔑907(3)

Where appeal was taken on the judgment roll alone, every presumption and intendment was to be resolved in favor of the regularity of proceedings in the trial court, and, in absence of a transcript of the evidence, it would be presumed that facts found not within the formal issues were supported by evidence introduced by the parties under stipulation or without objection.

4. Pleading 🔑246(2), 248(1)

Where assignee brought action on contract to pay for legal services, and client filed a cross-complaint to which assignee and attorney filed a joint answer, alleging that amount specified in agreement was a reasonable amount to be paid by client to attorney for his services, the answer would support an action in behalf of attorney on a quantum meruit and court could allow an amendment to conform to proof and an amendment to the prayer to justify judgment in favor of attorney, provided amendment did not change cause of action and judgment was supported by the evidence.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Percival E. Woods against Inez Watson on a contract to pay for legal services wherein defendant filed an answer, counterclaim, and cross-complaint against plaintiff, L. E. Dadmun, and another. Judgment in favor of L. E. Dadmun, and defendant appeals.

Affirmed.

Arthur E. Briggs, of Los Angeles (Chas. E. McGinnis, of Los Angeles, of counsel), for appellant.

L. E. Dadmun, of Los Angeles, for respondents.

MUNDO, Justice pro tem.

L. E. Dadmun was employed by Inez Watson to represent her in a law suit. After judgment was given in said law suit Inez Watson agreed in writing to pay Dadmun for his legal services. Dadmun assigned to Percival E. Woods the contract and his interest in the money due thereunder. Inez Watson did not pay the money and Woods brought this action to recover. Inez Watson filed an answer, counterclaim and cross-complaint. Dadmun was joined with Woods as a cross-defendant and they filed a joint answer to the cross-complaint in which, inter alia, they alleged: "* * * admit that said L. E. Dadmun did assign and transfer to Percival E. Woods that certain written contract entered into upon the part of

Inez Watson on or about the 28th day of August, 1936, and signed and approved by Cornelius Kallmeyer, which said agreement was signed by Inez Watson after the rendition of the decree of divorce rendered in said action entitled, Inez Watson v. John T. Watson et al., No. D–135555, wherein and by virtue of said agreement Inez Watson did agree to pay to L. E. Dadmun, for his legal services rendered in said action entitled Inez Watson v. John T. Watson et al., No. D–135555, a sum of money equal to thirty-three and one-third per cent (33 1/3%) of the amount recovered, and that said cross-defendants allege and aver that the amount so specified in said agreement, to-wit: A sum equal to thirty-three and one-third per cent (33 1/3%), was and is a reasonable amount to be paid by said Inez Watson to said L. E. Dadmun for his legal services so rendered and performed for and in behalf of said Inez Watson at her special instance and request in the prosecution of said action against Alvin Poore and Beulah Poore, and the defending of said Inez Watson as a cross-defendant in the action filed by Alvin Poore and Beulah Poore as cross-complainants, against Inez Watson, which said cross-complaint was filed in the action entitled Inez Watson v. John T. Watson et al., No. D–135555, and that the reasonable value of the legal services so rendered to said Inez Watson in the said action entitled, Inez Watson v. John T. Watson, Alvin Poore and Beulah Poore, No. D–135555, was and is a sum of money equal to thirty-three and one-third per cent (33 1/3%) of the amount recovered for and in behalf of said Inez Watson in said action, and that said contract herein referred to is the same contract referred to in said Percival E. Wood's Second Amended Complaint, filed in the above entitled action, which was assigned by said L. E. Dadmun to Percival E. Woods, as alleged and set forth in said complaint."

At the conclusion of the trial the court allowed Dadmun to file an amendment to the said joint answer to conform to proof. In this amendment Dadmun alleged that the reasonable value of services performed by him for Inez Watson at her request was $6,071.85, and that this amount, less certain credits, is due from Inez Watson to Dadmun. He also incorporated by reference certain allegations of the joint answer, which included the language hereinbefore quoted. The court found (finding 13) that the contract signed on February 16, 1935, was in contemplation of divorce; that (finding 36) the contract dated August 28, 1936, was entered into by Inez Watson in consideration of the legal services rendered Inez Watson by L. E. Dadmun, in defending her in the cross-complaint of Alvin Poore and Beulah Poore v. Inez Watson, and in recovering real and personal property from Alvin Poore and Beulah Poore, and did not include any of the legal services rendered Watson in obtaining her divorce in the case of Inez Watson v. John T. Watson; and also (finding 49) that the reasonable value for all the legal services rendered by Dadmun is the sum of $5,000, and that Dadmun is entitled to recover from Inez Watson said sum less certain credits.

As its conclusions of law the court concluded: (1) That Dadmun is entitled to recover from Inez Watson the reasonable value for services rendered; (2) that the contracts dated February 16, 1935, and August 28, 1936, are each void and contrary to public policy, being contingent upon divorce; (3) that both of said contracts are void and should be canceled; (4) that the claim of Percival E. Woods is based upon assignment of the alleged contract of August 28, 1936, and he has no enforceable claim either upon express or implied contract. Judgment was given in favor of Dadmun for $2,892.75. Inez Watson appeals. No appeal was taken by Woods. Inez Watson contends that the judgment in favor of Dadmun is at variance with the admissions of the pleadings and the valid findings of the court. She says: "there was no pleading asking for relief for L. E. Dadmun either upon said special contract or upon quantum meruit, nor was any allegation of fact made for relief for L. E. Dadmun, but on the contrary, for Percival E. Woods; nor even in the amended answer of L. E. Dadmun and Percival E. Woods to conform to proof was there an abandonment of their original affirmative defense, but indeed, a reaffirmance of that defense by incorporating the paragraphs of their original answer which so pleaded and alleged the defense in behalf of Percival E. Woods and not in behalf of L. E. Dadmun. It is only the prayer in the amended answer to conform to proof which asks for anything different from that sought in the original answer, the cause of action in substance remains the same."

[1-3] On this appeal, which is taken on the judgment roll alone, the findings are conclusively presumed to be supported by the evidence; the findings are to receive, if possible, such a construction as will uphold rather than defeat the judgment thereon; they are to be liberally construed and if possible any ambiguity or inconsistency will be resolved in favor of sustaining the judgment; and the judgment will be sustained unless some reversible error concerning a matter of law appears on the face of the record. Every presumption and intendment is to be resolved in favor of the regularity of the proceedings in the trial court, and in the absence, as here, of the transcript of the evidence, it will be presumed that facts found not within the formal issues were supported by evidence introduced by the parties under stipulation or without objection. Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5. The joint answer to the cross-complaint of Inez Watson alleged that the amount specified in the agreement was and is a reasonable amount to be paid by Inez Watson to L. E. Dadmun for his legal services so rendered and performed for and in behalf of Inez Watson at her special instance and request. This allegation would support an action in behalf of Dadmun upon quantum meruit, and the contract is referred to only in the sense that the amount mentioned in the contract is a reasonable amount to be paid for Dadmun's services. By this pleading Dadmun is not holding Inez Watson to the obligation of her contract but is adopting the amount which she agreed in the contract to pay as being a reasonable amount for his services rendered.

[4] As far as Dadmun's quantum meruit is concerned, it matters not whether the contract is valid or void. Elsewhere in the joint answer it is alleged that Inez Watson is indebted to Woods, and the prayer of the joint answer asks that Woods be given a judgment against Inez Watson. Upon this appeal we may assume that the evidence cleared up this inconsistency and that it showed Dadmun and not Woods to be the one entitled to recover a judgment from Inez Watson. Cullen v. Foster, 39 Cal.App. 625, 179 P. 695.

In short, we have a case where a party claims the judgment should go to his coparty and the court finds the party himself to be the one entitled to the judgment. In such a case the court may allow an amendment to conform to proof and it may allow an amendment to the prayer to justify the judgment; provided, of course, as we have here, the party has stated a cause of action, the amendment does not change the cause of action, and the judgment is supported by the evidence. Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Walsh v. McKeen, 75 Cal. 519, 17 P. 673; Burd v. Downing, 60 Cal.App. 493, 213 P. 287.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

45 Cal.App.2d 757

SLATER v. SUPERIOR COURT IN AND FOR CONTRA COSTA COUNTY et al.

Civ. 11735.

District Court of Appeal, First District, Division 1, California.

Aug. 8, 1941.

Appeal and error 🔑1194(1)

Where the District Court of Appeal believed that the matters of decrease in value of plaintiff's property and physical injury to property were inseparable, the court, in determining that there had been a remission by plaintiff of $10,000 of a judgment for $12,500, necessarily determined that the judgment for $2,500 constituted a judgment for all items included within the original judgment for $12,500, and, under the doctrine of "res judicata", defendant by paying the judgment as reduced would be in exactly the same legal position as if the judgment for $12,500 had been paid in full.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

On petition for rehearing.

Petition denied.

For former opinion, see 115 P.2d 32.

Muldary & Elkington, of San Francisco, for petitioner.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondents.

PETERS, Presiding Justice.

On this petition for rehearing it is urged by respondents that the opinion heretofore filed in this case discloses that the court misunderstood the contentions of respondents. It is urged that no contention was made that the waiver did not apply to the $10,000, but that the contention was that, because of the language of the waiver, no waiver was made as to the item of damage involved in the $10,000 portion of the judgment. It is urged that the opinion does not clearly determine whether the judgment as reduced by the remission constitutes a judgment for both the decrease in value of the property, and for the physical injury to the petitioner's property. This court did not misconceive respondents' position. It was, and is, our belief that the two problems are inseparable. In determining that there had been a remission of the $10,000, the court necessarily determined that the judgment for $2,500 constitutes a judgment for all items included within the original judgment for $12,500. Stated another way, so far as the doctrine of res judicata is concerned, the Shell Oil Company by paying the judgment as reduced will be in exactly the same legal position as if the judgment for $12,500 had been paid in full.

The petition for rehearing is denied.

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46 Cal.App.2d 307

In re MARKHAM'S ESTATE.

O'BRIEN v. BROWN et al.

Civ. 13129.

District Court of Appeal, Second District, Division 1, California.

Aug. 4, 1941.

1. Wills 🔑21

Every person of sound mind over age of 18 years may dispose of his property by will. Probate Code, § 20.

2. Wills 🔑1

A testator may dispose of his property as he wishes without regard to views of his beneficiaries or of juries or courts.

3. Wills 🔑651

A provision in will for forfeiture of a legacy in event of a contest of will by a legatee is valid and binding upon such legatee.

4. Wills 🔑641

A competent testator may distribute his property as he desires, and the beneficiary is required to take under terms of will so long as they are not prohibited by some law or opposed to public policy.

5. Wills 🔑651, 658

A clause in will providing for forfeiture of legacy in event of contest of will by legatee is to be strictly construed, but, if not strictured by law or by public policy, it will be enforced according to testator's intent.

6. Wills 🔑665

The testator's daughter, who was a legatee under will, but who filed action to have one-third of testator's assets set aside for her benefit on ground that testator had been incompetent to make will, that will was procured by fraudulent misrepresentation and was admitted to probate on perjured testimony and that she had been prevented from filing contest of will, thereby attacked validity of will and came within provision of forfeiture clause forfeiting legacy of a legatee attacking validity of will.

7. Wills 🔑666

The fact that superior court had found that legatee, who had brought suit attacking validity of will, was estopped from maintaining the suit because she had received and retained money paid to her under terms of will, did not estop the other beneficiaries from asserting that legatee's action in prosecuting legal proceedings attacking the will was a violation of provision thereof forfeiting legacy of a legatee attacking will.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding in the matter of the estate of William F. Markham, deceased, wherein Maude L. O'Brien filed a petition for an order distributing a portion of the estate to the successor trustee, Harlan G. Palmer, Sr., for the petitioner's benefit, and wherein answers were filed in opposition to the petition by Ben H. Brown, Public Administrator, and others. From an adverse decree, the petitioner appeals.

Decree affirmed.

Wm. H. Neblett, E. Walter Guthrie, and E. W. Miller, all of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for respondent Ben H. Brown.

Hahn & Hahn and Stanley L. Hahn, all of Pasadena, for respondents Leigh H. Markham and Louise Markham.

Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for respondents Harlan Guyan Palmer, Jr., Byron Hunkins Palmer, Ralph Judson Palmer, Margaret Dora Palmer, Edward Jenkins, Isa Markham, and E. S. Roe.

WHITE, Justice.

Maude L. O'Brien, a daughter of and one of the legatees under the will of William F. Markham, deceased, prosecutes this appeal from a decree of the superior court of Los Angeles county, sitting in the exercise of its powers in probate, denying her petition for partial distribution. The decree in question ordered that appellant should receive the sum of one dollar and no more and adjudged that appellant, by instituting and prosecuting certain proceedings and actions, had transgressed the disinheriting paragraph or forfeiture clause of the will, thereby bringing her within its inhibitions.

William F. Markham died April 30, 1930. On May 27 of the same year his will was admitted to probate and letters testamentary issued to his widow, Blanche C. Markham, who thereafter, and until her death on March 4, 1937, continued to serve as executrix. Following her death, and on August 26, 1937, letters of administration with the will annexed were issued to the public administrator, Ben H. Brown, who ever since has acted and now continues to act as administrator with the will annexed.

By his will decedent bequeathed to his wife, Blanche C. Markham, the family home with its household furnishings and adornments, for her use, benefit and enjoyment during the term of her natural life, and upon her death the same to go to the children of Mr. and Mrs. Harlan G. Palmer, Sr. The entire rest, residue and remainder of the estate was bequeathed to the testator's wife, to be held in trust for certain uses and purposes. In this connection the testator, after providing that from the gross income or from the principal of the trust estate his debts and the costs of administration should be paid, directed that from the net income of the estate the trustee should pay to appellant herein the sum of $250 per month during her natural life; to Lee H. Markham, the decedent's son, a like sum during his life; to the sister of decedent $100 per month; to Ben E. Sprague, designated as "my friend and chum", $250 per month during his life; to the gardener employed by decedent $150 per month during such time as he should be employed by the executrix and trustee in connection with the estate; to a niece $150 per month during her life, and to E. S. Roe, described in the will as "my friend and foreman", $150 per month as long as he lived. The will further provided that upon the death of decedent's wife and trustee, Harlan G. Palmer, Sr., should succeed her as trustee, and that, subject to the approval of the court, he was to withdraw from the estate sufficient assets to provide for the payments heretofore mentioned, and after so doing, the balance of the estate, together with any undistributed net income, was to go to the children of Mr. and Mrs. Harlan G. Palmer, Sr., share and share alike. It was further provided in the will that upon completion of all the trusts mentioned in clauses 1 to 8, and upon completion of the life payments under the fourth clause, the remainder of the estate, together with any undistributed net income, was also to go to the Palmer children.

The will also contained this provision: "Fifth: I have intentionally omitted all my heirs who are not specifically mentioned herein, and I hereby generally and specifically disinherit each, any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs at law, except as otherwise mentioned in this Will, and if any such persons or such heirs, or any devisees under this Will, or their successors in interest, or any other person who, if I died intestate, would be entitled or shall lawfully become entitled to any part of my estate, shall either directly or indirectly, singly or in conjunction with other persons, seek to establish or assert any claims to my estate or any part thereof, excepting under this Will or attack, oppose or seek to set aside the probate of this Will, or to impair, invalidate or set aside its provisions, or to have the same or any part thereof, or any devise or devises, or trust herein limited, declared void or diminished, or to defeat or change any part of the testamentary plan of this Will, or settle or compromise, directly or indirectly either in or out of court, with any contestants of this Will, or shall consent to, acquiesce in or fail to contest such proceedings, or shall endeavor to secure or take any part of my estate in any manner than through or under this Will, then in any or all of the above mentioned cases and events, I hereby give and bequeath to such persons or person the sum of One Dollar ($1.00) and no more, in lieu of any other share or interest in my estate; and all the rest of the interest, share or property which would otherwise have gone to such person or persons, by devise or inheritance, or which they may be entitled to take under any provision of law, shall go, and I hereby give, devise and bequeath the same, in fee simple, share and share alike, to such, each and all of my devisees and legatees mentioned in this Will, as shall not have made, joined, assisted, consented or acquiesced in such proceedings, or settled or compromised, directly or indirectly, either in or out of court, with any contestants of this Will; and if all of said devisees and legatees, or their successors in interest, shall join, assist, consent or acquiesce in such proceedings, or so settle or compromise with any such contestants, I hereby give, devise and bequeath in fee, the whole of my estate to my next heirs at law, excluding said devisees, legatees, their successors in interest, and such contestants, according to the laws of succession then in force in the State of California, anything to the contrary in this Will notwithstanding."

At the trial of the action which gave rise to this appeal, it was stipulated that the estate amounted to a sum in excess of $1,800,000.

From the record it appears that notwithstanding the aforesaid disinheriting clause, appellant herein, who under the will was to be the recipient of $250 per month during her life, filed on October 1, 1936, in the estate proceedings a document denominated "Petition of Maude Lillian O'Brien for Distribution", in which she charged on information and belief that the executrix and the attorney for the executrix, without any order of court, had borrowed from the assets of said estate sums of money approximating $500,000; that the executrix and her attorney were guilty of dilatory conduct in not terminating probate proceedings. This petition also charged the attorney for the executrix and the latter with procuring the execution of the will in question at a time when the decedent was in failing health and unable to comprehend the meaning, purport or intent of the document which he signed. There was also contained in the petition an allegation that the will in question was void by reason of the provisions of section 715 of the Civil Code of this state. By this petition appellant prayed for the removal of the executrix and her attorney, for distribution to her of one-third of the estate under section 221 of the Probate Code; that the executrix and her attorney be required to pay into the estate, the sums of money allegedly illegally withdrawn; and finally, that the order admitting the will to probate be set aside. On October 6 a similar petition was filed by appellant in the probate proceedings, while on October 16 appellant filed an amended petition entitled "Amended Petition of Maude Lillian O'Brien for the Removal of Blanche C. Markham as Executrix and of Harlan G. Palmer as Attorney, and for Distribution." A second amended petition was filed by the appellant in the estate proceedings on October 20, pursuant to the provisions of Probate Code, section 521. Following a hearing had on the second amended petition, the court on October 22, 1936, made its findings of fact thereon and its order denying such second amended petition. Appellant next filed in the district court of the United States for the Southern District of California her bill of complaint in equity. This action was directed against the executrix, her attorney, the beneficiaries under the will, and certain corporations allegedly controlled by the attorney for the executrix. To this action the defendants filed a motion to dismiss the bill upon the ground of non-joinder of indispensable parties, which said motion was sustained and the cause dismissed.

On January 8, 1937, appellant filed in the superior court of Los Angeles county an action in equity against the beneficiaries named in the will to impress a trust in her favor and seeking to have the beneficiaries declared to be involuntary trustees to the extent of a one-third interest in the estate of decedent as soon as the estate was distributed to them. This last-named action was based on the ground that the will was procured by fraud and undue influence exerted upon the testator by his attorney. The case was tried without a jury, and at the conclusion thereof the court held that at the time of execution of his will decedent was not acting under fraud or undue influence, and that the facts relied upon by appellant in her complaint therein filed were known to her within six months of the date when the will was admitted to probate. The court further found that the appellant was estopped from maintaining the action because she had received and retained moneys paid to her pursuant to the terms of the will and had not, prior to bringing the action, offered to restore the same. The court further found that appellant was guilty of laches and also that her cause of action was barred by the statute of limitations. From the judgment therein, appellant prosecuted an appeal to the Supreme Court of this state, which tribunal transferred the same to the District Court of Appeal of the Third Appellate District, in which forum the judgment of the superior court against appellant was affirmed on February 19, 1940. O'Brien v. Markham, Executrix, 37 Cal. App.2d 381, 99 P.2d 583.

At the trial of the cause from which the appeal herein was taken, it was stipulated that up to and including the month of September, 1936, there was paid to appellant in monthly payments from the available net income of the estate under the terms of the will, the same pro rata share as was paid to other beneficiaries, and that the total amount paid to said appellant at the rate of $250 per month amounted to $15,372; and further, that the estate paid inheritance taxes on behalf of appellant herein in the sum of $327.87. It was further stipulated that in the month of October, 1936, a check for her pro rata share of $250 from the net income of the estate was forwarded to appellant, but that she refused and returned the same, and since that time has not received any further pro rata payments.

The factual situation which gave rise to the litigation forming the basis for the instant appeal might be thus epitomized: On July 25, 1940, the estate of decedent being ready for distribution, there came on for hearing in the probate department of the superior court several and divers matters, among which were the fifth and final account and petition for distribution filed by the administrator with the will annexed, and the petition of Maude L. O'Brien, appellant herein, for an order distributing a portion of the estate to the successor trustee (Harlan G. Palmer, Sr.) for her (appellant's) benefit. Various of the respondents filed answers in opposition to the petition of appellant and to the petition of the administrator with the will annexed, contending that by the filing and prosecution of the hereinbefore-narrated proceedings and actions this appellant had violated the disinheriting provisions or forfeiture clause of the decedent's will and was therefore entitled to receive upon distribution only the sum of one dollar. Following a hearing, the court found that, in violation of the terms of the will and contrary to the fifth provision thereof, appellant herein, by filing various petitions, bills of complaint, and bills in equity, sought to assert claims against the estate of decedent other than those provided for in said will, and that by such litigation she had sought to impair, invalidate and set aside the provisions of the will, to have provisions of said will declared void, and by her actions and proceedings attempted to defeat and change the testamentary plan of the will and to secure and take a part of said estate in a manner other than through and under the will. The court further found that appellant herein had by such legal proceedings "attacked, opposed and sought to set aside the probate of said will". Based upon such findings, the court ordered, adjudged and decreed that the petition of appellant herein for partial distribution be denied; sustained all objections thereto, and directed that she take nothing under the terms of said will except the sum of one dollar. It is to this portion of the decree that the appeal herein is directed.

Appellant contends that the terms of the disinheriting or forfeiture clause should not be invoked against her because no bad faith was imputed to her by the respondents in either their pleadings or evidence, and further, that she acted in good faith and upon probable cause when she instituted the proceedings hereinbefore set forth. These claims upon her part are predicated upon the fact that she was the daughter of the testator, whose estate amounted to nearly two million dollars; that by the will offered and probated the major portion of the estate was ultimately to be distributed to strangers to the blood of the testator. It is also contended that by her litigation appellant did not seek primarily to defeat the will, but to establish a trust; that the impairment of the provisions of the will or its total destruction by legal process was but a secondary or incidental result.

[1-4] It is fundamental that every person of sound mind over the age of eighteen years may dispose of his property by will. Prob.Code, sec. 20. Further, it must be conceded that the property of the testator is his to dispose of as he wills, and he is not called upon to consult the wishes or views of his beneficiaries or of juries or courts. In re Spencer, 96 Cal. 448, 452,

3 P. 453; Estate of Perkins, 195 Cal. 699, 709, 235 P. 45. After all, in the minds of others than the testator, the question whether a will is just or unjust is a matter of opinion, and the policy of the law is to make the disposition under a will in accordance with the desires of the testator. Accordingly, it has frequently been held by the courts of this state that a provision in a will providing for forfeiture of a legacy in the event of a contest of the will by a legatee is valid and binding upon such legatee. Estate of Hite, 155 Cal. 436, 101 P. 443, 21 L.R.A.,N.S., 953, 17 Ann. Cas. 993; Lobb v. Brown, 208 Cal. 476, 484, 281 P. 1010, and cases therein cited. The maker of a will, possessing the necessary qualifications of mind and body, has therefore the right to distribute his property upon such terms and conditions as to him seem just and proper; and the recipient of the testator's bounty is required to partake thereof under the terms provided in the testamentary document, so long as such terms and conditions are not prohibited by some law or opposed to public policy. In re Kitchen, 192 Cal. 384, 220 P. 301, 30 A.L.R. 1008; Estate of Miller, 156 Cal. 119, 103 P. 842, 23 L.R.A.,N.S., 868.

[5] While it is true, as contended by appellant, that a forfeiture clause is to be strictly construed, it is equally true that if the same is not strictured by law or by public policy it will be enforced according to the ascertained intent of the testator. Estate of Bergland, 180 Cal. 629, 635, 182 P. 277, 5 A.L.R. 1363. The conditions upon which the forfeiture is to work under the will here in question are in part as follows: "* * * that any person * * * seek to * * * establish or assert any claims to my estate or any part thereof, excepting under this will * * * attack, oppose or seek to set aside the probate of this will * * * impair, invalidate or set aside its provisions, or to have the same or any part thereof, or any devise or devises, or trusts herein limited, declared void or diminished * * * defeat or change any part of the testamentary plan of this will * * * endeavor to secure or take any part of my estate in any manner other than through or under this will * * *."

[6] Let us therefore examine, in the light of the foregoing, the conduct of appellant, to determine whether the primary purpose of her activities was to defeat the provisions of the will. If the litigation instituted by her amounted to a direct attempt to challenge the validity of the will or defeat its provisions, then, irrespective of her good or bad faith she would come under the penalty provided in the forfeiture clause. Estate of Miller, supra.

That appellant sought to impair, invalidate and set aside the provisions of the will; attempted to establish claims to part of the estate other than under the will; sought to defeat and change the testamentary plan, as well as to secure or take part of the estate other than through or under the decedent's will, is abundantly established by reference alone to the bill in equity filed in the United States district court and the action filed in the superior court of Los Angeles county. By her complaint in the last-named action appellant alleged that at the time decedent signed the will "he was approximately eighty years old, in an advanced stage of senility, suffering from an incurable disease, and utterly incompetent to understand or comprehend what he was doing or the meaning of any sort of business transaction". She further alleged that the will was procured by fraudulent misrepresentations; that the will was not a true one but a document altered by certain of the defendants after its execution; and finally, that the will was admitted to probate on perjured testimony. She also charged that by fraudulent representations of some of the defendants she was prevented from filing a contest of the will within the statutory period. By her prayer in said complaint appellant sought to have the defendants declared trustees for her to the extent of one third of the assets belonging to decedent at the time of his death. We cannot conceive of a more outright and direct attack upon the validity of the will, or a more positive effort, in violation of the forfeiture clause therein, to "set aside the probate of this will, impair, invalidate, or set aside its provisions, or to have the same or any part thereof, or any devise or devises or trusts herein limited declared void or diminished", or to "defeat or change any part of the testamentary plan" or endeavor "to secure or take any part of my estate in any manner other than through or under this will", any one of which attempts would bring appellant within the purview of the disinheriting clause.

Following trial of the superior court action, the court found that at the time of the execution of his will decedent was not acting under fraud or undue influence, and that the facts relied upon by appellant as plaintiff therein were known to her within six months from the date when the will was admitted to probate. A comprehensive statement of the nature of appellant's last aforesaid action, the grounds therefor, the contentions advanced by her, the findings of the trial court, and the fact that such findings were amply sustained by the evidence, will be found in the decision of the district court of appeal in affirming the judgment against appellant. O'Brien v. Markham, 37 Cal. App.2d 381, 99 P.2d 583.

Considering the forfeiture clause in the light of the facts of this case, we are irresistibly drawn to the conclusion that such facts show such a breach of the forfeiture clause of decedent's will on the part of appellant as must subject her to the loss of the legacy given her by the terms of said will.

Appellant earnestly relies upon the Estate of Bergland, supra, and Lobb v. Brown, supra, as modifying the rule laid down in Estate of Hite, supra, and Estate of Miller, supra, but the two cases so relied upon are easily distinguished from the case at bar. In the Bergland case the daughter of the decedent offered for probate a later will, which proved to be spurious, and the petition for its probate was withdrawn. In that case, however, the spurious character of the later will offered by the decedent's daughter was unknown to her. The court held under the facts there present that an attempt made in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the party seeking its probate, did not fall within the forfeiture clause there under consideration. To hold otherwise, as pointed out by the court, would seriously discourage any attempt to probate even a genuine later will and would distinctly lessen the chance of any later testamentary expression by a testator being made effective, which of course it would not be presumed was contemplated or intended by a testator in drafting the forfeiture clause of an earlier will.

The second case which appellant stresses, Lobb v. Brown, was an action wherein the plaintiff sought to have it declared that defendants held in trust for him certain property received by the former under decrees of partial distribution in the estate of Mary Ellen Moore, deceased. Two wills of decedent were under consideration. In the first will she had made certain specific bequests and had named the defendants Brown, her nephews, as sole residuary legatees. In the second will plaintiff Lobb was named as executor, and he and the nephews were made equal residuary legatees. In the second will was contained a clause disinheriting anyone who should institute a contest against it. The last will was admitted to probate in September, 1920, and letters testamentary issued to Lobb. In the following January and in October of 1921 decrees of partial distribution were made to the defendants. Between the dates of such decrees other relatives of deceased filed a contest of the will so far as it bequeathed a share of the residue of the estate to Lobb. Lobb was joined as a defendant. The defendants Brown filed their answer to the contest, but did not deny invalidity of the bequest to Lobb by virtue of undue influence alleged to have been exerted by him. Upon the trial of the contest, the court made its order discharging the jury and dismissing the contest. Action was then brought by Lobb against the defendants Brown, seeking to have them declared trustees for him of the property they had received by virtue of the decree of partial distribution. Judgment went in favor of defendants and was affirmed on appeal. In that case the court held simply that since the contest was filed before the defendants had any knowledge thereof, and since they in their answers denied that the contestants had any interest sufficient to entitle them to contest the will, there was no violation by the defendants of the disinheriting clause in the will—that "mere expression of a desire that the contestants succeed was not sufficient to bring the respondents under the ban of the forfeiture clause" [208 Cal. 476, 281 P. 1014]; also that merely testifying to facts aiding the contestants was immaterial, since the respondent so doing was under subpoena and consequently upon oath compelled to testify to facts that he knew; that in advancing the contestants money to defray their costs and attorney fees there was no violation, since the disinheriting clause went only to those who "shall institute proceedings", while the institution of the contest was without the knowledge of respondents.

Thus we see that the facts and issues presented in the two last-cited cases differ materially from the circumstances of the litigation now before us, where appellant not only sought to impair, but to totally destroy and nullify the expressed desires and wishes of the testator by asserting his utter incapacity and incompetency to execute the testamentary document. However strictly we construe the forfeiture clause of the will in the instant case, when we view such clause according to the expressed intent of the testator the conclusion is inescapable that appellant brought herself under its ban. That forfeiture clauses such as the one before us, when contained in a will, are valid is the rule in this state (Estate of Bergland, supra), and manifestly it was the plain intent of the testator that one who sought, as appellant did, the utter destruction of his testamentary plan, did so at his peril, so far as the right to take under the will is concerned.

[7] Finally, appellant urges that because in the state court equity suit tried subsequently to the dismissal of the federal court equity action, it was found that appellant as plaintiff "had been and now is estopped from contesting the will of William F. Markham, deceased, and has been and now is estopped from seeking to have the said will declared void, and has been and now is estopped from maintaining this action", that respondents herein are also estopped from asserting or demanding a forfeiture of appellant's legacy under the will. This claim is without merit. The court found that the estoppel arose against appellant because she received and retained large sums of money paid to her under the terms of the will. Had she returned the money so received by her, the estoppel would not have come into being. She created the estoppel by her own actions. Surely an estoppel thus created against appellant does not operate to estop respondents from asserting that her filing and prosecuting the equity action in the federal court and the state court litigation was a violation of the forfeiture clause of the will. The disinheritance of appellant arose from her filing proceedings in the federal and state courts, all for the precise purpose of thwarting the expressed intentions of the testator as contained in his will, and notwithstanding the testator's declaration in his will that the legacy given to appellant was on condition that she acquiesce in the provisions of the will or forfeit his bounty.

The order, decree and judgment from which this appeal was taken is affirmed.

I concur: YORK, P. J.

I concur in the judgment: DORAN, J.

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46 Cal.App.2d 294

NEBLETT v. ELLIOTT et al.

Civ. 12525.

District Court of Appeal, Second District, Division 1, California.

Aug. 4, 1941.

Hearing Denied Oct. 2, 1941.

1. Appeal and error 🔑927(3)

On appeal by plaintiff from a judgment of nonsuit, the facts must be stated in the light most favorable to plaintiff.

2. Conspiracy 🔑14

In order to show that defendant has united or cooperated with others to inflict a wrong upon plaintiff so as to entitle plaintiff to a joint recovery of damages against such defendant and others, plaintiff must show concert of action between defendant and the others to accomplish purpose of the conspiracy, that defendant's actions were illegal and in furtherance of common scheme or design to achieve unlawful purpose of the conspiracy, and that defendant had knowledge of the conspiracy and its unlawful purpose.

3. Conspiracy 🔑13

In order to recover damages against defendant, who with others was charged with having conspired to libel plaintiff, plaintiff had to show concert of action between defendant and the others to accomplish the purpose of the conspiracy, that is, the publication of the libel, that defendant's actions were illegal and in furtherance of a common scheme or design to achieve the unlawful purpose of the conspiracy, and that defendant had knowledge of the conspiracy and its unlawful purpose.

4. Conspiracy 🔑14

A participant in a civil conspiracy is responsible as a joint tort-feasor for all damages resulting from the wrong, irrespective of whether he was a direct actor and regardless of the degree of his activity.

5. Conspiracy 🔑13

An attorney, who paid a private investigator for services and expenses in obtaining a written statement concerning alleged corrupt activities of a United States Senator's law partner, copies of which statement were subsequently delivered by others to newspaper reporters, was not liable in an action by Senator's law partner charging a conspiracy to libel, where the evidence was wholly unsatisfactory to show that conduct of the attorney was in furtherance of a common agreement or understanding to achieve claimed unlawful purpose of the persons who undertook to and did publish the alleged libel.

6. Trial 🔑165

On motion for nonsuit, evidence must be viewed with reasonable favor in support of plaintiff's case and taken most strongly against the defendant, but neither trial court nor appellate court upon appeal from judgment of nonsuit is required to accept as true everything that is testified to by witnesses.

7. Trial 🔑139(1)

Court is not required to accept oral testimony as evidence of fact where such testimony is inherently improbable.

8. Trial 🔑139(1)

To justify the submission of any question of fact to a court or jury, there must be proof of a substantial character that the fact is as alleged. Code Civ.Proc. § 1823.

9. Libel and slander 🔑112(1)

Testimony by plaintiff in libel action that one of defendants in asking plaintiff to dismiss action as to him stated that he had not wished to hurt plaintiff but that he could not publish things against other parties mentioned in allegedly libelous matter without publishing the matter with respect to plaintiff was so inherently improbable as not to be entitled to consideration.

10. Trial 🔑139(1)

Jurors are the sole judges of the facts, but the question as to whether there is substantial evidence in support of plaintiff's case is in all instances a question of law for the court.

11. Conspiracy 🔑13

Where written statement, containing allegedly defamatory matter, was introduced in evidence in involuntary bankruptcy proceeding against author of statement, a creditor of bankrupt who procured and paid an attorney to file petition in bankruptcy, but who did not attend bankruptcy hearing and was not shown to have had any knowledge of the libelous statement, could not be held liable in action for conspiracy to libel based on subsequent publication of allegedly defamatory statement by the delivery of copies thereof to newspaper reporters by the attorney in bankruptcy proceeding and others in the absence of any evidence disclosing motive for creditor to join any conspiracy to malign the party referred to in defamatory statement or disclosing any knowledge on creditor's part of intention of any person to publish statement.

12. Conspiracy 🔑21

Nonsuit as to one of several defendants in action for damages for an alleged conspiracy to libel was proper where record was such that a verdict against such defendant would have had no support in the evidence and consequently would have been against the law.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by William H. Neblett against John B. Elliott, Ralph B. Gordon and others, to recover damages for an alleged conspiracy to libel plaintiff. From orders granting nonsuits in favor of the named defendants and from the judgments of nonsuit entered in favor of such defendants, plaintiff appeals.

Appeal from order granting nonsuits dismissed and judgments of nonsuit affirmed.

William C. Ring, E. Walter Guthrie, E. W. Miller, J. Merrill Brown, R. Dean Warner, and Alfred F. MacDonald, all of Los Angeles, for appellant.

Gordon Lawson, Joseph L. Lewinson, and Donald Armstrong, all of Los Angeles, for respondent John B. Elliott.

Mayock & Lester, of Los Angeles, for respondent Ralph B. Gordon.

WHITE, Justice.

In an action to recover damages for libel, the plaintiff charged that the defendants, pursuant to a conspiracy theretofore entered into, caused to be written and published a false and defamatory statement of one Carl Pustau wherein plaintiff, an attorney at law, was accused of corruptly influencing or attempting to influence certain high officers of the United States government. Upon the trial a judgment of nonsuit was entered in favor of each of the defendants and respondents herein John B. Elliott and Ralph B. Gordon. From such judgments this appeal is prosecuted.

[1] So far as the factual background here involved is concerned, and stating the same in the light most favorable to plaintiff, as we are required to do on appeal from a judgment of nonsuit, it appears from the record that on October 22, 1937, one Walter Hearn, a friend of defendant Peirson M. Hall, brought defendant Carl Pustau to Mr. Hall's law office. On the day following, after talking with Mr. Pustau, defendant Hall telephoned defendant John B. Elliott, inviting the latter to come to his office. Upon Elliott's arrival at Hall's office, the latter in the presence of Pustau told Elliott the story related to him by Pustau and advised Pustau to reduce his story to writing and to keep whatever documents in the form of checks, receipts, etc., he had in his possession which would substantiate his narrative. At this meeting Hall suggested that Pustau obtain the services of defendant J. E. P. Dunn, a licensed investigator and detective, to assist Pustau in preparing his written statement and the assembling of such papers as he had which would substantiate his story. Responding to a telephone call from defendant Hall, defendant Dunn came to the former's office, where he met defendants Pustau, Elliott and Hall, and the latter again related what had been told him by Pustau. Ultimately, arrangements were made to employ defendant Dunn at an agreed compensation, payment of a portion of which at least was guaranteed by defendant Elliott. After several days of association with Pustau, defendant Dunn, with the approval of defendants Elliott and Hall, employed a stenographic reporter, and on the eighth and ninth days of November, 1937, in a hotel room in Los Angeles, the "Pustau Statement" was obtained. This statement was in the form of a civil deposition and was a typewritten transcript of the shorthand notes of the stenographic reporter made in recordation of conversations between Dunn and Pustau on the days mentioned. A few days thereafter, an original and two copies of the same were delivered to defendant Dunn by the reporter. In the latter part of November, 1937, defendant Dunn submitted a statement covering his services and expenditures to Elliott, which the latter paid.

It further appears that on October 23, 1937, defendant Gordon, who was a friend of defendant Dunn, had lunch with him. At this luncheon Gordon inquired of Dunn whether he could arrange a meeting between Gordon and the racing commission, a representative of each California track, and the governor of the state or one of his representatives. A few days thereafter defendant Dunn called defendant Gordon and told him he knew a man who said he could put Gordon in contact with the persons he wanted to see, and on November 4, 1937, defendant Dunn took Pustau to Gordon's home, at which time Gordon stated to Pustau whom he wanted to meet and outlined to the latter why he desired to meet the people in question. Defendant Gordon told Pustau he could not pay him for his services, but that if Pustau helped him to make his plans successful he would reward him with a percentage of the profits. Defendant Pustau advised Gordon that he would think the matter over, and on November 8 defendants Pustau, Gordon and Dunn met in the latter's office, where Pustau consented to assist Gordon. It further appears that at this meeting Dunn told his friend Gordon he did not know what kind of man Pustau was, or how much Gordon could rely upon him. Subsequently Gordon saw Pustau quite frequently, but notwithstanding Dunn's admonition not to advance too much money to Pustau until he had produced some results, it appears that nevertheless by the end of December, 1937, Gordon had advanced Pustau the sum of $764.50.

Early in the following year Gordon met Pustau and demanded return of the money he had advanced him, telling Pustau the latter had produced no results, had been very dishonorable and had related many things that were untrue. The evidence seems also to indicate that defendant Dunn never told Gordon that he was investigating Pustau or of the existence of the "Pustau statement".

On February 3, 1938, defendant Gordon went to defendant Hall's office and told him he wanted to sue Pustau for the money he had advanced. The attorney advised him that the best way to handle the matter would be to institute involuntary bankruptcy proceedings against Pustau, but advised Gordon that he could not handle the case. However, he mentioned the names of several attorneys who might be willing to handle the matter, and defendant Gordon finally selected defendant Welburn Mayock, whereupon Attorney Hall telephoned Mayock's office, as a result of which Mayock came to Hall's office on the day following, when Hall asked Mayock if he was in a position to handle a bankruptcy matter in which a United States senator as well as a nationally known banker might appear in an unfavorable light. Mayock replied that he did not know the gentlemen and was unaware of any impediment to his handling the matter. Defendant Hall informed Mayock he would call the party in question and tell him to make an appointment, and also advised Mayock that the name of the alleged bankrupt was Pustau, who might deny that he had any assets. Hall further told Mayock he had in his possession a statement in which Pustau disclosed certain assets, and gave a copy of the "Pustau statement" to Mayock, which the latter read, and on the following Sunday defendant Gordon went to Mayock's office and told him he had lent $764.50 to Pustau, of which sum $250 had been returned to him through defendant Dunn.

On the next day, Monday, February 9, 1938, Attorney Mayock prepared and filed a petition in involuntary bankruptcy and obtained an order of the United States District Court for the Southern District of California for the appearance of the alleged bankrupt, Pustau, on the following day before the Honorable Benno Brink, referee in bankruptcy, who was appointed to conduct, as special master, a hearing concerning the acts, conduct or property of Pustau; said hearing being held pursuant to section 21, sub. a, of the Bankruptcy Act, 11 U.S.C.A. § 44, sub. a. Defendant Gordon paid Mayock the sum of $30 as a fee for filing the petition, and compensated the notary for the latter's charges, but, so far as the record discloses, did not pay or agree to pay Mayock an attorney's fee for his services, because Attorney Mayock advised that his fee would be a preferred claim in the bankruptcy proceedings.

Prior to the bankruptcy hearing Mayock did not tell Gordon that he had a copy of the "Pustau statement" or that he might use it at the bankruptcy hearing. He did tell Gordon that his presence was unnecessary at the hearing, and Gordon was not in attendance. During the next succeeding few days Mayock consulted Hall on several occasions.

On the morning of February 10, 1938, Pustau called Dunn and told him he had been served with a subpoena commanding his appearance in the bankruptcy court at 10 o'clock, and asked Dunn what he should do. The latter advised him to obey the subpoena and suggested it would be appropriate for him to ask a continuance for the purpose of securing counsel. Pustau appeared at the hearing and requested a continuance, which was granted over Mayock's objection that a witness was not entitled to counsel. The hearing was continued until 2 o'clock the following day. Following the granting of the continuance Pustau met Dunn, who suggested he employ defendant J. J. Irwin as his attorney to represent him in the bankruptcy matter. Pustau did employ Attorney Irwin, who called Attorney Mayock and invited Mayock to his office. At the hearing on February 11, 1938, Attorney Mayock called Pustau to the witness stand and inquired briefly into the various transactions related in the "Pustau statement." During this interrogation Pustau orally made several changes in his statement. After asking Pustau a few questions, Attorney Mayock offered the "Pustau statement" and certain exhibits in connection therewith in evidence, and they were so received by the special master; Attorney Irwin making no objection to their introduction. Attorney Mayock testified that he offered the statement into evidence to accommodate Attorney Irwin, who had requested that he make the hearing brief, and also for the purpose of confronting Pustau with a statement of his assets and liabilities. Attorney Mayock testified also that at the time he offered the statement at the bankruptcy hearing he did not believe a legal action could be brought to recover the sums which Pustau claimed in his statement were owing to him, because of the alleged illegal nature of Pustau's activities upon which he based his claims.

On the evening of February 13, 1938, in the lobby of a Los Angeles hotel, defendant Dunn met a newspaper reporter, and in response to the latter's question, "What's new?" Dunn told him of the existence of the "Pustau statement" in the bankruptcy court and outlined to the reporter its general content. On the following morning the newspaper reporter went to Hall's law office and asked the latter if he had heard of the "Pustau statement". Hall replied in the affirmative, and referred the reporter to Attorney Mayock for a copy. When approached by the reporter for such copy, Attorney Mayock told him he did not have a copy, and suggested that the reporter go to the bankruptcy court and look at it. Upon arrival at the bankruptcy court the reporter was informed that upon orders of Referee Brink the "Pustau statement" could not be seen. This information the reporter conveyed to Mayock, whereupon the latter went to Hall's office and obtained a copy of the statement and a copy of the exhibits in connection therewith, after which he went to the office of the bankruptcy court reporter to obtain a transcript of the proceedings. The bankruptcy court reporter told Mayock that Referee Brink had suppressed his notes. Attorney Mayock thereupon prepared a written demand for a transcript of the proceedings and served it upon the court reporter and Referee Brink. This took place around noon on the 14th of February. It further appears that later that afternoon Attorney Mayock was informed by the newspaper reporter that the latter had heard that the referee was going to expunge the "Pustau statement" and exhibits in connection therewith from the record.

Following his appearance at Referee Brink's office Mayock and the newspaper reporter went to a public stenographic service in Los Angeles and ordered eight or nine copies of the "Pustau statement" typed. Subsequently Mayock delivered a copy thereof to the newspaper reporter. After a conference with defendant Hall, Mayock decided to give copies of the statement and the exhibits used in connection therewith to all the metropolitan newspapers, and thereupon he took copies of the exhibits to a photostatic service and ordered photostatic copies thereof. On the evening of February 14, about 6 o'clock, defendant Mayock returned to the photostatic service and obtained the photostatic copies, for which he paid thirty or thirty-five dollars. Assembled at the photostat service office were various newspaper reporters and defendants Hall and Mayock. When the latter received the photostats he distributed the copies of the statement and the photostats to the assembled reporters. The distribution of the copies of the statement and the photostatic copies of the exhibits in the office of the photostatic service, as above narrated, is the publication of which the appellant complains and upon which his cause of action was grounded.

By his second amended complaint (hereinafter referred to as the complaint) plaintiff alleged that he was at the time of the filing thereof and ever since October, 1919, had been duly admitted and licensed to practice as an attorney-at-law in all the courts of the state of California, and until September 1, 1917, was a law partner of then United States Senator William G. McAdoo; that as such attorney-at-law plaintiff came to and did enjoy a good name and a widespread and enviable reputation. It is then alleged that during the year 1937, prior to the filing of said complaint, the defendants willfully, unlawfully and maliciously conspired, confederated and arranged and agreed together and with each other to maliciously and wantonly injure and defame the plaintiff in his name and reputation; and that in pursuance and furtherance of the objects of said conspiracy the defendants caused to be published certain defamatory statements of and concerning the plaintiff, and which said statements were contained in the "Pustau statement" heretofore referred to. Without here setting forth in detail such statements, the complaint alleged that by the publication of portions of the same it was meant and understood by persons to whom the statement was published to mean that plaintiff had agreed to accept the payment of a substantial sum of money from the George A. Fuller Construction Company of New York, and that all or a portion of such money would be paid by plaintiff to United States Senator McAdoo as a bribe for the purpose of corruptly influencing the Senator in obtaining an increase in the allotment of $900,000 for the emergency deficiency bill, to the end that said construction company would be awarded the contract for the erection of the post office in the city of Los Angeles; that by certain other language and words contained in the published statement, it was meant and understood to mean by the persons to whom said statements were communicated, that plaintiff had requested Pustau to make a trip to Washington for the purpose of changing a certain Congressman's attitude toward a branch banking bill then pending in Congress, so that such Congressman would be in favor instead of against it; and further, that plaintiff had authorized said Pustau to pay the sum of $5,000 to such Congressman as a bribe for casting his vote in favor of a certain bill then pending in the House of Representatives. It was further alleged that certain language contained in the published statement was understood by persons to whom such statements were published to mean that defendant Pustau, at the request of plaintiff, gave the latter a check for $2,000 to be used for the purpose of corruptly influencing plaintiff's law partner, Senator McAdoo, to have a corporation known as the R. E. McKee Company declared to be the low bidder on a new building to be erected by the Vèterans Hospital at Sawtelle, California. Finally, it was alleged that certain other statements contained in the "Pustau statement" meant and were understood to mean by persons to whom they were communicated that plaintiff had made arrangements with Pustau whereby Pustau would give to plaintiff the sum of $6,000 for the purpose of delivering that sum to plaintiff's law partner, Senator McAdoo, as a bribe to corruptly secure the appointment of a certain person as the California Administrator of the Works Progress Administration.

Although there were four causes of action contained in plaintiff's complaint, the cause was tried only upon the fourth cause of action therein contained, which charged a conspiracy among the defendants to libel appellant. The first three causes of action were dismissed prior to the taking of testimony, and no appeal was taken from said judgments of dismissal. At the conclusion of plaintiff's case all defendants (except Pustau, who did not appear at the trial either in person or by counsel) made motions for nonsuit, and the same were granted as to defendants John B. Elliott and Ralph Gordon, but denied as to the other defendants, Dunn, Mayock and Hall, whereupon the trial proceeded as to all defendants except Elliott and Gordon. This appeal concerns only the judgments predicated upon the nonsuit granted to the last-named defendants.

Appellant's contention as to what the evidence shows is thus epitomized by him in his brief: "That Elliott and Hall, motivated by the desire to defeat the re-election of Senator McAdoo, and assisted by Dunn, bought the Pustau Statement from Pustau; that they attempted to publish it with the assistance of Gordon, Dunn, Mayock and Pustau by means of a collusive bankruptcy proceeding; that this plan was thwarted when the newspaper reporters were denied access to it; and that with the knowledge that the bankruptcy court had suppressed the further publication of the Pustau Statement and was going to expunge it from the records, they obtained copies of the Pustau Statement and distributed them to the newspaper reporters."

Respondents on this appeal take no issue with appellant in his claim that the language contained in the published statement is actionable per se and was not published on a privileged occasion; but they contend that, conceding the existence of a conspiracy to defame appellant, neither of them ever joined or knowingly participated therein.

[2, 3] We shall first give consideration to the evidence so far as it purports to show, as claimed by appellant, that the respondent Elliott knowingly participated with others, as charged, in the alleged conspiracy, or in the arrangements made to publish the defamatory statement, for the purpose of maligning and reflecting upon appellant's reputation. It is only when plaintiff can show that a defendant has united or cooperated with others to inflict a wrong upon him that he is entitled to a joint recovery of damages against such defendants. More v. Finger, 128 Cal. 313, 60 P. 933; Nevin v. Gary, 12 Cal. App. 1, 106 P. 422; Herron v. Hughes, 25 Cal. 555. To accomplish this, plaintiff must show (1) concert of action between Elliott and the other defendants to accomplish the purpose of the conspiracy, i. e., the publication of the libel; (2) that respondent's actions were illegal and in furtherance of a common scheme or design to achieve the unlawful purpose of the conspiracy; and (3) that respondent had knowledge of the conspiracy and its unlawful purpose. Angelus Securities Corp. v. Ball, 20 Cal.App.2d 423, 432, 67 P.2d 152; Fisher v. Myers, 339 Mo. 1196, 100 S.W.2d 551.

[4, 5] As to respondent Elliott, there is in the record evidence that in 1932 he was manager of the successful campaign of Senator McAdoo for the office of United States Senator, but vigorously opposed the re-election of the Senator in 1938; that he paid defendant Dunn some $800 for the latter's services and expenses in obtaining

and delivering an original and two copies of the Pustau statement to defendant Hall. The record is barren of any evidence that respondent Elliott ever knew of any plan or scheme to wrongfully publish the "Pustau Statement" or that he in any way participated in obtaining it other than to enable him to investigate and verify, if possible, the truth of Pustau's assertions concerning the activities of appellant and his law partner, Senator McAdoo. The record indicates that at no time was respondent Elliott aware of the subsequently established perfidy of Pustau. A reading of the record further discloses that the plan to publish the "Pustau statement" was initiated in February, 1938, and it is noteworthy in that connection that respondent Elliott's name is not mentioned by any witness in the case with reference to events occurring subsequent to the latter part of November, 1937. There is an utter lack of evidence that respondent Elliott knew anything about the Pustau bankruptcy proceedings or of the delivery of the "Pustau statement" and exhibits to the newspapers. It is true that each participant in a civil conspiracy is responsible as a joint tort feasor for all damages resulting from the wrong, irrespective of whether he was a direct actor and regardless of the degree of his activity; but the evidence herein is wholly unsatisfactory to show that the conduct of respondent Elliott was in furtherance of a common agreement or understanding to attain the claimed unlawful purpose of the persons who undertook to and did publish the alleged libel. Such a showing is indispensable, but here is entirely lacking.

Appellant places great reliance upon certain of his own testimony given at the trial wherein he testified that subsequent to the filing of the libel suit here in question he had a conversation with respondent Elliott at appellant's office, no other person being present. As to what occurred on this occasion, appellant testified in part as follows:

"Mr. Elliott, after we sat down and exchanged a few more or less nonessential statements said that he wanted me to dismiss this libel suit against him. He said, 'You and I have been old friends and have known each other socially well all these years, and I don't think you ought to sue me'. Quite a bit of discussion was had along that line, and I replied, 'I don't know what else I could do, Jack. Here I am practicing law in Los Angeles, not bothering you or anybody else, getting along all right, and you come along and publish against me a statement of Pustau, which it now develops that you bought and paid for and put out against me, which charges me with crimes of pretty nearly every nature in the calendar, and which, if true, I would not only be disbarred, but would go to the penitentiary. I cannot see any basis on earth why I should dismiss against you, and I cannot see any basis why you should come over here and ask me to do so.' I said, 'Every day since you have known me all these years I have been at your house and you have been at my house. We have been that sort of friends. We have done everything together.' I said, 'During the time we lived at the beach you lived just a little way from me.' I said, 'You were at my house nearly every day and all the time we were seeing each other last summer you were working up against me this Pustau statement at that time.' And I said, 'I cannot forgive you for it, and when you got it you should not have published it. You should have seen me and asked me whether it was true. You owed me that much. You owed it to me to give me a chance to tell you what my side of it was before you sprung it on the public, and it ruined me as a practicing attorney in this city. It ruined me from every standpoint, and I cannot see why you should do it.' He said, 'I was not after you; I didn't intend to hurt you; I was not trying to get at you at all. I had made up my mind that McAdoo ought not to be in there, and I could not publish things on McAdoo without putting them out on you.' * * *"

[6-8] Cognizant as we are of the rule applicable to motions for a nonsuit—that the evidence must be viewed with reasonable favor in support of plaintiff's case and taken most strongly against the defendant (Nicholas v. Jacobson, 113 Cal.App. 382, 387, 298 P. 505, 507), nevertheless, we are not required to accept as true everything that is testified to by the witnesses, and neither is the trial court. As was said in Nicholas v. Jacobson, supra:

"* * * Words may be mere words in the testimony, but evidence 'is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.' Code Civ.Proc. § 1823. One of the 'means sanctioned by law' is to have the witness appear and give his testimony orally, but it has frequently been held that a court is not bound to accept oral testimony as evidence of a fact if such testimony is inherently improbable. Davis v. Judson, 159 Cal. 121, 130, 113 P. 147; Caldwell v. Weiner, 203 Cal. 543, 546, 264 P. 1100; Staples v. Hawthorne, 208 Cal. 578, 583, 283 P. 67. Such is the case here. It is not the habit of normal men to submit to medical or surgical treatment unless they have some physical ailment, or, at least, unless they think they have such ailment. Hence, the mere statement of the appellant made seven years after the occurrence that he did not have any physical ailment when he consulted the respondent and that he did not ask the respondent for medical treatment must be rejected as evidence by the common sense of mankind. By this we do not mean to hold that the trial judge may pass on the credibility of a witness in ruling on a motion for nonsuit. We merely hold that this particular testimony is so inherently improbable that it was not entitled to consideration as evidence in the case, and that, if a verdict for the plaintiff should have been founded on it, such verdict would have had no support as being against the law. [In re] Estate of Luckenbach, 205 Cal. 292, 301, 270 P. 961, 965, where the court took the following quotation from [In re] Estate of Bryson, 191 Cal. 521, 541, 217 P. 525, adding the emphasis noted: 'To justify the submission of any question of fact to a court or jury there must be proof of a substantial character that the fact is as alleged.'"

[9, 10] To us it seems incredible and contrary to the normal conduct of men that respondent Elliott, after being served with a complaint whereby appellant sought a million-dollar judgment against him, would admit the whole question in controversy between him and appellant to be against himself. The trial court was therefore warranted in rejecting such testimony as inherently improbable. We are not unmindful of the fact that jurors are the sole judges of the facts, but the question as to whether there is substantial evidence in support of the plaintiff's case is in all instances a question of law for the court. Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220.

[11, 12] Bearing in mind the rules just enunciated, we come now to a consideration of the evidence so far as it relates to the conduct and actions of respondent Ralph Gordon. In that connection the record discloses that Gordon had been for some years a friend of defendant Dunn. During October, 1937, he advised his friend Dunn of his desire to effect a contact with members or representatives of the racing commission and others. Defendant Dunn introduced Gordon to Pustau, the latter of whom pretended he could assist Gordon, and received from Gordon sums totaling approximately $764.50 as loans or compensation. Subsequently some of this money was repaid Gordon, and thereafter the latter discovered that Pustau was unable to bring about the desired introductions, whereupon Gordon made unsuccessful efforts to retrieve his financial advancements to Pustau. He consulted defendant Attorney Hall, who advised of his unwillingness to accept the professional employment, but proffered Gordon a list of attorneys, from which Gordon selected Attorney Welburn Mayock, one of the defendants herein. The latter accepted the employment from Gordon; and because no tangible assets belonging to Pustau were known, defendant Hall suggested that proceedings in bankruptcy be instituted, wherein Pustau would be required to disclose all his assets. Attorney Mayock obtained from respondent Gordon the necessary information and data, and filed the bankruptcy action as aforesaid. At no time did Mayock mention to Gordon the "Pustau statement", and Gordon did not attend the bankruptcy hearing. The record discloses neither motive nor reason for respondent Gordon to join any conspiracy to malign appellant and contains no testimony that such respondent knew of the existence of the statement, its introduction into evidence at the bankruptcy hearing, or of the intentions of any person or persons to deliver, or of the actual delivery of, copies of such defamatory statement to the newspapers. We cannot roam in the fields of suspicion, conjecture and surmise to stigmatize respondent Gordon with guilty knowledge and wilful intent to injure appellant. Therefore, under familiar rules, the action of the trial court in granting a nonsuit as to respondent Gordon must be upheld, because if a verdict for plaintiff had been found against respondent Gordon on the state of the record here presented, such verdict would have had no support in the evidence and consequently would have been against the law.

The attempted appeal from the order granting the nonsuits is dismissed. For the foregoing reasons, the judgments from which this appeal is taken are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

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46 Cal.App.2d 335

BRAUN v. NEW YORK LIFE INS. CO.

Civ. 2765.

District Court of Appeal, Fourth District, California.

Aug. 4, 1941.

1. Evidence 🔑22(1)

The District Court of Appeal will take judicial notice of common knowledge that the New York Life Insurance Company is licensed to do business in California and maintains general offices within the state.

2. Action 🔑6

In action for declaration of insurer's liability to continue making payments under disability benefit provision of life policy, wherein complaint alleged that all of the payments previously made had been made to the insured within the state of California, general denial of such allegation, contained in the answer, constituted in effect an "admission" that all but one of the payments had been made to the insured in California.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

3. Insurance 🔑147(3)

In insured's action brought in California for determination of duty of insurer to continue to make disability benefit payments to insured, under disability provision of life policy which had been issued in New York and delivered to insured who then resided in Pennsylvania but who later moved to California, where he paid premiums and received certain disability benefit payments, the law of California and not the law of New York or of Pennsylvania was controlling in determining insurer's liability. Civ. Code, § 1646.

4. Insurance 🔑400

Where life policy provided that it should be incontestable after two years from date of issuance except for nonpayment of premium and except as to provisions and conditions relating to disability and double indemnity benefits, and provision of policy relating to disability benefits contained no provision for cancellation thereof for fraud in inception of contract, the provision for disability benefits became incontestable at expiration of two years, under California law, and the insurer could not thereafter avoid liability for payment of disability benefits because of alleged misrepresentations concerning insured's health, in his application for the policy.

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Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Declaratory judgment action by Theodore H. Braun against the New York Life Insurance Company to have rights of the plaintiff under disability benefit provisions of a life insurance policy determined, and to recover accrued payments. From an adverse judgment, defendant appeals.

Affirmed.

Meserve, Mumper & Hughes, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for appellant.

Ogden & Steelman, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment, in an action for declaratory relief, under which plaintiff was declared entitled to the continued payment of disability benefits under an insurance policy issued to him by defendant. Defendant was denied the relief it sought of cancellation of that portion of the policy under which plaintiff claimed those benefits, because of alleged misrepresentations, concealment and fraud in his application for the policy, which was made a part of the policy. Defendant also sought recovery of $6,381.89 it had paid to plaintiff.

[1] The New York Life Insurance Company is a corporation organized and existing under the laws of the state of New York, with its principal place of business in the city of New York. It is licensed to do business in California and maintains general offices in this state. This last fact is one of such common and general knowl-

edge that we may take judicial notice of it. People v. Tossetti, 107 Cal.App. 7, 289 P. 881; Wood v. Kennedy, 117 Cal.App. 53, 3 P.2d 366.

In 1925, plaintiff lived in the state of Pennsylvania. He made application for the policy of insurance at Pittsburgh on April 8, 1925, and it was delivered to him there.

The policy contained a section, numbered one, having eight paragraphs that dealt with total disability. Under the conditions there stated, in the event of total disability, the insurer agreed to pay the insured fifty dollars per month during the time of total disability.

Plaintiff suffered total disability in 1929, because of tuberculosis. His disability payments commenced on January 14, 1930, and were continued to June 1, 1938, when they were discontinued because defendant had then discovered that plaintiff, in his application for the insurance, allegedly had concealed and misrepresented that he had suffered from and had been treated for various named diseases and had consulted several physicians within five years prior to the date of his application, all contrary to statements made in it.

The disability payments having been discontinued plaintiff brought this action to have his rights under the policy determined and to recover accrued payments. Defendant denied its liability and sought cancellation of that portion of the policy providing for those payments because of the alleged misrepresentations, concealment and fraud of plaintiff in obtaining his policy.

The trial was most informal. Plaintiff introduced the policy in evidence, stipulated that it was applied for and delivered to him in Pennsylvania, and rested after much discussion between counsel for both parties and the trial judge in which it was inferentially admitted that this evidence and the admissions in the pleadings made out a prima facie case for plaintiff and that the real issues to be tried were the allegations of the cross-complaint seeking rescission of the total disability provisions of the policy and the recovery of the money paid to plaintiff. Under this state of the record we are not disposed to consider any question of the sufficiency of the evidence to support any of the findings except those bearing on fraud and rescission.

After plaintiff had rested, defendant attempted to introduce evidence to prove the fraud alleged in its cross-complaint. An objection was sustained to this evidence on the ground that defendant was barred from asserting fraud after the lapse of two years from the date of the policy under the incontestability clause it contained. The correctness of this ruling is the sole question to be considered here.

[2] It should be observed that it was alleged in the complaint "that all of said (disability) payments have been made to the plaintiff in said state" of California. The answer denied this allegation generally, which, in effect, is an admission that all but one of those payments had been made to plaintiff in California.

Defendant made a sufficient proffer of proof so that the question of the effect of the incontestability paragraph of the policy is squarely presented. The policy contained the following pertinent provisions:

"Disability Benefits. } And The Company Agrees To Pay To The Insured Fifty Dollars each month ($10 per $1,000 of the face of this policy) during the lifetime of the Insured and also to waive the payment of premiums, if the Insured becomes wholly and presumably permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof. * * *

"Income Payments.—The Company will pay to the Insured a monthly income of $10 per $1,000 of the face of the policy during his lifetime and continued disability, beginning immediately on receipt of said proof. * * *

"Payment of Premiums.—All premiums are payable on or before their due date at the Home Office of the Company or to an authorized agent of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. * * *

"Incontestibility.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits. * * *

"This Policy is free of conditions as to residence, travel, occupation, or military or naval service, except as provided under Sections 1 and 2. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York."

Section 1 of the policy, providing for disability benefits, contains no provision for cancellation of this portion of the policy for fraud in the inception of the contract.

We are not informed as to the place of plaintiff's residence during the time when he paid the premiums on the policy nor whether any of those payments were made to a general office in the state of his residence. We are not informed when plaintiff became a resident of California, but the admission that practically all of the disability payments were made to him in California justifies the conclusion that he has resided in this state since early in 1930, if not before.

Section 1646 of the Civil Code provides as follows: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

Defendant contends that under this Code section the incontestability clause of the policy must be construed according to the law of New York as, by its terms, the obligations of the policy were to be performed there. As an alternative it is argued that as the insurance was applied for and the policy was delivered to plaintiff in Pennsylvania, it must be construed according to the laws of that state, if the New York laws do not control.

It cannot be questioned that the precise incontestability clause before us here has been before the court of last resort of the State of New York which has held that this clause does not bar the insurance carrier from contesting the disability payment provisions after two years from the date of issuance of the policy, because of fraud, misrepresentation and concealment of the insured in obtaining the policy.

We are cited to no decision by the highest court of Pennsylvania on the precise question. There are decisions of an intermediate court, the functions of which correspond to those of the District Courts of Appeal in California, which follow the New York rule.

In speaking on this question, where an identical incontestability clause was involved, in the case of New York Life Insurance Co. v. Ruhlin, D.C., 25 F.Supp. 65, 69, it was said:

"In New York, it has been repeatedly held that an incontestable clause such as the one now before this court, does not apply to the disability and double indemnity provisions of the policy. Steinberg v. New York Life Insurance Company, 263 N.Y. 45, 188 N.E. 152, 90 A.L.R. 642; Chambers v. New York Life Insurance Company, 148 Misc. 561, 265 N.Y.S. 217, affirmed in 240 App.Div. 1027, 268 N.Y.S. 994; Manhattan Life Insurance Co. v. Schwartz, 274 N.Y. 374, 9 N.E.2d 16; Equitable Life Assurance Society v. Kushman, 276 N.Y. 178, 11 N.E.2d 719; Mutual Life Insurance Co. v. Union Trust Co., 244 App.Div. 764, 280 N.Y.S. 217.

"In Pennsylvania, the same rule has been applied. See Guise v. New York Life Insurance Co., 127 Pa.Super. 127, 191 A. 626; Kramer v. Mutual Life Insurance Co., 130 Pa.Super. 85 [196 A. 614]; Mutual Life Insurance Co. v. McConnell, 20 Pa. Dist.& Co.R. 250. The only Pennsylvania decision to the contrary that we know of is New York Life Insurance Company v. Thomas, 27 Pa.Dist.& Co.R. 215. But that case was decided in 1936, and we would consider it overruled by Kramer v. Mutual Life Insurance Company, supra, decided in 1938. The Kramer case, as a decision of Pennsylvania, is binding on this court, even though it may have been by an intermediate court of appeals. See Blair v. Commissioner of Internal Revenue, 300 U.S. 5, 10, 57 S.Ct. 330, 332, 81 L.Ed. 465."

When the same case was before the Supreme Court of the United States (Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 58 S.Ct. 860, 862, 82 L.Ed. 1290) that court said: "'Since the company is domiciled in New York and the insured lives in Pennsylvania, and "all that is here for our consideration is the meaning, the tacit implications, of a particular set of words," "for the sake of harmony and to avoid confusion" we shall follow the decision of those courts and hold that the insurance company is not barred by the incontestability clause from rescinding the double indemnity and disability provisions. Mutual Life Ins. Co. v. Johnson, 293 U.S. (335), 340, 55 S.Ct. 154, 79 L.Ed. 398; Trainor Co. v. Aetna Casualty & Surety Company, 290 U.S. 47, 54, 54 S.Ct. 1, 2, 78 L.Ed. 162.'" See Ruhlin v. New York Life Ins. Co., 3 Cir., 93 F.2d 416.

We are, therefore, justified in concluding that if plaintiff had been a resident, either of New York or Pennsylvania when this action was instituted, and he had filed a similar action in the proper court of either state of which he might have been a resident, that court would have held that, under the law of that state, the incontestability clause of the policy would not bar defendant from seeking cancellation of the disability provisions of the policy because of the misrepresentation, concealment and fraud of plaintiff in obtaining it.

There is a direct conflict of authority in the courts of the various states and in the federal courts on the question of the effect of the incontestability clauses in insurance policies under circumstances similar to those before us. There is very eminent authority on both sides of the question. Nothing could be gained by reviewing those cases. Many of them have been considered with care in the recent cases which are cited in this opinion.

The first California case to be considered is the Mutual Life Insurance Company of New York v. Margolis, 11 Cal.App.2d 382, 53 P.2d 1017, decided on January 22, 1936. No hearing of this case was asked of the Supreme Court, but it was cited with approval in Coodley v. New York Life Ins. Co., 9 Cal.2d 269, 70 P.2d 602.

On April 18, 1927, the Mutual Life Insurance Company of New York issued two policies of insurance to Margolis, which, in section one of each policy, provided for the payment of double indemnity for accidental death under circumstances there specified. Each policy, in section three, also provided for the payment of total disability benefits. Margolis' applications for the policies, which were made part of the contracts, recited that he was in good health, had not suffered from any illness and had not been treated by a physician. He became totally disabled and the insurer paid the disability benefits. In 1933, the insurer discovered that the representations made by Margolis concerning his health and lack of previous illnesses were false. It suspended the payment of disability benefits and brought an action to rescind the disability benefit provisions of the policies on the ground of misrepresentation, concealment and fraud of Margolis in the applications for the policies. After the first witness for the insurer had been sworn Margolis objected to the introduction of any evidence principally on the ground that plaintiff's action was barred by the provisions of the incontestability clauses in the policies. The objection was sustained and judgment was rendered for Margolis. The judgment was affirmed on appeal.

The incontestability clauses in the policies involved in the Margolis case [11 Cal. App.2d 382, 53 P.2d 1018], read as follows: "Except for non-payment of premiums and except for the restrictions and provisions applying to the double indemnity and disability benefits, as provided in sections 1 and 3, respectively, this policy shall be incontestable after one year from its date of issue unless the insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

The District Court of Appeal was of the opinion that these incontestability clauses were clear and unambiguous and limited the right of the insurer to contest the disability payments to one year from the date of the policies, and thereafter, to the grounds set forth in section three of the policies relating only to that subject; that as fraud in obtaining the policy was not there specified as a ground of contest, no contest on that ground could be maintained after the lapse of one year. The decision is supported by ample authority.

However, the court went on to discuss the case of New York Life Ins. Co. v. Kaufman, 9 Cir., 78 F.2d 398, in which the incontestability clause involved was in the exact language of the one in the policy we have before us, and which differs from those clauses used in the policies of the Mutual Life Insurance Company of New York which limited the right of the insurer to contest the disability benefit provisions to the grounds enumerated in section 3 of the policies. The New York Life Insurance Company's policies limit the right to contest the disability clauses to "provisions and conditions relating to disability" generally and do not specifically limit the contest to those grounds set forth in a specified section of the policy.

The Supreme Court of the United States agreed with the judgment in the Margolis case but disagreed with the reasoning of the District Court of Appeal, and held that the incontestability clause in the policies of the Mutual Life Insurance Company of New York was ambiguous and construed it against that company. It noted the differences between the incontestability clauses in the policies of the Mutual Life Insurance Company of New York and those in the policies of the New York Life Insurance Company, such as we have here, holding that the latter were more precise than the former, remarking that cases arising under New York Life Insurance Company policies "must be appraised accordingly". Stroehmann v. Mutual Life Ins. Co. of N.Y., 300 U.S. 435, 57 S.Ct. 607, 609, 81 L.Ed. 732.

The same subject was examined further by the Third Circuit Court of Appeals in the case of Ruhlin v. New York Life Ins. Co., 93 F.2d 416, 417, construing the incontestability clause used in policies of the New York Life Insurance Company. It was there said: "The 'language' employed in the incontestability clause here involved [New York Life Insurance Company] is the same as that used in the Gatti Case, but, as the Supreme Court pointed out, differs from that used in the Stroehmann Case. [Mutual Life Insurance Company of New York.] The language used in the clause here in question is 'more precise' than that employed in the Stroehmann Case, and 'expressed in plain words the exception for which' the company now contends. Furthermore, both the Court of Appeals of New York and the Supreme Court of Pennsylvania have held that the incontestability clause here involved clearly excepts the double indemnity and disability provisions from its operation. Steinberg v. New York Life Ins. Co., 263 N.Y. 45, 188 N.E. 152, 90 A.L.R. 642; Manhattan Life Insurance Co. v. Schwartz, 274 N.Y. 374, 9 N.E.2d 16; Guise v. New York Life Ins. Co., 127 Pa.Super. 127, 191 A. 626. We have read the recent opinion of the Supreme Court of California in the case of Coodley v. New York Life Insurance Co. [9 Cal.2d 269], 70 P.2d 602, and the opinion of Judge Coughlin in the case of New York Life Insurance Co. v. Thomas, 27 Pa.Dist. & Co. R. 215, but are not persuaded that the learned District Judge erred."

An identical comment on the cases of Coodley v. New York Life Insurance Company, supra, and New York Life Insurance Company v. Thomas, supra, was made by the Supreme Court of the United States in Ruhlin v. New York Life Insurance Company, supra.

The next case requiring our consideration is Coodley v. New York Life Insurance Company, supra, decided on July 21, 1937. It involved a New York Life Insurance Company policy having an incontestability clause in the precise language of the one now before us. There is no material difference in the legal effect of the two policies.

While the opinion of the Supreme Court does not so state, an examination of the record discloses that Mrs. Coodley was a resident of California when she applied for the policy, and justifies the assumption that thereafter she continued to be a resident of this state. No contention was there made that under the provisions of section 1646 of the Civil Code the incontestability clause in the policy must be construed and applied under the New York rule. These are the only points of distinction between the Coodley case and the instant case.

The Supreme Court affirmed the judgment of the trial court in favor of Mrs. Coodley and approved her contentions, which it summarized as follows [9 Cal.2d 269, 70 P.2d 603]: "On the other hand, it is respondent's contention that the exception in the incontestable clause 'as to provisions and conditions relating to disability benefits' reserves only unto the insurance company the right to set up as defenses against any claim for disability benefits, the provisions and conditions set forth in the body of the policy, viz., on page headed 'Total and Permanent Disability,' and that fraud not being mentioned as a provision or condition under such heading, and not being excepted in the incontestable clause itself, that, therefore, the defendant and appellant is barred and precluded by the incontestable clause from contesting the policy and any claim thereunder on the grounds of alleged fraud in the application and precluded from attacking the validity of the policy, or any portion or part thereof, for alleged fraud in the application, or in the procuring or inception of said policy."

The last California case on this subject which requires our attention is Blair v. New York Life Ins. Co., 40 Cal.App.2d 494, 104 P.2d 1075, decided on August 21, 1940. The Supreme Court denied a petition for hearing on October 17, of the same year.

Except for the date, the name of the insured, the amount, the place of application and place of delivery, the policy in the Blair case is identical with the policy in the instant case, even to the extent of policy loans having been made to each insured.

Blair was a resident of the state of Washington at the time of his application for the policy and its delivery to him. He paid some premiums and received some of the benefits in that state. He subsequently moved to California, where disability benefits were paid to him and were subsequently discontinued.

We are informed that in construing the incontestability clause of the New York Life Insurance Company policies, Washington follows the same rules as are applied in New York and Pennsylvania. Millis v. Continental Life Ins. Co., 162 Wash. 555, 298 P. 739. Therefore, there does not seem to be a single material fact to distinguish the Blair case from the instant case.

The same contentions were made by the insurer in the Blair case as are made by the defendant here. All of them were resolved in favor of the insured and the judgment in his favor was affirmed on appeal.

The court points out that there is no specific provision of the policy that the laws of New York shall govern in any controversy over the legal interpretation to be placed on any part of it; that it provides that the total disability benefit will be paid upon receipt of due proof at the home office; that premiums may be paid either at the home office or to any authorized agent in exchange for a duly executed receipt; that there is no restriction placed on the residence of the assured.

From this it was reasoned that it was the original intent to have the policy performed in part in New York and in part in Washington, that delivery usually completes the contract. The court then said [40 Cal.App.2d 494, 104 P.2d 1078]:

"The law of the place of performance of an insurance contract controls as to its legal construction and effect, but that of the place where made governs on all questions of execution and validity. (Flittner v. Equitable Life Assur. Soc., 30 Cal.App. 209, 157 P. 630), unless the terms of the contract provide otherwise or the circumstances indicate a different intention. In this case, the circumstances do not indicate that in the matter of the interpretation of the contract, the parties intended to be restricted to the laws of the state of Washington, where the contract was consummated by the delivery of the policy.

"In the body of the policy, there is a provision that: 'This policy is free of conditions as to residence * * * except as provided herein. * * *' We fail to find an excepted condition. Under the terms of the policy, the premiums could be paid at the home office or to an authorized agent in exchange for the company's official receipt signed by a designated officer and countersigned by the agent receiving the premium. Under this provision, the contract was to be performed partly in New York and partly in any other place where the premiums were paid or other necessary business could be transacted.

"In recognizing California as the place for the payment of benefits by delivery thereof in this state, defendant waived any right to insist that the Washington law governed. The waiver is not one of jurisdiction, but of the right to apply the Washington law to an action tried in California. The intention of the parties, as gathered from attending circumstances, is controlling in determining the place of trial and the governing laws. Liability for the breach of a contract partly performed in one state, and made and partly performed in another, is fixed by the laws of the state wherein the breach occurred. 17 C.J.S., Contracts, § 12, p. 343. The breach in this case was defendant's refusal to pay further disability income benefits to plaintiff in California. * * *

"California has answered the question in Coodley v. New York Life Ins. Co., 9 Cal.2d 269, 70 P.2d 602, involving an identical incontestability clause in another policy issued by the same company. It is conceded by the company that, after a stipulated period, evidence based on false statements, even though fraudulently made, was barred as a defense, unless by the terms of the policy fraud was expressly or impliedly excepted from the effect of the incontestability provision. Dibble v. Reliance Life Ins. Co., 170 Cal. 199, 149 P. 171, Ann.Cas.1917E, 34; Mutual Life Ins. Co. v. Margolis, 11 Cal.App.2d 382, 53 P.2d 1017.

"Had defendant desired to take advantage of the exception provided in the incontestability clause as relates to the facts in this case, it could and should have definitely included such provision in the 'Total and Permanent Disability' section of the policy, and had it desired that any controversy relative to an interpretation of this clause should be controlled by the laws of the place of execution of the contract, such provision could easily have been inserted in the policy."

The judgment for the insured was affirmed, the court evidently applying the rule that uncertainties in an insurance policy must be construed against the insurer who prepared the form of the policy.

[3, 4] Defendant urges that these California cases fail to give effect to the plain provisions of section 1646 of the Civil Code; that the entire subject should be reopened and re-examined; that under the facts of this case the New York and Pennsylvania rules should be applied in California. This argument might be addressed to the Supreme Court but can hardly be controlling in a District Court of Appeal. We consider the question settled and ourselves bound by the California cases we have cited.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

LYON v. GOSS et al.

Civ. 6582.

District Court of Appeal, Third District, California.

July 31, 1941.

Hearing Granted Sept. 25, 1941.

1. Contracts 🔑56

A promise is a good "consideration" for a promise, provided always that it imposes some legal liability on person making it, but, if it imposes none, then it cannot be a good "consideration".

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

2. Contracts 🔑56

A promise may be too vague and uncertain to amount to a "consideration" for a promise made by other party.

3. Contracts 🔑10(1)

A contract which can be terminated at will of one of parties without liability for damages, so far as it remains executory, is not binding for want of "mutuality".

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality".

4. Landlord and tenant 🔑24(1)

Where contract for lease of public market provided that lessee was to immediately commence to sublease spaces in market, subleases providing for payment of bonuses by prospective subtenants in addition to rentals, and that lessee's interest in lease would be forfeited unless lessee procured subleases calling for payment of specified amount in bonuses by certain date, contract was unenforceable for want of "mutuality", since lessee, under contract, had right to abandon contract at any time without incurring any personal liability. Civ.Code, § 3390.

5. Landlord and tenant 🔑49(1)

Where contract for lease of public market provided that lessee was to immediately commence to sublease spaces in market, subleases providing for payment of bonuses by prospective subtenants in addition to rentals, and provided for forfeiture of lessee's interest in lease unless lessee procured subleases calling for payment of specified amount in bonuses by certain date, and providing that lessee should replace with new subleases any subleases that might be withdrawn, and containing no provision fixing time in which lessee was required to replace subleases that had been withdrawn, lessee was entitled to a reasonable time for performance, however, elapse of more than four years without any replacements having been made, in absence of any excuse for delay, was more than a reasonable time, so as to constitute a breach of the contract. Civ.Code, § 1657.

6. Executors and administrators 🔑114

An "estoppel" cannot grow out of acts of representative of an estate of decedent as an individual which will affect his official title to property of the estate, except where estoppel is based upon and can be supported by equities against the estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

7. Executors and administrators 🔑114

The administrator of estate of decedent was not authorized to "waive" strict performance of contract entered into by decedent prior to his death, or to construe contract to prejudice of estate, or to revitalize the contract after an abandonment by other party.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

8. Action ⚷6

In action for declaratory judgment construing a contract for lease of public market, where contract provided that lessee was to immediately commence to sublease spaces in market, that lessee's interest should be forfeited unless he procured subleases calling for payment of specified amount in bonuses by certain date, and that lessee should replace with new subleases any subleases that might be withdrawn, evidence that practically all of subleases procured by lessee were in default and that lessee obtained only one replacement within the six years before action was commenced, established that lessee had "abandoned" the contract. Civ.Code, § 1657.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon".

9. Contracts ⚷350(3)

Although no definite time is fixed for performance of a contract, a rescission by consent may be implied from acts of parties. Civ.Code, § 1657.

10. Contracts ⚷143

When parties have entered into written engagements expressing obligations which each is to assume, the court should hesitate to enlarge such obligations, and the presumption is that the parties have expressed all of the conditions to which they intend to be bound.

11. Appeal and error ⚷77(1)

A declaratory judgment which held that a contract was still in force, and which granted defendant four additional months to fulfill contract upon his part, had effect of a "final judgment", and therefore was "appealable", notwithstanding that judgment was denominated an interlocutory judgment. Code Civ.Proc. § 1060.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable" and "Final Judgment".

◆

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Beach D. Lyon, as administrator with the will annexed of the estate of Homer Laughlin, deceased, against C. A. Goss and others, for a declaratory judgment construing a contract for a lease on real property. From judgment entered, the plaintiff appeals.

Reversed.

Russ Avery and Harmel L. Pratt, both of Los Angeles, for appellant.

Bartlett & Kearney, Alfred L. Bartlett, and Wm. B. Gilroy, all of Los Angeles, for respondents.

PER CURIAM.

This is an action by plaintiff and appellant, as administrator with the will annexed of the estate of Homer Laughlin, deceased, for a declaratory judgment construing a contract dated March 11, 1929, for a 20-year lease entered into between Homer Laughlin, as the owner of the real property, and C. A. Goss, to commence November 1, 1939, covering property then under lease to the Grand Central Public Market, a corporation, which lease would expire October 31, 1939. The new lease was drawn up and assigned by Goss to a trustee to be held until the terms of the contract for the lease had been performed. The real property affected by the lease was used as a public market and was divided into some 70 stalls, occupied by subtenants operating meat and vegetable markets, grocery stores, lunch counters, and other types of concessions found in such places.

The contract provided that Mr. Goss was to immediately commence to sublease spaces in the market for the term of the new lease, and that the subleases should provide for the payment of bonuses by the prospective subtenants in amounts set forth in a schedule attached to the contract, in addition to the rentals therein specified. The sum of all the bonuses to be so paid when the market was fully sublet amounted to $485,000. Of this Laughlin was to receive the first $205,000, the balance to be thereafter equally divided between himself and Mr. Goss.

The contract also provided that Goss should proceed with diligence to obtain subleases from prospective tenants until the whole of the market was sublet; and that unless Goss procured contracts for subleases calling for the payment of $135,000 in bonuses by March 11, 1932, and a total of $205,000 in bonuses by March 11, 1935, and subleases providing for the payment of rentals totaling $9,500 per month by the latter date, respondent should forfeit all his interest in the lease and the market premises. It also provided that Goss should replace with new leases any leases that might be withdrawn. By April, 1931, Goss had obtained contracts for the payment of bonuses of $264,000, and a letter of that date was addressed to the trustee by the parties to the contract providing that no default should be declared by Laughlin on account of any violation or failure to perform the conditions as to the amounts to be signed up for rents or bonuses.

By December, 1932, all but one of the contracts, however, were in default. On December 27, 1932, Homer Laughlin died, and appellant Beach D. Lyon was appointed the administrator with the will annexed of his estate.

This present action was filed June 30, 1938, and after a hearing upon the issues so raised, the court on March 2, 1939, entered what it denominated an interlocutory judgment and decree wherein respondent Goss was given four months from the date thereof within which to secure $205,000 bonus contracts, said bonuses being payable in cash, or at least 10 per cent upon execution and 10 per cent after acceptance by plaintiff, and the balance on or before the first day of November, 1939; and the total of the subleases to provide for a rental of $9,500 per month. It also provided that in case Goss should fail to procure the bonus contracts and subleases within the time specified or should fail to continue with diligence to procure such contracts and subleases, all of his rights in regard to the market should cease. And finally, that at the end of four months after the date of the decree a further hearing should be had and an additional decree entered as might be just and equitable. It is from this decree and the terms thereof this appeal is taken.

Many points are urged by appellant for a reversal. The first ground for such reversal is that the contract for the lease lacked mutuality, and is therefore void and unenforceable. In the contract Goss agreed to procure subleases and contracts, to enter into subleases, and further provides that,

> "Second party (Goss) further agrees to immediately endeavor to secure contracts to enter into leases and subleases under the terms hereof and to continue such endeavor with diligence until the same are secured for all space in the leased premises to be used for market purposes. Second party further agrees to secure contracts to enter into subleases, etc."

There seems to be no other provision in the contract which attempted to bind Goss to any other obligation or for the performance of any other act.

[1, 2] The rule as stated in 13 Corpus Juris, at page 329 is:

> "A promise is a good consideration for a promise, provided always that it imposes some legal liability on the person making it. If it imposes none, then it cannot be a good consideration. A promise may be too vague and uncertain to amount to a consideration for a promise made by the other party." See, also, 17 C.J.S., Contracts, § 98.

Many cases could be cited in support of this general rule. In Jackson v. Alpha Cement Co., 122 App.Div. 345, 106 N.Y.S. 1052, a cement dealer, in consideration that he would give the manufacturer's brand a preference in his sales and to push the same, was to have a lower rate per barrel than other dealers. This contract was held void for lack of mutuality, since the dealer did not bind himself to make any sales of cement.

In Leach v. Kentucky Coal Co., D.C., 256 F. 686, 688, the dealer agreed to sell as much coal as possible, and in consideration thereof he was to obtain coal at a lower rate. The court therein stated: "There is no obligation whatever upon plaintiff to order any coal. If plaintiff had refused or neglected to order coal, defendant would not have had any cause of action against him."

In Bartlett Springs Co. v. Standard Box Co., 16 Cal.App. 671, 117 P. 934, the contract there was held good because the purchaser bound himself to buy all his needs for a given period from the seller, and a purchase elsewhere of that commodity would have been a breach of the contract.

In Schimmel v. Martin, 190 Cal. 429, 213 P. 33, the owner of a pumping plant agreed to furnish water to adjoining land. The court held this contract was lacking in mutuality, for there was an absence of any agreement by the plaintiff to accept the water offered for sale by the contract.

George v. Weston, 26 Cal.App.2d 256, 79 P.2d 110, was an action for specific performance of an agreement to lease property for the development of oil and gas. It was there argued there was a want of mutuality because appellant could not be compelled specifically to perform for the reason he could surrender the lease at will, and was not obligated to perform any acts involving the drilling of oil wells, and also required the performance of personal service. The court held that a contract which could be terminated at the will of one of the parties without liability for damages so far as it remained executory, was not binding for want of mutuality.

[3] In Charles Brown & Sons v. White Lunch Company, 92 Cal.App. 457, 268 P. 490, 491, it was stated: "It will be noted that the executory contract imposes no burdens, promises, or restrictions upon the plaintiff. It was free to terminate the contract at will at any time, and it imposed no obligation to supply any goods to defendant for any price or at any time. It appears, therefore, that there exists no mutual obligation imposed by the writings, except as to the purchase of the stock by plaintiff, which was fully executed. Had plaintiff discontinued its business or refused to sell its wares to defendant, defendant would have been without a remedy. A contract which can be terminated at the will of one of the parties without liability for damages, so far as it remains executory, is not binding for want of mutuality."

[4] In the case at bar Goss, under the contract in question, had the right to abandon his contract at any time without incurring any personal liability, and for that reason the agreement lacked mutuality. Also Goss had been president of the Grand Central Market for many years, and thereby had a personal acquaintanceship with the tenants and their needs, and of the conditions generally in the market with which he had been so long connected, and it would thus appear the agreement between himself and the owner contemplated the rendition of personal services on the part of Goss, making it further impossible to compel performance by him. § 3390, C.C.

[5] Also another point urged for a reversal is that there was a breach of the contract between the parties by reason of the failure of Goss to procure any subleases after the death of Mr. Laughlin in December, 1932. In 1931 Mr. Goss had procured some $266,000 of bonus contracts, but within a year thereafter practically all of these contracts were in default. Under the agreement Mr. Goss was to furnish other parties to replace those whose contracts were defaulted, but no replacements were made, or had been up to the hearing of this matter. As a matter of fact, as found by the trial court in this matter, the respondent was not relieved of his obligation to replace and make good said (defaulted) contracts within a reasonable time. It is true that no definite time was specified for such replacements, but under section 1657 of the Civil Code if no time is specified for the performance of an act required to be performed a reasonable time only is allowed. More than four years had here elapsed and no replacements have been made. We find no waiver of the provision as to replacement of defaulted contracts, nor any excuse for the long delay, and it would clearly appear that Mr. Goss had had more than a reasonable time within which to complete his agreement.

In Ottney v. Finnie, 5 Cal.App.2d 356, 42 P.2d 714, 716, defendant had agreed to sell 200 club memberships. The court said: "The defendant testified that he sold about 40 memberships from 1927 to 1931 * * *. He admitted that he had not sold any memberships after 1931, claiming that the depression prevented further sales. * * * For approximately two years the defendant made no effort to sell memberships in the country club. We are satisfied that not only does the evidence support the finding that the defendant abandoned his contracts, but it also shows that his failure to complete the membership list of the country club and construct the improvements agreed upon for an unreasonable period of time constitutes a breach of the contracts. Since the contracts specify no limitation of time within which the membership list was to be completed or the improvements made, the law affords a reasonable time therefor." § 1657, Civ. Code; Williams v. Bergin, 116 Cal. 56, 47 P. 877; 6 Cal.Jur., p. 218; 6 R.C.L., p. 646. Here respondent obtained no additional subcontracts or leases, with the exception of one, from 1932 until the commencement of the action in 1938.

The trial court found that the plaintiff had acquiesced in the deal. However, plaintiff here was the administrator of the estate of Homer Laughlin, and as such was only the agent of the estate, with limited authority.

In See v. Joughin, 18 Cal.App.2d 414, 64 P.2d 149, 151, it appeared plaintiff settled a crop lien and expended money in improving property in reliance upon the premises of the agent of the executor. The court there said: "The executrix had no power to compromise or waive a claim in favor of the estate without an order of court. An executrix is a mere trustee in charge of the property of the estate and may act only pursuant to law."

[6] In 11b Cal.Jur., "Executors and Administrators", it is said: "No estoppel, it is said, can grow out of the acts of the rep-

resentative as an individual which will affect his official title to the property of the estate, except where the estoppel is based upon and can be supported by equities against the estate."

[7] It would therefore appear that the administrator was without power to waive the strict performance of the contract, and he was not authorized to construe the contract to the prejudice of the estate.

[8] It is also urged by appellant, and seemingly correctly, that the facts justify the conclusion that, following the death of Mr. Laughlin, Mr. Goss abandoned the contract.

[9] In Morrow v. Coast Land Co., 29 Cal.App.2d 92, 84 P.2d 301, a somewhat similar question was presented and a conclusion reached that in spite of the fact there was no definite time fixed for performance, that a rescission by consent be implied from the acts of the parties. A similar rule is likewise expressed in Middleton v. Newport, 6 Cal.2d 57, 56 P.2d 508.

Also, the plaintiff herein, being an administrator of the estate, an agent, had no right to take any action which would revitalize the contract or waive the performance of any of its provisions.

From the testimony of the respondent it would seem that it was recognized that a contract could not be completed within a reasonable time. The court asked the following question:

"When you say that the contract could be secured do you mean that the bonus could be secured at the present time? A. Yes. I would certainly have to have a chance to work that out on a different basis.

"Q. I am not talking about some other contract or some other basis. I am asking about the particular schedules here that are attached to the contract. A. I cannot make this schedule—I will be honest."

It would appear that the court had attempted to impose a new contract upon the parties. The original contract itself was silent as to how the bonuses were going to be paid, and also silent as to any limitation upon the kind of contract that plaintiff could accept.

In Foley v. Euless, 214 Cal. 506, 6 P.2d 956, 958, appears the following: "Courts have been careful not to rewrite contracts for parties by inserting an implied provision, unless, from the language employed, such implied provision is necessary to carry out the intention of the parties."

[10] To the same effect is the law in Loyalton, etc., Co. v. California, etc., Co., 22 Cal.App. 75, 133 P. 323, where it is said that when parties have entered into written engagements expressing the obligations which each is to assume, the court should hesitate to enlarge such obligations; the presumption being that the parties have expressed all of the conditions to which they intend to be bound.

[11] It is urged by respondent that the judgment and decree from which this appeal is taken is interlocutory, and therefore not appealable. In this we think respondent is in error. In the declaratory relief statute (1060 C.C.P.) it is specifically provided that a party "may ask for a declaration of rights or duties, * * * and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time", and further providing that the declaration "shall have the force of a final judgment".

In the judgment here appealed from it is provided the contract of March 11, 1929, "is still in force, and that the defendant Goss is entitled to an opportunity to fulfill the same upon his part upon the terms hereinafter stated", which is in effect a complete declaration of rights of the parties, and has the effect of a final judgment. Clement v. Duncan, 191 Cal. 209, 215 P. 1025; Guaranty, etc., Bank v. Los Angeles, 186 Cal. 110, 199 P. 35; Perry v. West Coast Bond & Mortgage Company, 136 Cal. App. 557, 29 P.2d 279.

As further evidence of the finality of this decree it is provided in a latter portion, that respondent should have four additional months within which to comply with the contract as construed by the court, and at the end of that time a further hearing should be had. This later hearing was not for the consideration of the contract itself but for the purpose only of determining if respondent had been able to obtain the requisite contracts for the subleases.

From the foregoing it would appear that the contract lacked mutuality, and for that reason was unenforceable and void. It is also apparent that respondent, after the death of Laughlin, from his own statement, abandoned his contract.

For the foregoing reasons the judgment should be reversed, and it is so ordered.

LYON v. GOSS.

Civ. 6606.

District Court of Appeal, Third District, California.

July 31, 1941.

Hearing Granted Sept. 25, 1941.

1. Appeal and error ⚷870(3)

In action for declaratory relief, where defendant had not appealed from a so-called interlocutory judgment previously entered in action, but which was in effect a final judgment, defendant could not attack terms thereof upon appeal from a final judgment subsequently entered therein. Code Civ. Proc. § 1060.

2. Action ⚷6

In action for declaratory relief, where trial court entered a so-called interlocutory judgment finding that contract was still in force and granting defendant four additional months to fulfill contract upon his part, and thereafter, on defendant's motion for additional relief, trial court found that neither plaintiff nor defendant had complied with terms of its interlocutory judgment, trial court properly held that only relief to be granted was a declaration of right of parties as set forth in interlocutory judgment, and directed entry of final judgment. Code Civ.Proc. § 1060.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Beach D. Lyon, etc., against C. A. Goss for declaratory relief. From judgment entered, the defendant appeals.

Affirmed.

Bartlett & Kearney, Alfred L. Bartlett, and Wm. B. Gilroy, all of Los Angeles, for appellant.

Russ Avery and Harmel L. Pratt, both of Los Angeles, for respondent.

PER CURIAM.

In this proceeding, the facts being the same as set forth in Lyon v. Goss, Cal. App., 115 P.2d 886, in which an opinion was this day filed, appellant is appealing from the final judgment entered in the action brought for declaratory relief.

The objection made by appellant arose out of certain actions taken by the trial court on August 23, 1939, after the entry of the interlocutory judgment and decree of March 3, 1939, with the exception of the objection to the action of the court in inserting provisions in the interlocutory decree which were not present in the provisions of the contract upon which the action was originally brought.

The interlocutory decree was entered, March 3, 1939. Thereafter on April 14, 1939, appellant Goss applied for an order directing respondent Lyon to show cause why he should not be ordered to approve certain contracts for subleases submitted to him, and why the four months period fixed in the interlocutory decree should not be extended.

[1] If this court is correct in holding as we did, in Lyon v. Goss, supra, that the so-called interlocutory judgment and decree of March 2, 1939, was a final judgment, appellant Goss not having appealed therefrom, cannot now attack the terms thereof, and cannot here present the question that the trial court erroneously inserted provisions in the first decree which were not present in the contract upon which the decree is based. The cases cited in our opinion in Lyon v. Goss, supra, seem to us conclusive upon that question, and need not be here repeated.

[2] The trial court, upon the hearing of the motion, found that neither plaintiff nor defendant had complied with the terms of its decree, and held that the only issues triable in the action then before the court were those essential to a declaration of the rights of the respective parties under the contract, and held that the only relief to be granted was a declaration of the right of the parties as set forth in the interlocutory decree, and directed entry of final judgment.

If, as appellant argues, respondent herein should not be heard because he has failed to comply with the previous order of the court, the finding that neither have so complied seems to be an answer to appellant also.

Under section 1060 of the Code of Civil Procedure "the court may make a binding declaration of such rights or duties, whether or not further relief is or could be obtained at the time". Here the court has decreed that neither party recover any relief of the other than a declaration of their respective rights. It was not necessary for the court to do more.

The judgment and decree are affirmed.

46 Cal.App.2d 263

WHITCOMB v. EMERSON et al.

Civ. 2754.

District Court of Appeal, Fourth District, California.

July 30, 1941.

1. Appeal and error 🔑1011(1), 1012(1)

It is not function of District Court of Appeal to weigh evidence or express preference for conflicting testimony or conflicting inferences or theories.

2. Appeal and error 🔑1010(1)

There being substantial evidence sustaining findings of lower court, parties are concluded.

3. Appeal and error 🔑931(1)

In action to restrain enforcement of Cosmetology Act against plaintiff, where trial court by its findings indicated that it preferred plaintiff's testimony and accepted same at its face value, District Court of Appeal must conclusively assume that plaintiff exclusively engaged in art of manipulation of customer's face as she testified. St.1927, p. 1711, as amended.

4. Constitutional law 🔑81

Those things which are of themselves evil may be prohibited, but those things which, though not evil in themselves, if practiced by those not adequately trained therein by education and experience, or by those not morally qualified or of sufficient age or discretion, may endanger health, safety, morals or general welfare of people, may not be prohibited, but may be controlled by reasonable regulation.

5. Constitutional law 🔑88

The right to labor or earn one's livelihood in any legitimate field of industry or business is right of "property", and any unlawful or unreasonable interference with, or abridgment of, such right is invasion thereof and restriction of liberty of citizen as guaranteed by Constitution.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

6. Constitutional law 🔑88

It is undoubtedly right of every citizen of United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed on all persons of like age, sex and condition, but there is no arbitrary deprivation of such right where its exercise is not permitted because of failure to comply with conditions imposed by state for protection of society.

7. Constitutional law 🔑88

The power of state to provide for general welfare of its people authorizes it to prescribe all such regulations for pursuing occupation as in its judgment will secure or tend to secure them against consequences of ignorance and incapacity, as well as deception and fraud.

8. Constitutional law 🔑88

If qualifications required are appropriate to calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty, and it is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue lawful vocation.

9. Constitutional law 🔑83(1)

Unreasonable restrictions on personal liberty are void.

10. Constitutional law 🔑81

The power to regulate is not the power to suppress, and business cannot be destroyed or people prohibited from laboring under guise of regulation.

11. Constitutional law 🔑88, 89(1)

The right to labor, to pursue any lawful employment in a lawful manner, and to make lawful contracts are rights enjoyed by the citizen under the protection of the Constitution of the United States.

12. Constitutional law 🔑86

The desire and inclination of mankind to adorn and beautify the person is not wicked nor evil of itself, but is lawful and within realm of inalienable rights classically defined as the "pursuit of happiness".

See Words and Phrases, Permanent Edition, for all other definitions of "Pursuit of Happiness".

13. Constitutional law 🔑88

It falls within legal protection of constitutional guarantees for those skilled in appropriate arts to serve needs of those who seek enhancement or preservation of personal beauty, subject only to right of state to impose such reasonable regulations as will pro tect health, safety, morals and general welfare of public.

14. Constitutional law 🔑48

In determining whether regulation prescribed by cosmetology act was unreasonable, District Court of Appeal could not assume that Legislature, either willfully or ignorantly, intended to violate organic law of either United States or of state of California. St. 1927, p. 1711, as amended.

15. Constitutional law 🔑48

Before District Court of Appeal could declare cosmetology act unconstitutional in any of its aspects, all reasonable doubts must be dispelled. St.1927, p. 1711, as amended.

16. Constitutional law 🔑48

There was a strong presumption of constitutionality of cosmetology act. St.1927, p. 1711, as amended.

17. Constitutional law 🔑88

In determining whether regulation prescribed by cosmetology act was unreasonable, District Court of Appeal must keep in mind sanctity of masseuse's right to engage in any lawful employment, a right which cannot be abrogated or imperiled by reasons of public economy or of convenience. St.1927, p. 1711, as amended.

18. Constitutional law 🔑82

The whole vital quality of constitutional government, from Magna Charta on, proceeds from impulse and desire of people to protect weak against strong and to secure rights of feeble minorities.

19. Constitutional law 🔑47

The invalidity of a statute may be shown by things which will be judicially noticed.

20. Constitutional law 🔑47

In determining constitutionality of cosmetology act, District Court of Appeal was empowered to judicially notice facts disclosing varying types of business usually followed, general character of such businesses and ordinary methods of conducting them. St.1927, p. 1711, as amended.

21. Constitutional law 🔑238(1), 275(1)
Licenses 🔑7(1)

The cosmetology act, when applied to occupation of facial massage as practiced by plaintiff, imposed arbitrary and unreasonable conditions by requiring those engaged in facial massaging to be trained and experienced in and to pass examination in different and unrelated subjects such as shampooing, waving, coloring, dressing and care of hair, and attempted enforcement of act against plaintiff amounted to taking of her property without "due process of law" and a denial to her of "equal protection of the laws." St.1927, p. 1711, as amended; U.S.C.A.Const. Amend. 14, § 1; Const.Cal. art. 1, §§ 1, 11, 13, 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Equal Protection of the Laws".

22. Licenses 🔑8(1)

Where statutes in effect when action to enjoin enforcement of cosmetology act was brought and determined were superseded by sections of Business and Professions Code, rights of parties to continue injunction would be measured by present provisions of code. St.1927, p. 1711, as amended; St.1939, p. 396 et seq., § 7300 et seq.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Helen Walker Whitcomb against Katherine E. Emerson and others for an injunction. From a judgment for plaintiff, defendants appeal.

Affirmed.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for appellants.

Loeb & Loeb, of Los Angeles (Herman F. Selvin, of Los Angeles, of counsel), for respondent.

KELLY, Justice pro tem.

This is an appeal from a judgment in favor of the plaintiff enjoining the defendants, their deputies, agents and successors in office, from enforcing or executing the provisions of an act of the legislature of the State of California, approved May 31, 1927, known as the "Act concerning cosmetology", Stats.1927, page 1711, or of any amendment to said act in so far as the same prevents or impairs the practice of the plaintiff from engaging in the operation of massaging, stimulating or beautifying the face, neck and upper part of the human body by means of the hands and use of oil lotions, upon the ground or for the reason that plaintiff has not had issued to her a certificate of registration or license to practice cosmetology, or upon the ground or for the reason that the plaintiff has violated, or is claimed to have violated, any of the provisions of said act or of any amendment thereto.

The defendants named in the complaint are the members of the State Board of Cosmetology of the State of California; the Director of the Department of Professional and Vocational Standards; the District Attorney of Los Angeles County, the Sheriff of Los Angeles County, and the Chief of Police of Beverly Hills.

The complaint alleges that the plaintiff, the respondent here, is an adult over the age of twenty-one years and that she is a resident of Beverly Hills, Los Angeles county, and has been such since 1936; that she is and has been a person of good moral character, temperate habits and with an education equivalent to the completion of the ninth grade of the public schools of California; that for three years immediately preceding the commencement of this action, in Los Angeles county, California, and for thirteen years next immediately prior thereto, in Boston, Massachusetts, the plaintiff engaged in the practice of that branch or occupation of cosmetology consisting only of massaging, stimulating and beautifying the face, neck and upper part of the human body by means of the hands and use of an oil lotion, and that she had developed a successful and substantial practice and clientele in the pursuit of such occupation and had become well and favorably known as a practitioner of that branch of cosmetology described as being practiced by her; that during all of the time in which the plaintiff engaged in said described branch of cosmetology she has always earned and is now earning her livelihood therefrom and that she is well and favorably known within the county of Los Angeles as a practitioner of the arts described; that she has never engaged in nor practiced, and has no desire nor intention ever to practice any branch or occupation of cosmetology, or any branch of the occupation of hair dresser and cosmetician or cosmetologist other than that branch which she does practice as described. That she has been and is proficient and fully versed in the principles of practice of that branch of cosmetology practiced by her as aforesaid and is fully capable of passing and would pass any reasonable examination and practical demonstration designed to test her fitness and aptitude to practice and engage in such branch of cosmetology, but that she never studied nor has been trained in, and is not proficient in, and could not pass an examination in the other so-called branches of cosmetology referred to and defined in the Cosmetology Act, or in any other of the various branches thereof, in which practical demonstrations are included in the examination for a certificate of registration and license to practice as a cosmetologist, and particularly in the branches thereof referred to in said act as shampooing the hair, hair dressing, marcel waving, water waving, hair coloring, manicuring and the use of mechanical apparatus or electricity; that a knowledge of any of said last mentioned branches is not necessary to, nor are any of them used or practiced in, the practice or performance of that branch of cosmetology practiced by her as aforesaid.

It is then alleged that on or about February 17, 1939, the plaintiff was notified in writing by the Board of Cosmetology that she had violated the rules of said board for the regulation of cosmetological establishments and the provisions of said act, and that she was ordered by the board immediately to cease performing any act of cosmetology until she has been licensed by said board; that she then offered and is now ready, willing and able to submit to an examination designed to test her fitness and aptitude to practice the branch of cosmetology now being practiced by her as described, and that she has requested the board to conduct an examination therefor and upon the successful passage thereof by her to issue to her a certificate of registration or license to practice said branch of cosmetology only, but that the board has refused and still refuses to do so, and has informed the plaintiff that a certificate of registration and license to practice cosmetology, or any branch thereof, or to engage in the occupation or practice of a cosmetologist will be issued to her only if she passes an examination as provided by section 8 of said Act Concerning Cosmetology as amended, St.1931, p. 2412, including an examination and practical demonstration in the subject or branches of cosmetology such as shampooing the hair, hair dressing, marcel waving, water waving, hair coloring, manicuring and the use of mechanical apparatus or electricity; that if she continues to practice or engage in that branch of cosmetology heretofore and now practiced by her as aforesaid, said board will report her conduct to the district attorney of Los Angeles county as a violation of said act, and that said officer will cause her to be arrested by the sheriff of Los Angeles county and the chief of police of Beverly Hills, and will prosecute and seek to convict her of the crime of conducting a cosmetological establishment and of practicing cosmetology without a license; that she will thereby be deprived of her means of livelihood and the only opportunity and privilege of engaging freely in her profession and business; that the defendants have threatened to, and unless restrained will seek to enforce against her the various provisions of the Act Concerning Cosmetology and force her out of her practice as described. That by reason thereof the plaintiff is being and will be deprived of her property and liberty without due process of law, and the equal protection of law contrary to the constitutions of the United States and of the State of California. That unless the defendants are restrained from enforcing the Act Concerning Cosmetology the plaintiff will suffer irreparable loss and damage in that she will be compelled either to abandon her profession or in the alternative take the risk of being fined and imprisoned for violations of the act.

The answer put in issue all of the material allegations of the complaint. The cause having been tried and submitted the trial court filed findings of fact and conclusions of law substantially sustaining the allegations of the complaint and entered judgment for the plaintiff.

At the trial the plaintiff testified that her work consists of molding the face by manipulation of the muscles and tissue for the purpose of giving it proportion and bring "it back to life". She uses no instruments in the course of her work but uses an oil lotion to make the customer feel more comfortable. She has been engaged in her present occupation for sixteen years, the last three years in Los Angeles; she does no hair or scalp work, manicuring, shampooing, electrolysis, hair removing, hair cutting, hair brushing or trimming; she has never done any work of such kind and has no training or schooling therein; she does no work of any sort in connection with the human body, other than the work of massaging the face and does no work upon the hair in any way; no marcel waving, water waving or hair coloring. Her operations are performed with the object in view of giving "symmetry and proportion" to the face and to "keep it firm and youthful". That if the face has become wrinkled, her object is to get rid of the fatty tissue under the skin with the hope that the personal appearance of her customer will be enhanced. Her work consists of massage of the face alone, not of the neck or any portion of the back or arms. It extends to the temple vein at a point opposite the eye and on the front of the forehead at a line that would be formed by the prolongation of the eyebrows. In working upon a customer she places a thin band around the head just over the hair line to keep the hair back from the portion of the face upon which she is working. She has never found it necessary upon removing that band, to comb the hair of the customer; that upon removal of the band, if the hair is mussed up, the customer combs it herself. She has about thirty to thirty-five customers a week and charges $10 for a single treatment; her clientele consists of people of considerable means from the wealthier districts of Los Angeles and the moving picture colony.

Several witnesses testified on behalf of the defendants to the effect that they were engaged in the work of cosmeticians or in the management of establishments engaged in such work. That in their work they do not give exclusive attention to facial massage but associate the same with hair dressing and various other branches of the cosmetician's art. That rarely does a customer desire the limited treatment which the plaintiff practices and that they would find it impossible to profitably conduct an establishment limited to facial massage and that ordinarily attention must be given to the hair by brushing or combing after the administration of facial manipulation.

The Act Concerning Cosmetology, as it read when this action was brought and was determined, provided in section 3 thereof, St.1931, p. 2405, among other things, that every person who shall "conduct or operate a cosmetological establishment, school of cosmetology, hairdressing shop, beauty parlor, or any other place of business in which any one or any combination of the occupations of a hairdresser and cosmetician, or cosmetologist, are taught or practiced, except the branch of manicuring as practiced in a barber shop, and every person who shall engage in, or attempt to engage in, the practice of cosmetology, or any branch or branches thereof, without a license therefor, issued as herein provided, by the state board of cosmetology, shall be guilty of a misdemeanor * * *."

"Cosmetology" is defined in section 2(b) of the statute, St.1933, p. 2485, as: "Arranging, dressing, curling, waving, cleansing, cutting, singeing, bleaching, tinting, coloring, straightening, dyeing, brushing, beautifying, or otherwise treating by any means, the hair of any person; massaging, cleansing, or stimulating the scalp, face, neck, arms, bust, or upper part of the human body, by means of the hands, devices, apparatus or appliances, with or without the use of cosmetic preparations, antiseptics, tonics, lotions, or creams; beautifying the face, neck, arms, bust, or upper part of the human body, by use of cosmetic preparations, antiseptics, tonics, lotions or creams. Removing superfluous hair from the body of any person by the use of electrolysis, or by the use of depilatories, or by the use of tweezers, chemicals, preparations, or by the use of devices or appliances of any kind or description, except by the use of light waves, commonly known as rays; cutting, trimming, polishing, tinting, coloring, cleansing, or manicuring the nails of any person, and massaging, cleansing, treating, or beautifying the hands of any person."

Hairdresser and cosmetician or cosmetologist is defined in section 2(c) of the act as: "A person who engages in the practice of cosmetology or in a majority of the branches thereof, except the branch of electrolysis."

Cosmetological establishment is defined in section 2(g) as: "Any premises, building, or part of a building, whereon or wherein any branch or any combination of branches of cosmetology, or the occupation of a hairdresser and cosmetician or cosmetologist, except the branch of manicuring as practiced in barber shops, are practiced."

The Act Concerning Cosmetology provides for the issuance of licenses for "Hairdressers and Cosmeticians" as well as for other branches of the arts described in the act.

It is apparent that the method of operations by plaintiff, as alleged in the complaint, and as found by the trial court, constitutes the practice of "cosmetology" as defined in the act and that therefore the plaintiff is a "hairdresser and cosmetician or cosmetologist" as defined in the statute and also that her business consists of conducting a "cosmetological establishment". It is further apparent that if the act is enforced against the plaintiff she is guilty of a misdemeanor, if unlicensed.

[1-3] (1) The testimony of witnesses on behalf of the defendants is of little value in view of the fact that the trial court by its findings indicated that it preferred the testimony of the plaintiff and accepted the same at its face value. It is not the function of this tribunal to weigh the evidence or express a preference for conflicting testimony or conflicting inferences or theories. There being substantial evidence sustaining the findings of the lower court the parties are concluded. We must, therefore, conclusively assume that the plaintiff exclusively engaged in the art of manipulation of the customer's face, as she testified.

(2) The lower court found that a knowledge of the operations included within the definition of "cosmetology" and required to be included in the examination for "hairdresser and cosmetician or cosmetologist", in addition to those practices indulged in by respondent, were not necessary to nor were any of them used or practiced in or required to be used or practiced in the practice or performance of the occupation practiced by respondent, and that:

"The requirements of said Act Concerning Cosmetology as amended, that persons desiring to practice only the occupation practiced by plaintiff, must be trained and experienced in, and pass examinations testing their proficiency and aptitude in the various branches of cosmetology other than massaging, and particularly in the branches referred to in said Act as shampooing the hair, hairdressing, marcel waving, water waving, hair coloring, manicuring, and the use of mechanical apparatus and electricity, are, and each of them is, unreasonable and arbitrary; and said provisions set up and prescribe standards having no reasonable relation to public health, morals or welfare, or to the purpose of protecting the public against incompetent, untrained or inefficient masseurs and masseuses. The occupation of massaging, practiced by plaintiff as aforesaid, is an independent occupation, having no inherent, fundamental or necessary relation to the occupations of waving, coloring and shampooing the hair, manicuring or electrolysis; and in the practice of said occupation of massaging, a knowledge of, or proficiency in, the occupations of waving, coloring and shampooing the hair, manicuring or electrolysis, is not necessary or reasonably required."

The trial court also found that: "Plaintiff has offered and is ready, willing and able to submit to an examination designed to test her fitness and aptitude to practice the occupation now practiced by her, and has requested the said Board to conduct such an examination and upon successful passage thereof by plaintiff to issue to her a certificate of registration and license to practice her said occupation; but the said Board has refused and still refuses so to do and has informed plaintiff that a certificate of registration and license to practice cosmetology, or any of the branches specified in said Act as included therein, or to engage in the practice or occupation of a cosmetologist, will be issued to her only if she passes an examination as provided by section 8 of said Act, including an examination and practical demonstrations in shampooing the hair, hairdressing, marcel waving, water waving, hair coloring, manicuring, and the use of mechanical apparatus and electricity."

The trial court concluded that, as contended by the plaintiff, she "has been, is, and unless the enforcement against her of the Act Concerning Cosmetology is enjoined and restrained, will continue to be: (a) deprived of her property and liberty without due process of law, contrary to the provisions of section 1 of Article XIV of Amendments to the Constitution of the United States, and of sections 1 and 13 of Article I of the Constitution of the State of California; and, (b) denied the equal protection of the laws, contrary to the provisions of section 1 of Article XIV of Amendments to the Constitution of the United States, and sections 11 and 21 of Article I of the Constitution of the State of California."

Apparently then, the sole question remaining for decision is whether or not plaintiff is deprived of, or in danger of being deprived of, her constitutional rights as above defined.

(3) It is not contended by the plaintiff, and the trial court did not find, that reasonable requirements of training, experience and competency may not be imposed by the State as a condition to the practice of a business, occupation or profession. Neither is it contended nor found that the Act Concerning Cosmetology is generally or in all respects unconstitutional. The plaintiff does contend, and the court below held, that in imposing requirements of training, experience and competency, the State can not constitutionally impose arbitrary or unreasonable conditions precedent to the issuance of a license having no relation to the regulated calling and that the Act Concerning Cosmetology, when applied to the occupation of facial massage as practiced by the plaintiff, does impose arbitrary and unreasonable conditions by requiring those engaged in facial massaging to be trained and experienced in, and to pass an examination in, subjects separate from and unrelated to massaging the face, such as shampooing, waving, coloring, dressing and care of the hair. We apprehend that it cannot be questioned that the State may, by appropriate legislation, require training and examination for an operator's license in each and every activity defined in the Act Concerning Cosmetology. It is questioned, however, whether the State has the power, in view of the constitutional provisions above noted, to group, by statute, all of the activities named in the act and require an operator or the proprietor of an establishment to pass an examination in all of the arts specified before qualifying for the issuance of a license, and of penalizing the practice of an unlicensed operator confining his or her activities to one alone of the acts to the exclusion of all others.

[4] In approaching the problem here involved we deem these truths to be established by reason and by law. Those things which are of themselves evil may be prohibited. Those things which, though not evil in themselves, if practiced by those not adequately trained therein by education and experience, or by those not morally qualified or of sufficient age or discretion, may endanger the health, safety, morals or general welfare of the people, may not be prohibited but may be controlled by reasonable regulation.

[5] The right to labor or earn one's livelihood in any legitimate field of industry or business is a right of property, and any unlawful or unreasonable interference with, or abridgement of, such right is an invasion thereof and a restriction of the liberty of the citizen as guaranteed by the Constitution. Yee Gee v. City and County of San Francisco, D.C., 235 F. 757.

[6-8] "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. * * * The interest, or, as it is sometimes termed,

the 'estate,' acquired in them [occupations] —that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation." Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 233, 32 L.Ed. 623.

[9] Unreasonable restrictions on personal liberty are void. Ex parte Miller, 162 Cal. 687, 124 P. 427; Ex parte Dart, 172 Cal. 47, 155 P. 63, L.R.A.1916D, 905, Ann. Cas.1917D, 1127; Ex parte Hall, 50 Cal. App. 786, 195 P. 975.

[10] The power to regulate is not the power to suppress and business cannot be destroyed or people prohibited from laboring under the guise of regulation. Curtis v. Los Angeles, 172 Cal. 230, 156 P. 462.

[11] "The right to labor, to pursue any lawful employment in a lawful manner, and to make lawful contracts are rights enjoyed by the citizen under the protection of the constitution of the United States." 16 C.J.S., Constitutional Law, § 473. Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, 3 Ann.Cas. 1133; Ex parte Hutchinson, C.C., 137 F. 949; The Stockton Laundry Case, C.C., 26 F. 611.

[12] We must assume that the desire and inclination of mankind to adorn and beautify the person is not wicked nor evil of itself. From earliest ages the practice of personal adornment, particularly by the fair sex, has been indulged, as evidenced by the ancient Egyptian tombs, and this with the approval and even the applause of the sterner sex. The noblest epic in all literature glorifies the deeds of heroes on the windy plains of Troy, contending for the glamorous Helen of Sparta. "The face that launched a thousand ships and burned the topmost towers of Ilion." History has collected and recorded that the immortal marshal of the unconquerable legions lowered the eagle standards and bent the proud Roman knee before the throne of Egypt's storied queen.

"Ah, has not such a story from of old,
Down man's successive generations rolled."

[13-17] Following the ancient tradition of her sex the modern dame or damsel, viewing with dismay the incipient extra chin or tiny crowfoot, marking the plodding progress of Father Time, is impelled to erect bunkers of defense armed to withstand the inevitable assault. All of this is lawful and within the realm of inalienable rights classically defined as the "pursuit of happiness". If, then, it is lawful for all to endeavor to preserve or to regain those treasured charms of yesteryear, it must also fall within the legal protection of the constitutional guarantees for those skilled in appropriate arts to serve the needs of those who seek the enhancement or preservation of personal beauty, subject only to the right of the state to impose such reasonable regulations as will protect the health, safety, morals and general welfare of the public. Is then the regulation prescribed by the challenged act unreasonable? In approaching this problem we cannot assume that the legislature, either willfully or ignorantly, intended to violate the organic law of either the United States or of the State of California. Before we may declare the act unconstitutional in any of

its aspects, all reasonable doubts must be dispelled. We begin our approach with a strong presumption of the constitutionality of the act. People v. Southern Pacific Co., 209 Cal. 578, 290 P. 25; Jersey Maid Milk Products Co. v. Brock, 13 Cal. 2d 620, 91 P.2d 577. We must also keep in mind the sanctity of the plaintiff's right to engage in any lawful employment; a right which cannot be abrogated or imperiled by reasons of public economy or of convenience. So clear is the voice of the people as expressed in their Constitutions that no agents or agencies of government can ignore the popular mandate. In reading the act, the thought occurs that it may be that the numerous branches of cosmetology therein defined are grouped and embraced as a needed qualification for a license to practice one because such would facilitate the supervision of a single board or the enforcement of the act in a more expeditious manner. The thought also occurs that the act as written affords a special protection to the larger establishments in which cosmetology is taught or practiced in all its branches. We must keep in mind that the whole vital quality of constitutional government, from Magna Charta on, proceeds from the impulse and desire of the people to protect the weak against the strong and to secure the rights of feeble minorities. The appellants compare the prescribed qualifications for a license with those prescribed for licenses to practice either law or medicine. The analogies are not valid. It is true that the doctor who intends to practice a single branch of his profession must study, subject himself to an examination in, and be somewhat experienced in, numerous branches of the science of medicine. The doctor, however, diagnoses and treats, not the sickness, but the sick patient. To fully understand the patient from a medical standpoint, all branches of his science may be needed by the practitioner of a specialty. Before he assumes to treat within his specialty, the sick patient must be diagnosed, and to do this the practitioner must know something of the symptoms of the various diseases which might otherwise be confused with the one suspected. The lawyer is not so much concerned with statutory definitions as with the subjective mind, trained and cultured to view all the broad aspects of the science of justice which constitute a single homogeneous system. The lawyer frequently should, and sometimes does, reason by analogy and this is possible only when many, if not indeed all, of the branches of his science have been studied. It might as well be argued that the high degree of academic culture required by our law schools or by the Bars of the several states before matriculation or admission to practice is useless because the lawyer, intending to specialize, needs only to know the substantive law and procedure of that department in which he intends to practice. It cannot be said that the learned professions supply a fair analogy in analyzing the qualifications conditional to the issuance of a license to practice cosmetology.

[18, 19] The invalidity of a statute may be shown by things which will be judicially noticed. Weaver v. Palmer Bros. Co., 270 U.S. 402, 46 S.Ct. 320, 70 L.Ed. 654. We are empowered, in determining the constitutionality of the questioned act, to judicially notice the facts disclosing the varying types of business usually followed, the general character of such businesses and the ordinary methods of conducting them. Ogilvie v. Aetna Life Ins. Co., 189 Cal. 406, 209 P. 26, 26 A.L.R. 116; Abbey Land, etc., Co. v. San Mateo County, 167 Cal. 434, 437, 139 P. 1068, 52 L.R.A.,N.S., 408, Ann. Cas.1915C, 804; Nicol v. Ames, 173 U.S. 509, 516, 517, 19 S.Ct. 522, 526, 43 L.Ed. 786, 792. We note then that the plaintiff is, by virtue of the act, a "Hairdresser" though in fact she does not practice that art, knows nothing of it and has no desire to acquire knowledge of it. She is now, and for a long time past, has been engaged exclusively in facial massage. In this lawful occupation she sustains herself abundantly and desires to continue to be self-sustaining by exercising her chosen occupation—an ambition in this day not wholly without need of encouragement. That in order to secure her right to labor as she chooses she must become a "hairdresser" in fact and to that end practice, have experience in, and pass an examination in shampooing, waving, coloring, dressing and care of the hair, or in the alternative, starve or go to jail. We can find nothing in the relation of facial massage with the arts of hair dressing which suggests that the public morals, safety, health or general welfare demands that the masseuse must be trained in those arts. We consider the attempted relation of hair dressing and facial massage arbitrary in the extreme. Viewing the varying modes of hair dressing over a span of fifty years it may be said that such art is more akin to archi-

tecture than to the care of the skin. We cannot say that one who is an expert masseuse, and has established a profitable business as such, should be deprived of her estate because she is not also expert in a totally different and unrelated art. The act, in so far as it attempts to deprive the plaintiff of her property, amounts to an unreasonable exercise of legislative authority and deprives plaintiff of her rights guaranteed by our organic law. Baker v. Daly, D.C., 15 F.2d 881.

[20] We hold, therefore, that while the several occupations specified in the act are proper subjects of legislative regulation, the relation of those having no reasonable natural association in so far as they apply to the instant case and an attempted enforcement thereof against the plaintiff, amounts to the taking of her property without due process of law and a denial to her of the equal protection of our laws.

[21] The statutes in effect at the time this action was brought and determined have been superseded by section 7300 et seq. of the Business and Professions Code, St.1939, p. 396 et seq. The provisions of that code changed many material provisions of the prior act under which several valid reasons could be urged for an affirmance of the judgment. The rights of the parties to continue the injunction will be measured by the present provisions of the code. For this reason we have given no attention to certain provisions of the earlier enactment which might have been controlling had they not been superseded.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

LOS ANGELES COUNTY v. FRISBIE.

Civ. 13026.

District Court of Appeal, Second District, Division 1, California.

Aug. 4, 1941.

Hearing Granted Oct. 2, 1941.

1. Paupers ⚷37(1)

At common law, no legal liability rested upon one relative to support another.

2. Paupers ⚷37(1)

By statute, providing that any indigent who had, residing in the state, relatives of certain degrees of kindred, who were able to support such indigent, should not be eligible for aid except emergency aid, a statutory liability for the support of indigent relatives was imposed upon kindred of such degrees and in the order named. St.1937, p. 1099, § 2576.

3. Paupers ⚷37(1)

The provisions of Welfare and Institutions Code, dealing with liability of indigent's kindred for the support of indigent, when read together, provide a system for establishing such liability and for the enforcement thereof. St.1937, pp. 1099, 1100, §§ 2576–2579.

4. Paupers ⚷52(3)

Under provisions of Welfare and Institutions Code, dealing with liability of indigent's kindred for the support of indigent, before a liability to support an indigent relative arises, such liability must be fixed by a court in a proceeding brought for that purpose and until such an adjudication of liability and ability to furnish such support has been had, county is without authority to commence an action to recover for aid money expended by county for indigent at least other than for emergency aid. St.1937, pp. 1099, 1100, §§ 2576–2578.

5. Paupers ⚷52(3)

Where provisions of Welfare and Institutions Code, dealing with liability of indigent's kindred for support of indigent, contained no specific authorization for the bringing of action by county to recover from relatives money expended by county for aid of indigent, without the county having first obtained an adjudication of liability and ability to furnish such support, court was without authority to read into such provisions a legislative intent forbidden by the language thereof taken in its ordinary and general sense. St.1937, pp. 1099, 1100, §§ 2576–2578.

6. Paupers ⚷43(3)

The provisions of Welfare and Institutions Code, dealing with liability of indigent's kindred for support of indigent, are prospective in their character, and do not contemplate that county may proceed to relieve a pauper or indigent person, other than by way of emergency aid, and thereafter recover from a relative of indigent, the amount so expended. St.1937, pp. 1099, 1100, §§ 2576–2578.

7. Paupers 🔑52(3)

Where county failed to utilize remedy provided by statute whereby county was authorized to proceed by petition to have court determine liability of kindred for support of indigent and obtain from court an order directing payment of specific sums for such support, county could not recover from estate of decedent money expended for aid, hospital care, and medical supplies for adult daughter of decedent during decedent's lifetime, since the remedy provided by statute was exclusive. St.1937, pp. 1099, 1100, §§ 2576–2578.

8. Paupers 🔑52(5)

Where county sought to recover from estate of decedent money expended by county for aid of adult daughter of decedent, county's complaint, which failed to allege a compliance with statute, providing for the imposing of liability on indigent's kindred for support of indigent, failed to state a cause of action. St.1937, pp. 1099, 1100, §§ 2576–2578.

9. Paupers 🔑43(3)

Where, in county's action to recover from estate of decedent money expended by county for aid of adult daughter of decedent, complaint alleged that, during the time aid was being furnished by county to decedent's daughter, decedent had sufficient financial ability to reimburse county in full for the aid extended, in that decedent was the owner of real and personal property of a specified value, it affirmatively appeared from such pleading that indigent daughter was not entitled to the aid furnished, and hence it must be assumed that the aid given was advanced gratuitously and voluntarily by the county. St.1937, pp. 1099, 1100, §§ 2576–2578.

10. Statutes 🔑109

The direct and immediate purpose of constitutional requirement that every act shall embrace but one subject which subject shall be expressed in its title was that a title should on its face give at least some sort of information as to what proposed act was about. Const. art. 4, § 24.

11. Statutes 🔑105(1)

The constitutional requirement that every act shall embrace but one subject which subject shall be expressed in its title should not receive a narrow or technical construction, but should be construed liberally to uphold proper legislation, all parts of which are reasonably apparent, since the main object of such constitutional provision was to prevent legislators and the public from being entrapped by misleading titles to bills, whereby legislation relating to one subject might be obtained under the title of another. Const. art. 4, § 24.

12. Statutes 🔑107(1), 109

Where all the provisions, however numerous, of an act have one general object, clearly indicated in the title of act, such act does not violate constitutional provision that act shall embrace only one subject, which shall be expressed in its title. Const. art. 4, § 24.

13. Statutes 🔑109

The Legislature may insert in single act all legislation "germane" to the general subject as expressed in title and within legislative field thereby suggested, the rule being that a provision, which conduces to the act or which is auxiliary to and promotive of its main purpose or has a necessary and natural connection with such purpose, is germane. Const. art. 4, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Germane".

14. Statutes 🔑120(5)

Where act, which was entitled "an act to provide for the aid and relief of indigents", expressly repealed a prior act which gave to county a cause of action based upon a debt to recover from financially able kindred aid money advanced to an indigent, constitutional provision that every act shall embrace but one subject which subject shall be expressed in its title was not violated by failure to expressly state in title that act repealed prior act, since the repeal of other acts dealing with the same subject is "germane" to the purpose of any act. St.1901, p. 638, § 7; St.1933, p. 2007, § 13; Const. art. 4, § 24.

◆

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by the County of Los Angeles against Azile M. Frisbie, executrix of the estate of Mary A. Stoner, deceased, to recover from decedent's estate for aid, hospital care, medical supplies, etc., furnished by the county to an adult daughter of the decedent. From a judgment of dismissal, entered after a demurrer to its complaint was sustained, plaintiff appeals.

Affirmed.

J. H. O'Connor, Co. Counsel, and Gerald G. Kelly and L. K. Vobayda, Deputies Co. Counsel, all of Los Angeles, for appellant.

Holbrook & Tarr, Leslie R. Tarr, and Freda B. Walbrecht, all of Los Angeles, for respondent.

WHITE, Justice.

In this action the County of Los Angeles seeks to recover from the estate of Mary A. Stoner, deceased, the sum of $2,236.57, together with interest thereon, for aid, hospital care, medical supplies, etc., furnished by the county to one Fay Pheysey, an adult daughter of decedent, between February 26, 1937, and April 28, 1939. Mary A. Stoner died a resident of Los Angeles county on April 28, 1939, and thereafter, upon admission of her will to probate, letters testamentary were issued to Azile M. Frisbie, defendant herein. Following the filing by such executrix of an inventory and appraisement of such estate with the probate court, the County of Los Angeles presented its amended creditor's claim in the above-mentioned amount, and the same was rejected. Thereupon this action was commenced. Defendant demurred to the amended complaint, and the demurrer was by the court sustained without leave to amend following plaintiff's refusal to further amend such pleading. From the judgment of dismissal thereupon entered the plaintiff county prosecutes this appeal.

Presented to us by this appeal are questions of the construction and interpretation of sections 2576, 2577 and 2578 of the Welfare and Institutions Code, St.1937, p. 1099. The amended complaint alleged that the County of Los Angeles rendered charity aid to Fay Pheysey, the indigent adult daughter of decedent, in the sum above mentioned; that all such aid was rendered during the lifetime of the mother, and that during the entire period over which such aid was furnished the mother was possessed of sufficient financial ability to reimburse the county in full for the aid extended. The court below sustained defendant's contentions as advanced in her demurrer, which in the main challenged the sufficiency of plaintiff's complaint to state a cause of action for the reason that there was not contained therein any allegation of the filing of a petition pursuant to the terms of section 2578 of the Welfare and Institutions Code.

The sections of the Welfare and Institutions Code with which we are here concerned are as follows:

Section 2576: "If any indigent has living within this State a spouse, parent, or adult child, and such kindred or any of them, or any group of them has sufficient financial ability to support the indigent, he shall not be eligible for aid under this chapter, except such emergency aid as may be extended hereunder pending a determination of responsibility for his support. Upon failure of such kindred to support the indigent, the county may extend aid, and such kindred in the order above named and to the extent of their ability shall reimburse the county for the support of the indigent by paying to the county the sums per month or per day fixed by the board of supervisors for such aid. In any case where such kindred are unable to pay the entire charge for such support, they shall reimburse the county to such an extent as may be determined under the provisions of this section. The board of supervisors shall, in the case of aid granted by institutional care, fix a reasonable charge therefor, which shall be the measure of reimbursement to the county, and the existence of the order fixing the charge shall constitute prima facie evidence of its reasonableness."

Section 2577: "Upon failure of the kindred, referred to in section 2576, to perform their duty to support the indigent, the board of supervisors shall request the district attorney of the county to proceed against such kindred in the order of their responsibility for support. Upon such request the district attorney shall promptly commence and prosecute proceedings for the ascertainment and enforcement of the liability and responsibility of the kindred."

Section 2578: "Such proceedings shall be begun by filing in the name of the county a petition verified in the manner of a complaint praying that the responsibility and liability of the named kindred be ascertained, and that an order be made accordingly. The provisions of Titles I to IX, inclusive, of Part II of the Code of Civil Procedure shall apply to the proceedings in such action and the court shall therein determine the liability, if any, of each of the kindred for such support. The court shall, in such action, ascertain the financial ability of the defendants and each of them, and unless it finds that a defendant is unable to pay any sum for support, either because of lack of sufficient funds or because such payment would result in the probability of the defendant becoming at some future time a public charge, the court shall order each defendant to pay to the county a proper proportion, if any, of his liability for the support of the indigent. If any relative or group of relatives has sufficient financial ability to support the indigent no relative beyond him or them in the order named in section 2576 shall be ordered to pay any portion of the support. The order of the court shall specify that a given sum shall be payable monthly in advance to the board of supervisors or its designated social agency for the entire or partial maintenance of the defendant's indigent relative in accordance with the defendant's financial ability."

Appellant county contends that the foregoing sections give it two separate causes of action, viz., (1) an action against a responsible relative for *reimbursement* for charity aid rendered by the county to the indigent, and (2) a proceeding by the county against the legally responsible kindred to obtain court orders *for future monthly support*, whereby said kindred is to pay the county in advance the aid which the county will have to pay the indigent. In other words, appellant county claims that the two actions given it by sections 2576 and 2578 are, by the former, an action to recover *by way of reimbursement* for moneys expended for charity aid, and by the latter an action to proceed by petition to obtain a court order directing future periodical payments by the liable kindred to the county to be disbursed by the latter.

[1, 2] Appellant's contention cannot be sustained. We find no ambiguity in the quoted sections of the Welfare and Institutions Code. When the general tenor and scope of the sections in question are considered, the intent of the legislature appears to us clear and manifest. Undoubtedly the legislature recognized that so far as the assistance of one's relatives is concerned, at common law no legal liability rested upon one relative to support another, however strong the moral duty might be, and that the duty to provide such support must arise by statute. Therefore, by section 2576 the legislature first provided that any indigent who had residing in this state relatives of certain degrees of kindred who were able to support such indigent should not be eligible for aid except emergency aid, which was to be extended only until a determination could be had of the responsibility and ability of the indigent's kindred to assume the obligations of support impressed upon them. Section 2577 then provides that when the kindred of an indigent person refuse to discharge their statutorily imposed duty to support their indigent relative, the district attorney shall, upon request of the board of supervisors, promptly commence and prosecute proceedings "for the ascertainment and enforcement of the liability and responsibility of the kindred". Section 2578 then provides that such proceedings shall take the form of a petition praying for a judicial determination of the liability and responsibility of the kindred of the indigent; that upon the hearing of said petition the court shall "ascertain the financial ability of the defendants and each of them, and unless it finds that a defendant is unable to pay any sum for support, either because of lack of sufficient funds or because such payment would result in the probability of the defendant becoming at some future time a public charge, the court shall order each defendant to pay to the county a proper proportion, if any, of his liability for the support of the indigent". Section 2579 then provides for proceedings to be taken in the event of noncompliance by such kindred with the court's order directing them to pay for the maintenance of the indigent relative.

[3-5] Thus when read together, the Welfare and Institutions Code sections in clear, unambiguous and understandable language provide a system for establishing the liability of an indigent's kindred and for the enforcement of such liability. It seems clear to us that the legislature, by the enactment of the quoted sections, intended that before a liability to support an indigent relative arose, that liability must be fixed by a court in a proceeding brought for that purpose. Until such an adjudication of liability and ability to furnish such support has been had, the county is without authority to commence an action to recover for aid money expended by it, at least for other than "emergency aid", and it is not here contended that the complaint alleged that the aid extended was of an emergency character. The fact that the code provisions relative to the care of juvenile delinquents, blind and aged persons contain specific authorization for the bringing of actions by the county to recover from rela-

tives the money expended by the county for the care of such persons seems to us to add strength to the conclusion that had the legislature intended such authority in the case of indigent persons it would have so declared in the applicable sections of the Welfare and Institutions Code. Not having done so, the courts are without authority to read such a legislative intent into the language which, taken in its ordinary and general sense, forbids any such interpretation.

The serious consequences which the appellant county asserts will follow in the wake of a construction of the law to the effect that the county must file a petition to determine responsibility of relatives before instituting suit against the kindred of the indigent, are all arguments which should be addressed to the legislature and not to the courts.

[6-8] The provisions of the Welfare and Institutions Code with which we are here concerned (secs. 2576, 2577, 2578) are prospective in their character, and do not contemplate that the county may proceed to relieve a pauper or indigent person (other than by way of emergency aid) and thereafter recover from a relative the amount so expended, but rather that when a relative fails to discharge the duty of supporting his kindred, the county must proceed by petition to have the court determine the liability of the kindred for such support and obtain from the court an order directing the payment of specific sums, which order may be enforced as provided in section 2579. It is well settled that in such cases the remedy is exclusive. The county not having utilized the remedy provided by the statute, its present action must fail. By failing to allege a compliance with the statute, the complaint fails to state a cause of action thereunder. Town of Saxville v. Bartlett, 126 Wis. 655, 105 N.W. 1052; Multnomah County v. Faling, 49 Or. 603, 91 P. 21; Howard County v. Enevoldsen, 118 Neb. 222, 224 N.W. 280; Pinel v. Rapid R. System, 184 Mich. 169, 150 N.W. 897; 46 Cor.Jur., p. 1270.

Several reasons suggest themselves as to why the legislature might require as a prerequisite to the establishment of liability of kindred for the support of indigent relatives that a petition must be filed "for the ascertainment and enforcement of the liability and responsibility of the kindred". In every instance the indigent person is neither aged nor infirm, but able-bodied and willing to work if afforded that opportunity. Such opportunity might well be provided by kindred if advised of the impecunious condition of their relative. Again, a very evident purpose of the summary proceeding is to distribute the liability among all responsible kindred of a given group who may be able to pay, and as the statute provides, "The court shall order each defendant to pay to the county a proper proportion, if any, of his liability for the support of the indigent."

[9] Furthermore, section 2576 of the Welfare and Institutions Code expressly declares that "if any indigent has living within this State a spouse, parent, or adult child, and such kindred, or any of them, or any group of them has sufficient financial ability to support the indigent, *he shall not be eligible for aid* under this chapter, except such *emergency aid* as may be extended hereunder pending a determination of responsibility for his support". The amended complaint in the instant case specifically and directly alleges "that during the time aid and relief was furnished by the plaintiff to said Fay Pheysey, the said Mary A. Stoner had sufficient financial ability to reimburse plaintiff in full for the aid extended her said daughter as aforesaid, in that the said Mary A. Stoner was the owner of real property of the reasonable market value of $5,600, and personal property of the reasonable market value of $275, and all said property is now in the estate of said decedent". Upon such a state of the pleadings, it affirmatively appears that the indigent was not entitled to the aid or relief furnished, except such portion thereof as may have been "emergency aid", and there is no averment in the complaint that any of it was. Under the circumstances last mentioned, it can only be assumed that the aid given was advanced gratuitously and voluntarily by the county.

Finally, appellant county contends that in enacting in the statutes of 1933, page 2007, the clause (sec. 13) purportedly repealing the statute of 1901, page 636, the legislature failed to comply with section 24, article IV of the Constitution, which relates to the manner of expressing the subject of an act in its title. So far as here pertinent, the cited constitutional section provides that "Every Act shall embrace but one subject, which subject shall be expressed in its title". Section 7 of the statutes of 1901, page 636, definitely gives the county a cause of action based upon a debt to recover from financially able kindred, moneys advanced as aid to an indigent relative of such kindred. The title of the act contained in the statutes of 1933, page 2005, is as follows: "An act to provide for the aid and relief of indigents." Section 13 of the last-named act reads as follows: "An act entitled 'An act to provide for the maintenance and support, in certain cases of indigent, incompetent and incapacitated persons (other than persons adjudged insane and confined within State hospitals), becoming a public charge upon the counties or cities and counties within the State of California, and for the payment thereof into a fund for the maintenance and support of such persons,' approved March 23, 1901, is hereby repealed."

Appellant argues that sections 2576 and 2577 of the Welfare and Institutions Code, with which we are here concerned, being a restatement of the statutes of 1933, page 2005, and being in conflict with section 7 of the statutes of 1901, page 636, which gave a cause of action to the county to recover as a debt aid money advanced to an indigent, the last-named section 7 of the statutes of 1901, page 636, is still in effect, and the attempted repeal thereof is void as violative of section 24 of article IV of the Constitution. The language contained in Haverstick v. Southern Pacific Co., 1 Cal.App.2d 605, 614, 37 P.2d 146, relied upon by appellant, is merely dicta used in the course of an opinion, hazarding the possibility that a certain statute was not repealed because the repeal was not mentioned in the title of the repealing act. The other case cited by appellant, City of Los Angeles v. Hance, 122 Cal. 77, 78, 54 P. 387, does not expressly hold that the repealing act must state the intention to repeal in its title, but says, "The subject of the repealing act" (authorizing a certain class of cities to refund indebtedness) "as expressed in its title, is entirely foreign to the subject of the section attempted to be repealed" (an act authorizing the incurring of indebtedness), "and the question to be determined is whether an act or part of an act can be repealed when the title of the repealing act announces no such intention, and when the repeal of the existing law would have no effect one way or another upon the operation of the new law." In such case, the court held, no repeal is effected.

[10-14] In our opinion the act of 1933, page 2005, which repealed the statutes of 1901, page 636, is free from the constitutional objection urged by appellant. The purpose and intent of section 24 of article IV of the Constitution was thus set forth in Lewis v. Dunne, 134 Cal. 291, 66 P. 478, 480, 55 L.R.A. 833, 86 Am.St.Rep. 257: "* * * whatever considerations led up to its adoption, it is clear that its direct and immediate purpose was that the title should, on its face, give at least some sort of information as to what the proposed act was about." The main object of the constitutional provision being to prevent legislators and the public from being entrapped by misleading titles to bills, whereby legislation relating to one subject might be obtained under the title of another, it has been held that the provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation, all parts of which are reasonably germane. Evans v. Superior Court, 215 Cal. 58, 62, 8 P.2d 467, 469. As is stated in the case just cited, "The provision was not enacted to provide means for the overthrow of legitimate legislation." However numerous may be the provisions of an act, if they have one general object, fairly indicated in the title, they may be united in one act, the rule in that regard being thus epitomized in Evans v. Superior Court, supra: "The Legislature may insert in a single act all legislation germane to the general subject as expressed in its title and within the field of legislation suggested thereby." And further it is therein stated: "A provision which conduces to the act, or which is auxiliary to and promotive of its main purpose, or has a necessary and natural connection with such purpose, is germane within the rule." When the legislature adopted the statutes of 1933, page 2005, under the title, "An act to provide for the aid and relief of indigents", it must certainly be assumed that a clause therein providing for the repeal of a previous act in conflict therewith is most germane to the general subject embraced in the all-inclusive title expressed in the subsequent act; that it is necessarily promotive of the main purpose of the act; has a necessary and natural connection with the purpose of, is auxiliary to, and promotive of the main purpose of the subsequent act, and possesses a necessary and

natural connection with such purpose. We therefore hold that the statutes of 1933, page 2005, do not contravene the provisions of section 24 of article IV of our Constitution, because as stated in Evans v. Superior Court, supra, 215 Cal. at page 65, 8 P.2d at page 470, "The repeal of other statutes dealing with the same subject is germane to the purpose of any act." Without doubt, the statute of 1933, page 2005, and the repealed statute of 1901, page 636, dealt with the same subject-matter, that is, the aid and relief of indigents.

For the foregoing reasons, the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

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46 Cal.App.2d 319

BOWMAN v. LOS ANGELES CITY BOARD OF EDUCATION et al.

Civ. 13044.

District Court of Appeal, Second District, Division 2, California.

August 4, 1941.

Hearing Denied Oct. 2, 1941.

1. Schools and school districts 🔑146

Under act authorizing district school board to devise plan for payment of pensions to teachers, and to fix minimum benefits, and providing that benefits should not be based upon any amount of salary in excess of $500 monthly, board had power to fix maximum benefits. School Code, § 5.1100 et seq., as added by St.1937, p. 153 et seq.

2. Schools and school districts 🔑146

The statutory authority of district school board to devise plan for payment of pensions to teachers includes power to prescribe all details not expressly prohibited. School Code, § 5.1100 et seq., as added by St.1937, p. 153 et seq.

3. Schools and school districts 🔑146

Under act authorizing district school board to devise plan for payment of pensions to teachers from district, and providing that such pensions shall be in addition to pensions received by teachers from the state, board may consider pension received from the state in determining maximum pension payable by district. School Code, § 5.1110, as added by St.1937, p. 159.

4. Schools and school districts 🔑146

A school board's plan for payment of pensions to teachers and other employees of school district, under which certificated teachers who also received pensions from the state could receive maximum of $600 annually, whereas noncertificated employees who received no pensions from the state could receive maximum of $1,200 annually, was not invalid for discrimination against certificated teachers. School Code, § 5.1100 et seq., as added by St.1937, p. 153 et seq.

5. Constitutional law 🔑70(3)

The sentiments of a court cannot prevail against a legislative act, since it is for the legislature to determine the policy of the state.

6. Constitutional law 🔑70(3)

Salaries to be paid those who serve the state are not the concern of the courts, which must be guided by legislative intent with reference thereto.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus by Samuel H. Bowman against the Los Angeles City Board of Education and others. From a judgment of dismissal, petitioner appeals.

Affirmed.

Joseph Scott and J. Howard Ziemann, both of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

Petitioner sought by writ of mandate to compel respondent board to disregard certain provisions of the "Rules and Regulations for the Operation of the District Retirement Plans of the Los Angeles City School District, the Los Angeles City High School District", etc. After a demurrer had been sustained without leave to amend, a judgment of dismissal was entered from which petitioner takes this appeal.

Petitioner Samuel H. Bowman is a retired school teacher. He had served continuously as a certificated teacher and as principal in respondent district for a total of 26 years 112 days. During petitioner's incumbency a plan for the payment of retirement salaries to the employees of the district was adopted. Subject to the provisions of such plan, petitioner retired June 30, 1940. He declined to accept a retirement salary in the sum of $50 per month claiming that he was entitled to the sum of $90.46 monthly as his pension. In his petition, he alleged that in devising the retirement plan, respondent took into consideration the benefit of $50 per month to which petitioner was entitled from the Teachers' Permanent Fund provided by the state (School Code, § 5.800 et seq., St.1937, p. 1717 et seq.) and that by reason thereof the plan is illegal in that it discriminates against the certificated teachers by placing a limitation of $600 per year upon their benefits from the district while allowing noncertificated employees a maximum benefit of $1,200 per year. It is this limitation upon the benefits to be received which petitioner demands should be disregarded by respondent in fixing the pension to be paid petitioner by the district.

In order to test the validity of the provision under attack, it will be necessary to review the legislative background of the District Retirement Plan. By statutory enactment in 1937 (ch. 59, p. 153 et seq. same as part V of the School Code, § 5.1100 et seq.), any school district, except those of a city or county which already pay retirement salaries, is authorized in its discretion to submit to the electors of such district the proposition of establishing a plan for retirement salaries under the provisions of the statute, payable to all certificated teachers fulfilling requirements of the plan, and to such other employees as the governing board may determine who may retire under such a plan. § 5.1100. Every employee of the district at the time of the adoption of such plan who agrees to be subject to the burden of the retirement plan is entitled to the benefits and is bound by the burdens thereof. § 5.1102.

Section 5.1103 is as follows: "Contributions must accord with recent prevailing rates: Bases of retirement salary: Duty to revise plan: Approved plan: Taxation for costs. That such plan shall not be adopted or established until the governing board, after such inquiry and hearing as it may direct, shall find that the respective contributions of said teachers and other employees and the district provided for in said plan, are substantially in accordance with the more recent generally prevailing rates of such contributions in public institutions which have established retirement systems, and that such plan is in accordance with sound business practice and with recognized actuarial methods.

"Bases of retirement salary. That such plan may provide that the retirement salary shall be a stipulated monthly sum, or that all benefits under the retirement feature of said plan shall be based upon the monthly salary for each year of future active service in the district earned by said employee up to the date of retirement and upon the average monthly salary earned by the teacher or other eligible employee during the year immediately preceding the adoption of said plan and the number of years of past active service of said employee in the district, and subject to such provisions as may be made in said plan for minimum benefits, but no employee with less than fifteen years' service in the district prior to normal retirement age shall receive the benefit of any such minimum; provided, however, that in no instance shall such retirement benefits be based upon or allowed for any amount of salary in excess of the sum of $500 per month.

"Duty to revise plan. That such governing board, after the adoption of such plan, shall at regular intervals, each not exceeding a period of five years, secure a general survey and actuarial report of said plan, and said board shall from time to time amend said plan in such manner as may be found to be advisable to meet changed conditions, or, as in the light of experience, may be considered necessary.

"Approved plan. A plan under which, as a part thereof, the district establishing the plan agrees to pay to employees who may become entitled to retirement salaries within a specified period, not exceeding fifteen years, after the establishment of such plan, a specified sum or sums, which, during the life expectancy of such employees, will be approximately equal, in the aggregate, to the aggregate difference, during such life expectancy, between the maximum salary paid to employees in the respective class or classes of the retiring employees, and the salaries paid to beginning employees in such class or classes, shall be construed to comply with the provisions of this section requiring such plan to be in accordance with sound business practices and recognized actuarial methods.

"Taxation for costs. For the purpose of providing funds which may be necessary to make the payments required by any such district retirement plan, district taxes shall be levied and collected annually by such respective districts at the same time and in the same manner as other district taxes are levied and collected. Such tax shall be in addition to any other district tax now or hereafter authorized by law, and shall not be considered in fixing maximum rates of tax for school district purposes."

Section 5.1110 provides that the retirement salaries "shall be in addition to any other retirement salaries received by any teacher under Part IV of this division."

On May 4, 1937, pursuant to the authorization of the cited act, respondent board submitted to the electors of the district the question as to whether it should devise and adopt a retirement plan for certificated teachers and noncertificated employees. Pursuant to the instructions received from the electorate, respondent board adopted a plan under which it has offered to pay petitioner the sum of $50 per month as his pension from the district.

Under section 5 of the Retirement Plan, it is provided: "(3) If the member has a prior service certificate in full force and effect, a pension of one seventieth of the member's average annual earnable compensation during the year of a creditable service immediately preceding the date of establishment, multiplied by the number of years of prior service creditable to him, except that the pension allowed on account of prior service to any member who is a duly certificated teacher at the date of establishment shall not exceed $600" etc.

Inasmuch as petitioner's salary for the year 1936-1937 was $3,200, petitioner claims to be entitled to 1/70th of his annual salary at the time of the adoption of the retirement plan multiplied by the number of years during which he served as teacher and principal in the district. Expressed mathematically, his annual pension would be derived as follows: $\frac{\$3,200}{70} \times 23.7466$ which amounts to $1,085.46 per year or $90.46 a month.

[1, 2] Since the act authorizes the board to provide for only minimum benefits and does not authorize it to set a maximum limit to the benefits to be received, it is contended that it was the legislative intent to leave the retirement benefits free from curtailment by "categorical limitation". In support of his argument, he points to the provision for the maximum monthly salary of $500 that may be used as a base for calculating retirement benefits. Under familiar rules of construction, says petitioner, it is a fair inference from the provisions of the act that the legislature could not have intended that the governing board was empowered to fix the maximum limitations upon the pensions for teachers. Citing 25 R.C.L. 229; Davis v. County of Los Angeles, 12 Cal.2d 412, 84 P.2d 1034, 1041. But such power was a logical implication. The authority to devise a plan to pay pensions to any group necessarily conveys the power to prescribe all details not expressly prohibited. The same rule of construction that has always been applied to authorizations to govern apply here. Essentials omitted from the grant by the origin of power not contrary to it are to be supplied by the governing board in possession of more intimate knowledge of the situation. The motivating causes that induced the delegation of such authority was that the governing board should know the extent of the ability of the district to balance a budget for the support of superannuated teachers in their retirement.

In excluding from the computation of the amount of retirement allowance the amount of salary in excess of $500 per month and more, it must have been the thought of the legislature that those who received incomes in excess of $500 per month are competent to save for old age, and for that reason such class of teachers shall receive no benefits on the excess over $500.

The act is a recognition of the principle of local autonomy. It did not attempt to provide all the details for a district retirement plan. Its aim was to establish sound principles and to prescribe general policies to be followed by all districts but to leave to each the privilege of incorporating such details as might be congenial to the locality. Had the legislature designed to place all teachers on the same footing and to impose the same taxes on every locality, the statewide plan, as expressed in part IV (§ 5.800 et seq.) with common benefits to teachers of each class would have sufficed. Having established a universal pension to be paid from a state fund, it was deemed to be wise not to impose upon the cities, districts and counties heavier obligations without specific instructions from their own electorates. The Davis case pointed out that the legislature delegated "only the administrative duties" to establish details of plans for pensions "subject to the limitations and requirements prescribed by the act". But in defining the powers of the board as "administrative duties" the Supreme Court could not have intended that the governing board should have only clerical work to do in devising the retirement plan. To devise comprehends the power to create. Pursuant to the authority granted, it was proper for the governing board to devise and establish a plan whereby a maximum limitation of $50 per month is imposed upon teachers who are already the recipients of other benefits.

Respondent board was authorized to devise a retirement plan if instructed to do so by the people. (§ 5.1100.) Such authorization and instruction must have contemplated that the board would do something more than merely classify the employees for pensions, prepare a budget for their payment and fix the time for retirement. All such details could have been prescribed by the legislature in part IV of the School Code. But because economic and social conditions of school districts may differ widely, it was determined to be a better public policy to allow each district to determine its additional obligations "in accordance with sound business practice and with recognized actuarial methods". § 5.1103.

Not only might the governing board advise and plan but it was authorized to amend the plan "in such manner as may be found to be advisable to meet changed conditions". This authorization to amend the plan vests the governing board with extensive powers. § 5.1103. It contemplates the exercise of the board's discretion in placing a maximum limitation upon retirement benefits and in determining the amounts to be paid. It recognizes that conditions differ in the several localities and that conditions in any locality must change from time to time. The local board is in a position to evaluate such changes. If it must determine when and what changes are to be made, it surely is vested with power to determine maximum benefits at the time of devising the plan.

[3] Because the retirement salary is in addition to that paid petitioner by the state (§ 5.1110) petitioner contends that respondent board improperly considered the state pension in the sum of $600 annually from the state. Inasmuch as the act specifically recites that the district pension shall be in addition to any other pension received by the retired teacher, the legislature must have intended that the state pensions should be known to the board in fixing the district pension. No good reason appears why it should not have been so regarded. It was logical and judicious to do so. Had there been no state pension, the board indicated what it might have done for teachers by its provision for noncertificated employees. But since other provision had been made for the teachers, the board wisely considered the power of the revenue-producing source by using its knowledge of other income payable to retired teachers. It realized that the source of retirement salaries is identical with that of salaries paid for active service. Both must be paid by the citizens of the district. In dispensing the revenues of the district in payment for "prior services" no sound reason can be advanced why the board should not determine the amount to be paid as in the case of current services.

Petitioner contends that the plan of fixing the maximum retirement salary for teachers is discriminatory and therefore unconstitutional because the noncertificated employees of the district receive $1,200 annually after retirement. But that, likewise, is a detail to be determined by the governing board. In providing for the economic security of the employees of the public schools system during the years of their retirement, the legislature has not undertaken by part IV (§ 5.800 et seq.) or by part V (§ 5.1100 et seq.) to do more than provide for mere subsistence. No extravagant pension is allowed to any class of teachers. Under part IV no retirement salary is provided for any employee except the teachers. Facing that condition in 1937, the governing board of the wealthy and extensive district of respondents determined partially to correct what must have appeared to them as an injustice when they made provision for a decent subsistence of the noncertificated employees of the district. By allowing such employees upon retiring to receive the sum of $1,200 per annum, the board merely attempted to correct a vicious disparity, which had resulted from the legislation for statewide teachers' retirement pay. § 5.800 et seq. While it is true that the act providing for the State Teachers' Retirement System requires contributions from all teachers and librarians to the "teachers' permanent fund" and to the "annuity deposit fund", at the same time the entirety of both funds had been paid to the teachers of respondents' district with the revenues derived from that district. The contributions there made were a form of deferred salary payments just as are the district retirement salaries established by respondent board.

[4] These facts emphasize that there was no discrimination against the teachers in the act of granting an increase in the salaries of noncertificated employees and to defer the payment of such increase to a future time. The power to increase a salary (§ 5.781) carries with it the power to defer the payment of such increase. To defer to the years of retirement the payment of a portion of the salaries of the janitors and the gardeners could not be seriously deemed a discrimination against the teachers who contribute nothing toward the fund of the district out of which their retirement salaries are to be paid.

[5, 6] Neither this court nor any other will disagree with the claims of petitioner that the retirement salaries should be such as would enable faithful teachers to live in decency in the years of their retirement. But neither the sentiments of this court nor of any other institution should prevail against the act of the legislative body which determines the policy of the state. Salaries to be paid those who serve the state are not the concern of the courts but rather are we to be guided by the legislative intent with reference thereto.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

18 Cal.2d 409

SEEGER et al. v. ODELL et al.

L. A. 17462.

Supreme Court of California.

Aug. 12, 1941.

1. Appeal and error 🔑916(1)

Where the plaintiffs appealed from a judgment on the pleadings in favor of certain of the defendants, the allegations of the complaint were required to be considered true as though the complaint were before the court on a general demurrer.

2. Contracts 🔑94(1)
Deeds 🔑70(1)

A person who has been induced by fraudulent misrepresentations to enter into a contract or to make a conveyance may have the contract or conveyance set aside and secure a restitution of those benefits lost to him by the transaction. Civ.Code, § 1689(1).

3. Fraud 🔑4, 13(2)

A "fraudulent misrepresentation" is one made with the knowledge that it is or may be untrue and with the intention that the person to whom it is made shall act in reliance thereon. Civ.Code, § 1572.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraudulent Misrepresentation".

4. Contracts 🔑94(5)
Deeds 🔑70(2)

To have a contract or conveyance set aside and lost benefits returned on ground of fraudulent misrepresentation, it must appear not only that the plaintiff acted in reliance on the misrepresentation but that he was justified in his reliance.

5. Contracts 🔑94(7)
Deeds 🔑70(3)

A plaintiff seeking to have a contract or conveyance set aside on ground of fraudulent misrepresentation cannot justifiably rely on mere statements of opinion, including legal conclusions drawn from a true state of facts unless the person expressing the opinion purports to have expert knowledge concerning the matter or occupies a position of confidence and trust.

6. Contracts 🔑94(7)
Deeds 🔑70(3)

If an opinion or a legal conclusion misrepresents the facts on which it is based or implies existence of facts which are nonexistent, it constitutes an actionable "misrepresentation" justifying the setting aside of a contract or conveyance.

See Words and Phrases, Permanent Edition, for all other definitions of "Misrepresentation".

7. Contracts 🔑94(5)
Deeds 🔑70(2)

In an action to set aside a contract or conveyance on ground of fraudulent misrepresentation, negligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense where the misrepresentation was intentional rather than negligent.

8. Contracts 🔑94(5)
Deeds 🔑70(2)

Generally, the negligence of the plaintiff seeking to have a contract or conveyance set aside on ground of fraudulent misrepresentation is no defense to an intentional tort.

9. Contracts 🔑94(5)
Deeds 🔑70(2)

The fact that an investigation would have revealed the falsity of a misrepresentation will not alone bar recovery in an action to set aside a contract or conveyance on ground of fraudulent misrepresentation.

10. Contracts 🔑94(5)
Deeds 🔑70(2)

In an action to set aside a contract or conveyance on ground of fraudulent misrepresentation, a plaintiff will not be held to constructive notice of a public record which would have revealed the true facts.

11. Contracts 🔑94(5)
Deeds 🔑70(2)

The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value.

12. Contracts 🔑94(5)
Deeds 🔑70(2)

The plaintiff in an action to set aside a contract or conveyance on ground of fraudulent misrepresentation is not held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man.

13. Contracts 🔑94(5)
Deeds 🔑70(2)

Exceptionally gullible or ignorant people may recover in an action to set aside a contract or conveyance on ground of fraudulent misrepresentation, against defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled.

14. Mortgages 🔑529(3)
Quieting title 🔑7(4)

In action to set aside foreclosure sale, and to quiet title to realty in the plaintiffs except as to existent subleases in the hands of innocent sublessees and for a money judgment, on ground that certain of the defendants were guilty of fraudulent misrepresentations, if the conduct of the plaintiffs in the light of their own intelligence and information was manifestly unreasonable, they would be denied recovery.

15. Contracts 🔑94(5)
Deeds 🔑70(2)

A plaintiff seeking to set aside a contract or conveyance on ground of fraudulent misrepresentation may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.

16. Mines and minerals 🔑54½
Quieting title 🔑34(5)

Allegations that plaintiffs, an elderly couple, mortgaged lot to certain of defendants, that mortgage was foreclosed, that certain defendants and their attorney falsely represented to plaintiffs that two of the defendants had obtained a money judgment against the plaintiffs and that execution had been secured on the plaintiffs' lot so that any interest that plaintiffs had was lost by a sale of the lot to certain of the defendants, that plaintiffs were thereby induced to lease the realty to one of the defendants for drilling of oil, with result that plaintiffs refrained from paying mortgage indebtedness or from exercising their equity of redemption, though they had received a number of offers sufficient to cover the mortgage indebtedness, were sufficient to establish plaintiffs' right to relief on the basis of a fraudulent misrepresentation.

17. Mortgages 🔑529(3)
Quieting title 🔑15

In action to set aside foreclosure sale, to quiet title to realty in the plaintiffs except as to subleases in the hands of innocent sublessees, and for a money judgment, on ground that certain of the defendants were guilty of fraudulent misrepresentations, defendants could not urge as a defense that the plaintiffs were more credulous than the average person.

18. Mines and minerals 🔑54½
Quieting title 🔑7(4)

In suit to have foreclosure sale set aside, title to realty quieted in plaintiffs except as to subleases in the hands of innocent sublessees, and a judgment for royalties, on ground that certain of the defendants were guilty of fraudulent misrepresentation as to ownership of realty, plaintiffs were not precluded from recovering on ground that the owner of realty is conclusively presumed to know the state of his own title and therefore may not justifiably rely on misrepresentations as to ownership.

19. Mines and minerals 🔑54½
Quieting title 🔑34(1)

Action to set aside foreclosure sale of realty and to have title to property quieted in the plaintiffs except as to certain subleases in the hands of innocent sublessees, and for a judgment for royalties on ground of fraudulent misrepresentations on the part of certain of the defendants, was an action for equitable relief, rather than for damages at law, and hence it was sufficient for the plaintiffs to allege that they had been wrongfully deprived of certain property by misrepresentation without setting forth in detail the extent to which they had been damaged.

20. Mines and minerals 🔑54½
Quieting title 🔑14

In action to set aside foreclosure sale, to quiet title to realty in plaintiffs except as to subleases in the hands of innocent sublessees, and for a money judgment for royalties, on ground of fraudulent misrepresentation on the part of certain of the defendants, plaintiffs as a condition of restitution were required to restore to defendants, any benefits which plaintiffs had received as result of the transaction.

21. Mines and minerals 🔑54½
Quieting title 🔑14

In action to set aside foreclosure sale, and to have title to realty quieted in plaintiffs except as to subleases in the hands of innocent sublessees, and for a judgment for royalties, a restoration of the royalties received by the plaintiffs was not necessary in order to entitle plaintiffs to recover, since the plaintiffs were not required to restore property which was rightfully theirs.

22. Judgment 🔑229

A court granting equitable relief has the power to make its decrees contingent on compliance by the plaintiff with certain conditions, so that the interests of the defendants can be protected.

23. Limitation of actions 🔑100(1, 11)

The statute of limitations in action based on fraud begins to run from the time when the fraud was discovered or should reasonably have been discovered. Code Civ.Proc. § 338(4).

24. Limitation of actions 🔑177(3)

In action to set aside foreclosure sale, to quiet title to realty in plaintiffs except as to subleases in the hands of innocent sublessees, and for a judgment for royalties on ground of fraudulent misrepresentations, it was necessary for plaintiffs to allege facts showing that the action was brought within a reasonable time after discovery of the fraud without unnecessary delay and that failure to make the discovery of the fraud sooner was not due to negligence. Code Civ.Proc. § 338(4).

25. Limitation of actions 🔑100(11)

Where action based on fraud was brought more than three years after date when misrepresentation was allegedly made but only 60 days after the misrepresentation was allegedly discovered to be fraudulent, and plaintiffs alleged that the discovery did not occur sooner because of their advanced age, the considerable distance of the available records from their home, and the absence of any occasion on their part to examine the records or otherwise inquire into the truth of the representation, the trial court was justified in finding that plaintiffs were sufficiently diligent in discovering the fraud and that the action was brought within a reasonable time thereafter. Code Civ.Proc. § 338(4).

In Bank.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Nettie L. Seeger and another against A. J. Odell and others, to have a foreclosure set aside, to have title to realty quieted in the plaintiffs except as to existent subleases in the hands of innocent sublessees, and for all moneys received as royalties by one of the defendants or her assigns from an oil well and for all moneys received by the named defendant from the oil well. From a judgment on the pleadings in favor of certain of the defendants, the plaintiffs appeal.

Judgment reversed.

For prior opinion, see 108 P.2d 33.

Daniel A. Knapp, of Los Angeles, and Fred A. Wilbur, of Santa Ana, for appellants.

McAdoo, Neblett & Warner, of Los Angeles, Louis N. Whealton, of Long Beach, and William H. Neblett, B. H. Neblett, E. Walter Guthrie, and Neblett, Warner & MacDonald, all of Los Angeles, for respondents.

TRAYNOR, Justice.

[1] Plaintiffs have appealed from a judgment on the pleadings in favor of defendants A. J. Odell, Mary Gibbs, William G. McAdoo and R. T. Colter. The allegations of the complaint must therefore be considered true as though the complaint were before the court upon a general demurrer. Miller v. Price, 103 Cal.App. 650, 654, 284 P. 1035.

The complaint alleges: The plaintiffs, an elderly couple, were the owners of a lot located in Huntington Beach, California. In 1926 they executed a note and mortgage on this lot to William G. McAdoo and R. T. Colter as security for the payment of a loan of $2,255. McAdoo and Colter assigned the note and mortgage to Mary Gibbs, who in 1933 secured a final judgment of foreclosure. Shortly thereafter, A. J. Odell and Mary Gibbs requested the plaintiffs to confer with them on the disposition of the property. At the conference, McAdoo, Colter, Gibbs and Odell were represented by their attorney, Ben H. Neblett. Neblett told plaintiffs that as an attorney he had superior knowledge of many facts concerning the land and that they could rely upon all he had to say. McAdoo and Colter had previously secured a money judgment against plaintiffs in another action, and Neblett stated that, acting on behalf of Colter and McAdoo, he had secured an execution on plaintiffs' land to satisfy the judgment, that the sheriff had levied on the land and sold it to McAdoo and Colter for the amount of the judgment debt, and that McAdoo and Colter were the owners of any interest which plaintiffs previously had in the land. McAdoo and Colter, he represented, were going to submit to the foreclosure sale, which had been set for August, 1933, and would not exercise their equity of redemption. Neblett went on to assure the plaintiffs, however, that he and his clients were plaintiffs' friends and would make an unselfish proposal solely to enable the plaintiffs to receive some return from the land out of which they would otherwise get nothing. The proposal was that plaintiffs join with Mary Gibbs in a lease of the land to Odell for the purpose of drilling for oil, with the understanding that they would receive a specific royalty from the oil produced.

The complaint further alleges: The plaintiffs believed Neblett's representation that their land had been sold at an execution sale to Colter and McAdoo. They therefore joined in executing a lease to Odell and made no attempt to pay the mortgage debt or to exercise the equity of redemption after the foreclosure sale, although during this period many persons offered to lease the land from them with advances sufficient to cover the mortgage indebtedness. After Mary Gibbs bought in the property at the foreclosure sale in August, 1933, Odell took possession under his lease and drilled a well, from which he has received profits of more than $100,000.

The complaint alleges further: No execution actually had been levied on the land. The representation that the land had been sold to McAdoo and Colter was known to be false by Neblett and his clients. It was made to induce the plaintiffs to refrain from paying the mortgage indebtedness or from exercising their equity of redemption and to induce them to join in leasing the property to Odell. Plaintiffs did not discover the falsity of the representations until May, 1936. The records covering the facts involved were situated in a city at some distance from the city where plaintiffs reside. They are both elderly; neither drives an automobile; and they had no reason to suspect that the representations were false. Following the discovery of the misrepresentation, plaintiffs notified Odell of their rescission of the lease. They then brought this action against Odell, McAdoo, Colter and Gibbs, asking that the foreclosure sale to Mary Gibbs be set aside, that the title to the property be quieted in them except as to existent sub-leases in the hands of innocent sublessees, and that a judgment be awarded them for all moneys received as royalties by Mary Gibbs or her assigns from the oil well and for all moneys received by Odell from the oil well. Plaintiffs offer to do all things required of them by the court, including the paying of the mortgage indebtedness on the property. The oil companies were made nominal defendants solely to have their rights, if any, adjudicated.

[2-14] It is well established in California and other jurisdictions that a person who has been induced by fraudulent misrepresentations to enter into a contract or to make a conveyance may have the contract or conveyance set aside and secure a restitution of those benefits lost to him by the transaction. Cal.Civ.Code, sec. 1689(1); see cases cited in 12 Cal.Jur. 781, 782; 6 Cal.Jur., Supp. 54; Cal.Annotations to Rest. Restitution, sec. 28. See Rest. Restitution, sec. 28. A fraudulent misrepresentation is one made with the knowledge that it is or may be untrue, and with the intention that the person to whom it is made act in reliance thereon. Rest. Torts, secs. 526, 531; Cal.Civ.Code, secs. 1572, 1710; see cases cited in 12 Cal.Jur. 706-9. It must appear, however, not only that the plaintiff acted in reliance on the misrepresentation but that he was justified in his reliance. Rest. Torts, sec. 537; see cases cited in 12 Cal.Jur. 750 et seq. He may not justifiably rely upon mere statements of opinion, including legal conclusions drawn from a true state of facts (Rest. Torts, sec. 545; see cases cited in 12 Cal.Jur. 730-33), unless the person expressing the opinion purports to have expert knowledge concerning the matter or occupies a position of confidence and trust. Rest. Torts, sec. 542; see cases cited in 12 Cal.Jur. 725 et seq. If, however, the opinion or legal conclusion misrepresents the facts upon which it is based or implies the existence of facts which are nonexistent, it constitutes an actionable misrepresentation. Rest. Torts, sec. 539; see cases cited in 12 Cal.Jur. 727, 728. Negligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation was intentional rather than negligent. See cases cited in 12 Cal.Jur. 758, 759; Prosser, Torts, 748. As a general rule negligence of the plaintiff is no defense to an intentional tort. See Prosser, Torts, 402. The fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar his recovery (Rest. Torts, sec. 540; see cases cited in 12 Cal.Jur. 758, 759), and it is well established that he is not held to constructive notice of a public record which would reveal the true facts. Rest. Torts, sec. 540[b]; see cases cited in 12 Cal.Jur. 764, 759; Prosser, Torts, 750, 751. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value. Nor is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical,

reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. See cases cited in 6 Cal.Jur. Supp. 45 (note 13); Prosser, Torts, 749. "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." Chamberlin v. Fuller, 59 Vt. 247, 9 A. 832, 835, 836. If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. Rest. Torts, sec. 541; see cases cited in 12 Cal.Jur. 757; Prosser, Torts, 747, 748. "He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth * * *" Prosser, Torts, 749.

[16, 17] In the present case the allegations of the plaintiffs' complaint, if true, are sufficient to establish the right to relief on the basis of a fraudulent misrepresentation. According to these allegations the misrepresentation was made by the defendants through their agent (See cases cited in 12 Cal.Jur. 774; 6 Cal.Jur., Supp. 51) with the knowledge that it was false and with the intention of inducing plaintiffs to act in reliance upon it, and plaintiffs did act in reliance thereon. The fact that an examination of the record would have revealed to plaintiffs the falsity of the representation or that they may have been negligent in failing to make further investigations does not bar their right to relief. The misrepresentation is not such that its falsity must have been so obvious to the plaintiffs as to preclude any justifiable reliance thereon by them. The defendants cannot urge as a defense that plaintiffs were more credulous than the average person. The representation that a levy of execution and sale of the property had occurred was a false statement of fact and is not rendered less actionable because it also contained legal conclusions.

[18] Defendants contend that under the case of Robins v. Hope, 57 Cal. 493, an owner of property in California is "conclusively presumed" to know the state of his own title and therefore may not justifiably rely upon misrepresentations as to ownership. Since a "conclusive presumption" is simply a statement of the rule of law applicable in a given situation, defendants are contending for the establishment of a rule that no action will lie for a fraudulent misrepresentation when it concerns the title to property owned by the party misled. Such a rule would give legal sanction to the perpetration of fraud and permit the cunning to take unfair advantage of the ignorant. The average property owner knows nothing more about the state of his own title than that it is presumably in himself. He usually purchases his property in reliance upon a policy of title insurance and does not search the record for possible adverse claims. While situations might arise where the owner of property would not be justified in relying upon a misrepresentation as to its title, the circumstances of each case should determine whether or not justification exists as in any other action based upon fraud. The defense should not be conclusively presumed against the owner without giving him a chance to show justifiable reliance. Numerous cases in other jurisdictions have permitted a vendor of realty to rescind a contract of sale because the vendee had fraudulently misrepresented to the vendor the value, quantity, or state of the title of the land being conveyed. No attempt is made to presume, conclusively or otherwise, knowledge by the ignorant vendor of the facts concerning his own land. Holt v. Gordon, Tex.Civ.App., 176 S.W. 902; Livingston v. Peru Iron Works, 2 Paige, N.Y., 390; Caples v. Steel, 7 Or. 491; Crompton v. Beedle, 83 Vt. 287, 75 A. 331, 30 L.R.A., N.S., 748, Ann.Cas.1912D, 399; Burrows v. Fitch, 62 W.Va. 116, 57 S.E. 283; Wilson v. Nichols, 72 Conn. 173, 43 A. 1052; Faxon v. Baldwin, 136 Iowa 519, 114 N.W. 40. See 9 A.L.R. 1062. In the California case of Conlan v. Sullivan, 110 Cal. 624, 42 P. 1081, a vendee purchased land from a vendor for far less than its value by concealing from the vendor the fact that a mortgage with which the vendor believed the land to be encumbered actually applied to another piece of land. This court held that the fraudulent conduct of the vendee justified the trial court in rescinding the contract of sale on behalf of the vendor. There was no conclusive presumption against the vendor that he knew the state of the title to his land. In the recent case of Glickman v. New York Life Insurance Co., 16 Cal.2d 626, 107 P.2d 252, 131 A.L.R. 1292, this court held that the holder of an

insurance policy was not so chargeable with notice of the terms of his policy as to be precluded from rescinding a surrender of the policy when he was misled by fraudulent statements as to his rights made by the insurer's agent. The same considerations which prompted the court to refuse to hold the policyholder to a knowledge of the terms of his policy apply against conclusively presuming knowledge of the state of his title on the part of the owner of realty. The case of Robins v. Hope, supra, is therefore overruled to the extent that it holds that an owner of realty is conclusively presumed to know the state of the title to his land.

[19-22] Because of the alleged fraudulent misrepresentation plaintiffs ask for a setting aside of the foreclosure sale to Mary Gibbs and a rescission of the lease to Odell, with an accounting of the profits received by these defendants from the property. Since the action is one for equitable relief rather than for damages at law, it is sufficient for the plaintiffs to allege that they have been wrongfully deprived of certain property by the misrepresentation and they need not set forth in detail the extent to which they have been damaged. See cases cited in 12 Cal.Jur. 813, 814. As a condition of restitution, however, the plaintiffs must restore to the defendants any benefits which they have received as a result of the transaction. Rest. Restitution, sec. 65; Cal. Civ.Code, sec. 1691(2); see cases cited in Cal.Annotations to Rest. Restitution, sec. 65; 12 Cal.Jur. 781. Plaintiffs must therefore pay to Mary Gibbs the amount of the mortgage debt before they can recover the property. A restoration of the royalties received by plaintiffs is not necessary since they need not restore property which is rightfully theirs. See Rest. Restitution, sec. 65 and Cal. Annotations. Defendants contend that plaintiffs have not properly offered to make the necessary restitution. It is well established, however, that a court granting equitable relief has the power to make its decrees contingent upon compliance by the plaintiff with certain conditions. See cases cited in 10 Cal.Jur. 508-11, 512. The interests of the defendants can thus be well protected by a decree making any relief granted to plaintiffs conditional upon their paying the mortgage debt. Plaintiffs' offer in their complaint to "do and perform all things of them in equity required by the court to be done by them in the premises" and to subtract the amount of the mortgage debt from any sum awarded them from Mary Gibbs is a sufficient offer of restitution.

[23-25] Defendants finally contend that plaintiffs are barred from a recovery by the statute of limitations and laches. In California the statute of limitations in an action based upon fraud begins to run from the time when the fraud was discovered or should reasonably have been discovered. Cal.Code Civ.Proc. sec. 338(4). It is necessary for a plaintiff to allege facts showing that suit was brought within a reasonable time after discovery of the fraud without unnecessary delay and that failure to make the discovery sooner was not due to negligence. See cases cited in 12 Cal. Jur. 795–799. The present action was brought more than three years after the date when the misrepresentation was allegedly made but only sixty days after it was discovered. Plaintiffs allege that the discovery did not occur sooner because of their advanced age, the considerable distance of the available records from their home, and the absence of any occasion on their part to examine the records or otherwise inquire into the truth of the representation. The alleged facts, if believed, would justify a trial court in finding that the plaintiffs were sufficiently diligent in discovering the fraud, and that the action was brought within a reasonable time thereafter.

The judgment is reversed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; HOUSER, J.; CARTER, J.

18 Cal.2d 419

LOEW'S INC. et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 17812.

Supreme Court of California.
Aug. 14, 1941.

1. Literary property 🔑1

Apart from statute, certain property rights in an author's original intellectual products are recognized by law and entitled to same protection as rights in any other species of property.

2. Literary property 🔑1

An author has right of first publication of original literary work by him.

3. Literary property 🔑6

An author's right of first publication of original literary work by him is transferable.

4. Literary property 🔑5

An author's publication of his literary work is dedication thereof to public, and he no longer has exclusive right of property therein.

5. Copyrights 🔑32

An author of literary work has no rights which can be protected under copyright statute until first publication thereof, whereupon right of exclusive property therein, that is, right to multiply copies thereof for limited period, is that afforded by statute. Copyright Act §§ 1(a), 9, 23, 17 U.S.C.A. §§ 1(a), 9, 23.

6. Copyrights 🔑33

The statutory right of author of unpublished copyrighted dramatic composition to exclusive performance or representation of drama exists for limited period. Copyright Act §§ 1(d), 11, 23, 17 U.S.C.A. §§ 1(d), 11, 23.

7. Copyrights 🔑26

Compliance with copyright statute to secure right to exclusive performance of unpublished drama serves as "constructive notice" of such right and affords prima facie evidence of facts stated in registration certificate and hence of originality and innocence of composition. Copyright Act §§ 1(d), 9, 12, 17 U.S.C.A. §§ 1(d), 9, 12.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

8. Copyrights 🔑41

The rights of one proceeding under statute to secure copyright for his literary work should thenceforth be measured by statutory provisions. Copyright Act § 1 et seq., 17 U.S.C.A. § 1 et seq.

9. Literary property 🔑1

The common-law right of author of unpublished dramatic work to exclusive representation thereof for profit exists until copyright statute has been invoked and rights created thereunder or common-law right has been otherwise abandoned. Copyright Act § 1 et seq., 17 U.S.C.A. § 1 et seq.

10. Copyrights 🔑1
Literary property 🔑1

An author of unpublished dramatic composition has right of election to content himself with common-law copyright or to substitute therefor right afforded by copyright statute to exclusive representation of drama for profit by complying with statutory provisions, whereupon extent of copyright and remedies for infringement thereof are governed by such provisions. Copyright Act § 1 et seq., 17 U.S.C.A. § 1 et seq.

11. Copyrights 🔑41
Literary property 🔑1

One proceeding under copyright statute to secure protection of his dramatic rights in unpublished composition written by him elected to substitute right afforded by such statute to exclusive representation of drama for his common-law copyright and cannot subsequently make different election. Copyright Act § 1 et seq., 17 U.S.C.A. § 1 et seq.

12. Copyrights 🔑41
Literary property 🔑1

A common-law and statutory copyright may not exist concurrently, but statutory copyright divests owner of his common-law right. Copyright Act § 1 et seq., 17 U.S.C.A. § 1 et seq.

13. Copyrights 🔑1

The system of remedies provided by statute for infringement of copyright is exclusive. Copyright Act § 25, 17 U.S.C.A. § 25.

14. Copyrights 🔑41

One becoming owner of special right, created by copyright statute, to exclusive representation for profit of unpublished dramatic composition written by him and deposited with register of copyrights, must be restricted to remedies provided by such statute for infringement of such right. Copyright Act §§ 1(d), 12, 17 U.S.C.A. §§ 1(d), 12.

15. Courts ⚿489(4)

One securing exclusive right to produce for profit unpublished drama written by him as substitute for his common-law right of performance by complying with copyright act is restricted to remedies afforded thereby for infringement of such right and may seek such redress originally in federal district court only, not state court. Copyright Act §§ 11, 34, 17 U.S.C.A. §§ 11, 34.

◆

In Bank.

Proceeding by Loew's Incorporated and another for a writ of prohibition to prohibit the Superior Court of Los Angeles County from entertaining jurisdiction of an action against petitioner to recover damages for misappropriation of a literary and dramatic work, in which an alternative writ was first denied and subsequently issued after hearing.

Order that peremptory writ issue.

Loeb & Loeb, of Los Angeles (Herman F. Selvin, of Los Angeles, of counsel), for petitioners.

J. H. O'Connor, Co. Counsel, and Douglas DeCoster, Deputy Co. Counsel, both of Los Angeles (Harold A. Fendler, of Los Angeles, of counsel), for respondent.

SHENK, Justice.

The petitioners seek to prohibit the respondent Superior Court from entertaining jurisdiction of an action brought against the petitioners and others as defendants to recover damages for alleged misappropriation of a literary and dramatic work claimed to be the exclusive property of one Al Rosen. In the complaint in the pending action, the plaintiff, Al Rosen, alleged that he is the owner by assignment of a common law copyright in an unpublished dramatic composition and motion picture scenario entitled "The Mad Dog of Europe"; that in 1933 the work was submitted by him to the defendants, petitioners herein, and that it was rejected by them; that in 1939, without his knowledge or consent, the defendants appropriated the dramatic composition and in 1940 presented the same in a motion picture entitled "The Mortal Storm". He also alleged the immediate giving of notice to the defendants of the alleged misappropriation. He sought damages in the sum of $575,000.

Loew's Incorporated and Louis B. Mayer, two of the defendants in said action, and who are the petitioners herein, answered the complaint denying any misappropriation and alleging that the scenario, "The Mortal Storm", was based upon a novel of the same title written by Phyllis Bottome, also named as a defendant in the action. The answering defendants also alleged and presented a certificate showing that in December, 1933, one copy of the composition, "The Mad Dog of Europe", not reproduced for sale, was entered in the office of the Register of Copyrights in the library of Congress at Washington, D. C., under the copyright act of March 4, 1909, as amended by the act of March 2, 1913, 17 U.S.C.A. § 55, and that registration of a claim to copyright for the first term of twenty-eight years was duly made in the name of Al Rosen. The same defendants moved the Superior Court to dismiss the action on the ground that exclusive jurisdiction thereof was vested in the federal courts under the provisions of the copyright law. The court denied the motion. The present proceeding was commenced to prohibit the trial of the action.

The petitioners now likewise contend that exclusive jurisdiction of all matters arising under the copyright law is vested in the federal courts, and that the subject matter of the pending action is one in which the federal courts have such exclusive jurisdiction. The respondents assert that the plaintiff in the action is relying on a common law copyright which has been expressly reserved by the copyright act.

[1-4] There is no doubt that apart from statute the law recognizes certain rights of property in the original intellectual products of an author, which are entitled to the same protection as rights in any other species of property; that the author has the right of first publication and that such right is transferable. Wheaton v. Peters, 33 U.S. 591, 8 Pet. 591, 8 L.Ed. 1055; Parton v. Prang, Fed.Cas. No. 10,784, 3 Cliff. 537; Holmes v. Hurst, 174 U.S. 82, 84, 19 S.Ct. 606, 43 L.Ed. 904, Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346, 28 S.Ct. 722, 52 L.Ed. 1086; Palmer v. De Witt, 47 N.Y. 532, 7 Am.Rep. 480. But under that law publication by the author is a dedication to the public and the author

no longer has an exclusive right of property in the work. Wheaton v. Peters, supra; Palmer v. De Witt, supra; Holmes v. Hurst, supra; Caliga v. Inter-Ocean Newspaper Co., 215 U.S. 182, 30 S.Ct. 38, 54 L.Ed. 150; Fashion Originators Guild v. Federal Trade Commission, 2 Cir., 114 F.2d 80, and cases cited at pages 83, 84.

By section 8 of article I of the United States Constitution, Congress was given the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right in their respective Writings and Discoveries."

The copyright law grants to any person, upon compliance with its provisions, the exclusive right to publish and vend the copyrighted work, 17 U.S.C.A. § 1(a), and to perform or represent the copyrighted work publicly, if it be a drama, in any manner or by any method. 17 U.S.C.A. § 1(d). Any person entitled to copyright may secure the same for his work by publication thereof with the notice required affixed to each copy published (sec. 9), and by depositing two copies with the register of copyrights. (Sec. 12.) Section 11 provides that the copyright of a dramatic work, of which copies are not reproduced for sale, may be obtained by the deposit with the claim of copyright of one complete copy, but that the privilege does not exempt the author from deposit of copies pursuant to section 12 when the work is later reproduced in copies for sale. The copyright thus secured continues for twenty-eight years "from the date of first publication" with the right of one renewal for a further term of twenty-eight years. Sec. 23. The limitation of time has been held to apply to a copyright obtained for exclusive representation of an unpublished dramatic composition pursuant to the provisions of section 11, the period commencing from the date of deposit. Cardinal Film Corp. v. Beck, D. C., 248 F. 368; Marx v. United States, 9 Cir., 96 F.2d 204.

Section 25 provides the remedies for infringement of copyright under the statute by injunction and by action for damages. That section limits the damages to a maximum sum of $5,000 and a minimum of $250 and provides that the sum allowed shall not be regarded as a penalty; except that the limitations do not apply to infringements occurring after notice. Turner & Dahnken v. Crowley, 9 Cir., 252 F. 749.

By section 34 jurisdiction of all actions or proceedings arising under the copyright laws of the United States is vested in the federal courts. Section 2 provides: "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

It is asserted by the respondent that Rosen's common law right of redress against the infringement of his right of exclusive representation of the dramatic work existed because the dramatic composition remained unpublished, and that deposit pursuant to section 11 of the copyright act did not amount to such publication as at common law is considered a dedication to the public.

It is not contended that Rosen did not effect a valid statutory right, namely, the right to exclusive performance and representation dramatically of the composition on deposit with the register. The question is whether a statutory and a common law right, such as is here claimed, can exist concurrently. It is not questioned that the author or the assignee, Rosen, has the right of first publication of the dramatic composition, but Rosen is not suing for infringement of that right. The right which is the subject matter of the pending action is the claimed right to exclusive representation of the dramatic work for profit, which is the subject of the copyright held by Rosen.

[5-7] In the case of a literary work, there is no right which can be protected under the statute until first publication. Upon first publication the right of exclusive property, that is, the right to multiply copies for a limited period, is that afforded by the statute. In the case of an unpublished dramatic composition the statutory right to exclusive performance or representation exists for a limited period. The duration of the right, apart from statute, of exclusive representation by the author of an unpublished dramatic work is not entirely clear. It has been said that it is not lost by public performance. Ferris v. Frohman, 223 U.S. 424, 32 S.Ct. 263, 56 L.Ed. 492; Nutt v. National Institute, Inc., 2 Cir., 31 F.2d 236, 238. It has also been stated that by a public performance or a publication of the work with the author's consent, the author's common

law right to exclusive performance is lost. Palmer v. De Witt, 47 N.Y. 532, 542, 7 Am. Rep. 480; Keene v. Wheatley, 14 Fed.Cas. 180, 201, No. 7,644. See, also, Civil Code, sec. 983. Compliance with the statute to secure exclusive performance serves as constructive notice of the exclusive right and affords prima facie evidence of the facts stated in the certificate of registration (Nutt v. National Institute, Inc., 2 Cir., 31 F.2d 236), and therefore of the originality and innocence of the composition. The existence concurrently of the common law and the statutory copyright, as is here claimed, would permit the owner of the statutory right of exclusive representation to seek the advantages of the statute and at the same time to reject its disadvantages. It would give him something in addition to the statutory right and an advantage which is not afforded to other copyright holders. The respondents' contention appears to be that the proprietor of the statutory right to represent an unpublished drama may seek redress in the state courts as a perpetual right, while the proprietor of a similar right who also had obtained copyright for the publication of his composition, would be restricted to the statutory redress in the federal courts and for the limited period prescribed.

[8-14] The rights of one who proceeds under the statute should thenceforth be measured by the provisions of the statute. The common law right exists until the statute has been invoked and rights created thereunder, or the common law right has otherwise been abandoned; and this is so in one case as in the other. The author has the right of election, that is, he may content himself with his common law copyright, or he may elect to substitute therefor the right afforded by the statute by complying with its provisions, whereupon the extent of his copyright and the remedies for infringement are governed by the statutory provisions. Rosen's election was made when he proceeded to secure protection of the dramatic rights in the composition under the copyright statute. He cannot make a different election now. There is no expression in any of the authorities that a common law and a statutory right may exist concurrently, as is here claimed. The contrary conclusion is indicated. "No proposition is better settled than that a statutory copyright operates to devest a party of the common-law right." Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N.Y. 241, 247, 49 N.E. 872, 873, 41 L.R.A. 846, 63 Am.St.Rep. 666; Bobbs-Merrill Co. v. Straus, 2 Cir., 147 F. 15, 15 L.R.A.,N.S., 766; Société des Films Menchen v. Vitagraph Co., 2 Cir., 251 F. 258, 260; Universal Film Mfg. Co. v. Copperman, 2 Cir., 218 F. 577; Cohan v. Robbins Music Corp., 244 App.Div. 697, 280 N.Y.S. 571, and cases cited. The foregoing proposition appears to have found frequent expression in the decisions. It may be said that it is the outgrowth of cases involving publication of literary works, and for the most part has been applied in such cases. However, counsel has not presented nor have we discovered a case involving any copyright under the statute in which a different conclusion has been announced. In Nutt v. National Institute, Inc., supra, 31 F.2d at page 238, it was said, referring to section 2 of the copyright statute, that the statute did not change the common law. In Photo-Drama Motion Picture Co., Inc., v. Social Uplift Film Corp., 2 Cir., 220 F. 448, 450, the court through Lacombe, circuit judge, said: "We do not concur in Judge Hand's holding [D.C., 213 F. 374] that one who has obtained statutory copyright of a book or play has left in him any common-law right in literary property by virtue of section 2 of the act [17 U.S.C.A. § 2]. We think that section is intended only to indicate that the statute does not displace the common-law right. Whoever elects to avail himself of the statute, however, must be held to have abandoned his common-law right." The right to multiply copies has been termed the "special creation of the statute". Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 351, 28 S.Ct. 722, 726, 52 L.Ed. 1086; see, also, Caliga v. Inter Ocean Newspaper, 215 U.S. 182, 188, 30 S.Ct. 38, 54 L.Ed. 150. The statute provides the system of remedies and no others can be resorted to. Globe Newspaper Co. v. Walker, 210 U.S. 356, 367, 28 S.Ct. 726, 52 L.Ed. 1096. Rosen has become the owner of a special right created by statute, that is, the right to the exclusive representation for profit of the dramatic composition deposited with the register. Therefore, he likewise must be restricted to the remedies provided for the infringement of that right. Under this view of the matter, the question whether the deposit of the dramatic composition with the register amounts to publication becomes unimportant.

None of the cases relied on by the respondents involved a claim of the concurrent existence of common law and statutory copyright to protect the exercise of the same right. In Palmer v. De Witt, 47 N.Y. 532, 7 Am.Rep. 480, the action was brought to restrain the defendant from printing an uncopyrighted and unpublished manuscript drama. The court held that whatever rights the plaintiff had, existed at common law, and that the state court was the proper forum for the redress of any infringement of those rights. It was pointed out in that case that "the right publicly to represent a dramatic composition for profit, and the right to print and publish the same composition to the exclusion of others, are entirely distinct, and the one may exist without the other. * * * The rights of an author of a drama in his composition are two-fold. He is entitled to the profit arising from its performance, and also from the sale of the manuscript, or the printing and publishing it." That distinction is impliedly recognized by the provisions of section 11 of the copyright law. In the present case we may assume that the author or his assignee still has the common law right of first publication, redress for the infringement of which it is also assumed may be sought in the state courts. To support the contention that Rosen still has the common law right of exclusive performance, the respondent relies on certain language in the case of Fashion Originators Guild v. Federal Trade Commission, 2 Cir., 114 F.2d 80, 83, where it was said: "It would certainly be a strangely perverse anomaly that turned the grant of statutory copyright into a detriment to the 'author'; yet it would be hard to prove that the statutory remedies conferred made up for the limitation of the monopoly." The case did not present a question of the concurrent existence of common law and statutory copyright in the same subject matter. The court was discussing the question of the survival of the common law right after publication and apart from statute. Its remarks were intended as a refutation of the contention that after passage of the copright act, publication by the author without registering under the act did not destroy the common law right. It pointed out that if it did not constitute a complete exercise of the common law right in every case, an author who copyrighted his work would lose rather than gain from compliance with the statute, inasmuch as without compliance his monopoly to multiply copies would exist forever.

In Underhill v. Schenck, 201 App.Div. 46, 193 N.Y.S. 745, 748, it was stated that the right of exclusive dramatic representation "asserted by plaintiff must not be confused with any right of literary property which he might claim as an author either under the copyright statutes or at common law". The court in that case denied relief for a violation of the copyright by production of the play on the ground that relief must be sought in the federal courts. The case of Berry v. Hoffman, 125 Pa.Super. 261, 189 A. 516, recognized that section 2 of the copyright law referred to those rights existing at common law before publication, and upheld in the state forum a claim of copyright before publication apart from the statute. The case did not involve any statutory copyright. The case of Caruthers v. R. K. O. Radio Pictures, D.C., 20 F.Supp. 906, was commenced in the state court and was transferred to the federal court because of diversity of citizenship. It involved only the common law right. It was not shown that the work had either been published or copyrighted under the statute.

[15] In the present case, as we have noted, the right created under section 11 of the copyright law is not assumed to have destroyed any common law right to the first publication of the dramatic composition. It did secure to the holder of the copyright the exclusive right to reproduce the play for profit for the term prescribed by the statute. The right thus secured was a substitute for the author's common law right of performance, and the plaintiff in the pending action is restricted to the remedies afforded by the statute for any infringement of that right. The only court in which he may seek such redress originally is the United States District Court, as specified by section 34 of the copyright statute.

Let the peremptory writ of prohibition issue as prayed.

We concur: CURTIS, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.; WHITE, Justice pro tem.; PULLEN, Justice pro tem.

46 CalApp.2d 355

COUNTY FIRST NAT. BANK OF SANTA CRUZ v. COAST DAIRIES & LAND CO.

Civ. 11425.

District Court of Appeal, First District, Division 1, California.

Aug. 6, 1941.

Hearing Denied Oct. 2, 1941.

1. Appeal and error 🔑987(1)

An appellate court has no power to weigh the evidence.

2. Appeal and error 🔑931(1)

All conflicts in the evidence must be resolved in favor of the judgment of the lower court.

3. Appeal and error 🔑931(1)

In passing on the evidence, all reasonable inferences therefrom must be indulged in to support the judgment.

4. Appeal and error 🔑842(7)

Where all material facts were admitted and the question presented was whether the defendant corporation, as a matter of law, was liable on note executed by its employee, the question was a "question of law" rather than a "question of fact", so that rules regarding review of evidence were inapplicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

5. Corporations 🔑432(12)

Evidence disclosing that defendant corporation had a three-man board of directors, that the board permitted an employee to act as general manager, that between 1925 and 1934 such employee executed many renewal notes, that such employee's authority was not questioned by the corporation, that notes in substantial amounts executed by the employee had been paid, that large balances were carried in account in plaintiff bank, and most if not all checks were signed by such employee, established that the employee had "implied authority" to execute notes or that the corporation was precluded by doctrine of "estoppel" from questioning the employee's authority to execute notes to plaintiff bank.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Implied Authority".

6. Corporations 🔑399(5), 413

A lending agency, in accepting a note from a corporation, should normally insist on a corporate resolution authorizing the officer executing the note to execute such instrument, but a failure to secure a copy of such resolution will not bar relief, where lending agency reasonably relies on a condition created by the borrowing corporation.

7. Principal and agent 🔑23(3)

An agency may be proved by evidence of facts showing that the alleged agent acted as such with the knowledge and acquiescence of the principal.

8. Principal and agent 🔑23(3)

Actual authority of an agent need not be shown by express agreement, but it may be shown by facts which demonstrate that the principal, by lack of ordinary care, led the agent to believe reasonably that he possessed the power in question. Civ.Code, § 2316.

9. Corporations 🔑399(5)

Where directors of corporation knew the general scope of functions of employee acting as general manager and knew generally what he was doing, and from 1921 to 1934 with full knowledge and acquiescence of the directors the employee was in full charge of all money and finances of the corporation, and executed many notes which were paid, the employee had "ostensible authority" to execute note sued on by plaintiff bank. Civ. Code, § 2317.

See Words and Phrases, Permanent Edition, for all other definitions of "Ostensible Authority".

10. Principal and agent 🔑99

The statute defining "ostensible authority" embodies in statutory form one phase of the doctrine of estoppel. Civ.Code, § 2317.

11. Principal and agent 🔑99

The statute defining "ostensible authority" applies, and an "ostensible agency" is created where the business done by the supposed agent, so far as open to observation of third party, is consistent with the exercise of an agency, and whereas to the transaction in question, the third party was justified in believing that an agency existed. Civ.Code, § 2317.

See Words and Phrases, Permanent Edition, for all other definitions of "Ostensible Agency".

12. Principal and agent ⚷99

The essential elements of "ostensible agency" are that the third person must believe that the agent has authority and that such belief must be generated by some act or neglect by the person or company to be held. Civ.Code, § 2317.

13. Principal and agent ⚷123(4)

Evidence that similar acts of agent were approved by principal establishes ostensible authority, if the other essential element of belief is present. Civ.Code, § 2317.

WARD, J., dissenting.

◆

Appeal from Superior Court, Santa Cruz County; J. L. Atteridge, Judge.

Action on a note by the County First National Bank of Santa Cruz against Coast Dairies & Land Company. From the judgment, plaintiff appeals.

Reversed.

For prior opinion, see 112 P.2d 315.

Bias & Bias, Harry J. Bias, and W. A. Deans, all of Santa Cruz, for appellant.

John Ralph Wilson and Bertrand F. Lurie, both of San Francisco, for respondent.

PETERS, Presiding Justice.

A rehearing was granted in this case in order to give further consideration to the contention of respondent that there is evidence in the record to support the findings and judgment of the trial court. After again reading the record, we are convinced that the opinion heretofore filed correctly disposes of the appeal. We therefore adopt as the opinion of this court the opinion heretofore prepared, with certain omissions and additions.

Plaintiff appeals from a judgment in favor of defendant determining that defendant is not liable on a promissory note in the sum of $11,000 alleged to have been executed by defendant corporation by its general manager, L. Poletti. The trial court found that Poletti had neither express nor implied authority to execute the note; that the defendant had not ratified its execution; and that defendant was not estopped to deny such lack of authority. Plaintiff urges that these findings are not supported by the evidence.

The facts are not substantially in dispute. Defendant land company was organized in 1913, its officers and directors being L. Moretti, president; D. Morelli, vice-president, and A. E. Morelli, secretary-treasurer. Moretti, a substantial shareholder and the representative of other principal foreign shareholders, left this country in 1915 and took up his residence in Switzerland, returning to California only for short periods in 1919 and 1926. The interests of the Morellis in the company consisted in each holding a single share of stock so that he could qualify as officer and director. D. Morelli, who operated a general store on a profit sharing basis with defendant company, took little part in its general affairs until after 1934. In settling store accounts with the defendant he dealt with Moretti, when he was in this country, otherwise with L. Poletti, who had been employed by the company in 1918 as a bookkeeper, with the approval of Mr. Moretti, to assist A. E. Morelli. As vice-president, D. Morelli, in performing his corporate duties, merely signed any instruments presented to him for signature by either A. E. Morelli or L. Poletti. He further testified that, although he was a director and officer of the company, he paid little attention to its affairs; that he depended on Poletti for information; that he paid so little attention to its affairs that he did not know of a $250,000 mortgage that was placed on the defendant land company's properties.

A. E. Morelli testified that, while he participated in the general management of the company until 1930, when he moved to Nevada, his time, prior to 1930, was occupied with other interests, and Poletti, who at first took over part of A. E. Morelli's duties, at all times from 1921 to 1934 acted as defendant's general manager. He further testified that he knew that Poletti signed notes and renewal notes on behalf of the defendant, and that this was done with his full knowledge and permission. In response to the question, "Did Mr. Poletti sign renewal notes with your permission?", he answered, "Yes, sir". When he was asked, "Did you advise him [Poletti] to sign any notes?", he replied, "Yes, sir; he was left there in charge, taking my place". Prior to 1921 A. E. Morelli had been general manager of the defendant, but he stated that after that date Poletti was "authorized" to take his place.

The uncontradicted evidence shows that between 1921 and December, 1934, when Poletti left the employ of the defendant company, he took full charge of all of the company's affairs, including those calling for discretion and judgment. He acted as the defendant's general manager. Generally speaking, he had charge of the office, including the corporate records and seal; he had charge of the money and finances of the company; he handled the leasing of acreages, although the leases were actually signed by an officer of the company; he fixed and collected rentals, depositing the collections to the credit of the company; he negotiated for the sale of real estate and made investments for the corporation; he settled litigation; he kept the company's books and paid the taxes; he prepared and sent to Mr. Moretti, and to the plaintiff bank, financial statements, some of which he signed as "Treasurer"; he made regular deposits to the credit of Moretti in a San Francisco bank out of the profits of the company.

The business relations between plaintiff and defendant, commenced in 1919 when defendant first opened an account with the bank, were carried on almost entirely by Poletti. Various signature cards were filed with the bank from 1919 to 1931 authorizing Poletti over his individual signature to draw checks on the company's account. During the period from 1921 to 1934, all correspondence by the defendant company with the bank was over Poletti's signature, and during all of such period he conducted business with the bank personally and by correspondence as general manager of the company. He rendered regular financial reports to the bank as the representative of defendant. During one of Moretti's visits to California, in 1926, he told some of the officers of the bank that, in his absence, Poletti and A. E. Morelli would be in charge of, and handle, the company's affairs. All of the financial dealings, however, were carried on by Poletti, and the officers of the bank testified that they looked upon him as the Coast Dairies & Land Company.

During a visit of Moretti to California in 1919, he purchased a cannery and organized a corporation to operate it. The cannery had no operating capital. Moretti instructed Poletti and A. E. Morelli to borrow money from defendant company to start operations, instructing them further that if more money was needed, to borrow it from plaintiff bank. Pursuant to such instructions, various sums were borrowed from the bank by defendant upon defendant's credit, but, such sums, so borrowed, were used for the benefit of the canning company. All amounts so borrowed had been entirely repaid to the bank when the indebtedness forming the basis of this action was first incurred on April 28, 1925. On that date a promissory note for $15,000, payable to the bank, was executed by A. E. Morelli as secretary of defendant company and, pursuant to Poletti's instructions, this sum was credited to the account of the canning company at the bank. Concurrently, with the delivery of this note, there was filed with the bank a purported resolution of the directors of defendant company authorizing the borrowing of not to exceed $25,000, the president, or the vice-president or the secretary of the corporation to execute promissory notes for all sums so borrowed. It appears that all transactions by defendant company, including this, were handled in an altogether informal manner; that no directors' meetings were ever actually held, the resolutions and minutes being prepared by Poletti, and he and Morelli simply counting "the other directors in". Between 1921 and 1934 no directors' meetings were ever, in fact, held, although the record shows numerous "resolutions" including the one above mentioned, "passed" by defendant company. After the original note of $15,000 was executed by A. E. Morelli on behalf of defendant in 1934, various payments of principal and interest were made by Poletti, acting for defendant, on the obligation. The note was frequently renewed by the execution of a new note and the cancellation of the old one. Between 1925 and June 4, 1934, approximately ten renewal notes were executed. These renewal notes were signed either by A. E. Morelli or by Poletti. Each note purported to be an obligation of defendant company and bore the corporate seal. The renewal note which forms the basis of this action was executed on June 4, 1934, was payable six months from date, was in the sum of $11,000, and was signed "Coast Dairies & Land Co., By L. Polletti".

Both A. E. Morelli and Poletti testified positively that Moretti had instructed them to borrow from the bank the funds necessary for operating the cannery, and A. E. Morelli, the secretary-treasurer, not only signed the original obligation but had full knowledge of the existence of the indebtedness from the time it was incurred. Furthermore, as already indicated, he not only knew that Poletti signed some of the renewal notes, but also testified that they were signed by Poletti with his permission and authorization. D. Morelli, the vice-president and a director, testified that he had no knowledge of the matter until after 1934. While in a letter from Moretti to the defendant dated September 12, 1931, he stated that he had not known of this indebtedness to the bank on account of money borrowed for the operation of the cannery until 1926 when he made a trip to this country; he also stated that at that time he had given instructions to pay the obligation out of proceeds of the canning business. The cannery was later transferred to the defendant company in satisfaction of the former's note to it, but the defendant refused either to renew its note with the bank or to pay the same, and this suit is brought for the collection thereof.

As already indicated, the original indebtedness of April 28, 1925, was evidenced by the note signed by A. E. Morelli under proper authorization from the company. This note was renewed many times by either Morelli, or Poletti, under authority from Morelli, and while, as respondent contends, there was no proper authorization at the bank for permitting Poletti to borrow for the account of the company, the renewals, which preserved the credit of the company, were without dissent on its part, and payments thereon, both of principal and interest, were made through Poletti for the account of the company. There had at no time since Poletti commenced dealing with the bank in 1919 as an employee of the company, been any repudiation by the company of his activities in its behalf.

It should also be noted that Poletti was a director of the plaintiff bank at the time of the execution of the note sued upon; that, although D. Morelli, a director and the vice-president of the company, had no knowledge of the note until 1934, up to that time he had executed all leases for the company; that Poletti personally paid interest and renewal notes purportedly on behalf of the company without making entries thereof on the company's books, an examination of which, without independent investigation, would not have revealed the company's liability to the bank on the note; that financial statements furnished the bank in accordance with the books of the company did not represent its actual financial condition in that the liability on the note to the bank for money furnished the canning company in the conduct of its business was omitted; that the bank knew of this obligation and that the money so secured was used for the benefit of the canning company.

These are the uncontradicted facts. Appellant urges that Poletti, as general manager of the defendant, had authority to renew the overdue note which represented a lawfully incurred obligation of respondent; that knowledge on the part of a majority of the company's officers and directors of his action, and of the numerous payments made on account of principal and interest of such renewal, constituted a ratification by the corporation of the execution of the note by Poletti; that respondent is estopped to deny Poletti's authority to execute such renewals where it knowingly permitted the making thereof and the payment of principal and interest thereon, and where the payee believed in good faith that the general manager had authority to renew the notes.

Respondent contends that by resolution it permitted the execution of notes in its behalf by the president, vice-president or secretary; that copy of such resolution was filed with the bank and in force at all times; that renewal notes, executed without the authority of respondent company, did not constitute a valid and binding obligation of the company.

The trial court based its judgment that respondent was not liable on the note on the findings that neither precedent nor subsequent authority had been conferred on Poletti, and that, under the facts, the defendant was not estopped to deny Poletti's authority.

[1-4] The problem presented involves no weighing of the evidence. We are well aware of the rule that this court, as an appellate court, has no power to weigh the evidence, and that all conflicts must be resolved in favor of the lower court. We are also aware of the rule that, in passing on the evidence, all reasonable inferences therefrom must be indulged in to support the judgment. These rules have no application to the problem here involved. Here there is no conflict. The case is one where all the material facts are admitted, and the question presented is whether or not, under these facts, the defendant, as a matter of law, is liable. That is not a fact question at all. It is

a question of law, which, in our opinion, was incorrectly decided by the trial court.

[5, 6] The facts establish a clear case of estoppel, if not a case of implied authority. They establish that defendant company had a three-man board of directors, and that each of the directors was an officer. L. Moretti was a director, president, a large shareholder and the representative of several foreign shareholders. He left this country in 1915, and returned for two short visits, one in 1919 and one in 1926. He corresponded with the company occasionally by letter on matters of general policy. Other than this, he did nothing in the performance of his important duties as president and director. He knew of the original obligation incurred in 1925, and ratified it by ordering it paid. From 1921 to 1934 he was apparently content to let Poletti handle all the details of the company's business.

D. Morelli was vice-president and a director. He owned but a single qualifying share, for which he paid nothing. He admitted that during all the period here relevant he took no interest or active part in the affairs of the company. He was content to let Poletti handle all the affairs of the company.

A. E. Morelli was the secretary-treasurer, and the third director. He, too, owned but a single qualifying share, for which he had paid nothing. He was the only officer or director who took active interest in the business. In 1930 he moved from California, and his time was entirely taken up with other affairs. He knew of the fact that prior to 1930 Poletti had executed several of the notes renewing the obligation forming the basis of this action. He approved and authorized the execution of these notes by Poletti.

So far as plaintiff bank is concerned, they were dealing with the man that they knew was in full charge of the defendant's business. They had been told in 1926 by Moretti, a large stockholder, president and director, that Poletti was one of the two men who had authority to handle the company's affairs. Between 1925 and 1934 they knew that Poletti had executed many of the renewal notes, and that his authority had not been questioned. The bank knew that prior to 1925 the respondent had borrowed on behalf of the canning company large sums of money, and that all of said loans had been repaid by Poletti. They knew his authority to pay these notes had never been questioned. Large balances were carried in the bank account of defendant, and most, if not all, checks were signed by Poletti. All correspondence of the plaintiff was answered by Poletti. Reports, some of which were signed "Treasurer", were frequently received signed by Poletti. While it is true that in 1925 a copy of a purported resolution was delivered to them authorizing certain officers to execute notes, and while it is true that Poletti's name did not appear therein, this does not bar them from recovery in this case. They were reasonably entitled to believe, from all the facts heretofore recounted, that Poletti had been subsequently authorized to act. While it is the general rule that a lending agency, in accepting a note from a corporation, should insist on a corporate resolution authorizing the officer executing the note to execute such instruments, the failure to secure a copy of such resolution will not, in all cases, bar relief. Certainly, relief should not be denied where the lending agency relies on a condition created by the borrowing corporation.

[7] The above recounted facts, in our opinion, establish, as a matter of law, that either Poletti had actual implied authority to execute the note, or that the defendant is estopped to deny his authority. First, as to actual authority. It is a fundamental and elementary rule of agency that an agency may be proved by evidence of facts showing that the alleged agent acted as such with the knowledge and acquiescence of the principal. Mattison v. Italo Petroleum Corp., 137 Cal. App. 148, 29 P.2d 901. This principle has peculiar application to the facts here involved. Poletti was originally employed with the knowledge and acquiescence of the board of directors. From 1921 to 1934, with the knowledge and acquiescence of the board, he was in full charge of all the money and finances of the company. No one made any attempt to question or disapprove anything done by him. The record is full of instances where Poletti exercised, and by necessity was compelled to exercise, duties involving discretion and judgment. The directors knew the general scope of his functions and knew generally what he was doing. Moretti was apparently willing to trust A. E. Morelli to gen-

erally supervise matters. A. E. Morelli knew of the renewal notes, approved and authorized them.

[8] Under the circumstances here existing, it would seem that the board of directors certainly caused Poletti to believe he had the authority to execute the notes. It is not indispensable that actual authority be shown by an express agreement. It may also be shown by facts which demonstrate that the principal, by lack of ordinary care, led the agent to believe, reasonably, that he possessed the power in question. Civil Code, section 2316, provides: "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." See, also, Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 P. 658.

A case somewhat similar to the one here involved is Union Oil Co. v. Purissima Hills Oil Co., 181 Cal. 479, 185 P. 381. In that case, the president of a corporation, who was also the managing officer, acknowledged the existence of a debt of the corporation validly incurred after the running of the statute of limitations. In the instant case, the managing officer executed renewal notes representing an obligation validly incurred. In the Union Oil Co. case, supra, the court, in holding that the corporation was bound by the acts of the president, stated (181 Cal. at page 482, 185 P. at page 382): "It is unnecessary to determine whether the last payment alone would take the matter out of the statute of limitations, because in addition to that very significant partial settlement of the debt the defendant did in writing acknowledge the said obligation, less than four years before the filing of the complaint. It is true that the letters of acknowledgment, written upon the stationery of defendant, were signed by Mr. Broughton personally. Appellant's principal contention is that he had no power to bind the corporation, but the court properly found to the contrary. By the bylaws the president was authorized in his discretion to proceed with the business of developing the land of the company. He was authorized to procure a drilling rig and all necessary appliances. True, he was to have, 'subject to the advice of the directors,' direction of the affairs of the corporation, yet their minutes fail to show any meeting of the directory between February 26, 1908, and January 1, 1913. He, and he alone, conducted all business with the assignor of plaintiff. He, and he only, replied to letters addressed to the corporation. It is apparent from all of these facts that defendant is bound by his acts as the managing officer of the corporation, which may not now, after so long acquiescence, repudiate his negotiations with plaintiff's assignor. Section 1962, subd. 3, C.C.P.; Nicholson v. Randall Banking Co., 130 Cal. 533, 62 P. 930; Chandler v. Hart, 161 Cal. 405, 119 P. 516, Ann.Cas.1913B, 1094; Newton v. Johnston Organ & Piano Mfg. Co. [180 Cal. 185] 180 P. 7."

The only evidence relied upon by respondent as indicating a contrary result are the letters sent by Moretti to the defendant company in 1931. In the letter dated September 12th of that year he stated that he had just learned "with great astonishment" that the bank still held the notes of defendant growing out of the canning company transaction. He then states that he learned of the original transaction upon his arrival in California in 1926 and that "the entire transaction was right then and there disapproved by me". But he also states that he ordered the note paid from the proceeds of the sale of the canning company's canned goods, and that, "it seems to us" that the notes do not have to be paid because they were not authorized by the board of directors. In 1931 the amount outstanding on the notes to the bank was $12,500. It is to be noted that in this letter Moretti admitted that the original transaction had been ratified by him, and that the notes were ordered paid. It is true that Poletti and A. E. Morelli did not strictly follow the instructions contained in that letter. The evidence shows, however, that the reason was that $7,674.96 was received on the sale of the canned goods and that $5,174.96 of that had to be expended to save the canning company from attachment and complete loss of its physical equipment. Two thousand five hundred dollars was applied on the note. The evidence, without conflict, also shows that Poletti had tried to liquidate the canning company so that money could be secured to pay off the note, but that he had had great trouble in finding a purchaser and that, when a purchaser was secured, the deal later fell through. Moretti was informed of all these facts in 1931. He admittedly did not inform the plaintiff bank of his position and permitted them to continue to deal with Poletti as before. Poletti was certainly led to believe he had authority to handle the canning company transaction in the manner he did. Under these circumstances, it would seem that a clear case of actual implied power was established by the evidence.

[9-13] Moreover, and aside from the question of implied authority, the evidence establishes a clear case of ostensible authority. Section 2317 of the Civil Code provides that: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." This section embodies in statutory form one phase of the doctrine of estoppel. Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 49 P. 559; Wiley B. Allen Co. v. Wood, 32 Cal.App. 76, 162 P. 121. It has been held that the above-quoted statutory provision applies, and an ostensible agency is created, where the business done by the supposed agent, so far as open to the observation of third parties, is consistent with the existence of an agency, and where, as to the transaction in question, the third party was justified in believing that an agency existed. Buckley v. Silverberg, 113 Cal. 673, 45 P. 804. The two essential elements of an ostensible agency are: (1) The third person must believe that the agent had authority; and (2) such belief must be generated by some act or neglect of the person or company to be held. Harris v. San Diego Flume Co., 87 Cal. 526, 25 P. 758. Evidence that similar acts of the agent were approved by the principal establishes ostensible authority, if the other element of belief is present. See cases collected and commented on in 1 Cal.Jur. p. 742, sec. 42.

These principles establish, as a matter of law, the existence of an ostensible authority in the present case. Certainly, the plaintiff believed Poletti had authority. The uncontradicted evidence is that the bank looked upon Poletti as the Coast Dairies & Land Company. This belief on the part of the bank was generated by the acts and neglect of the members of the board of directors of defendant. Moretti had told the bank that Poletti and A. E. Morelli had authority. Other notes were executed by the respondent corporation on behalf of the canning company and paid by Poletti to the bank without objection by defendant. With the exception of A. E. Morelli (who knew of, and approved, the execution of the notes), neither of the two other directors made any attempt to discover what Poletti was doing, and were apparently willing to let Poletti manage the affairs of the company. As directors and officers of the company, it was their duty to know what was being done by Poletti and how he was performing his duties as general manager. They cannot be permitted to disregard their duties for thirteen or fourteen years, and then, after receiving the benefits of the transaction, and when the particular transaction does not turn out advantageously, as an afterthought, contend that their agent was unauthorized to perform the questioned act.

None of the cases cited by respondent, including the case of Montrose Land & Inv. Co. v. Greeley Nat. Bank, 78 Colo. 240, 241 P. 527, compel a contrary conclusion. None of the cited cases involved a state of facts demonstrating such a disregard for their duties on the part of the board of directors as is shown in this case. Nor did any of the cases, including the Colorado case, involve a situation where over the years the agent had signed other notes which had been paid by the corporation.

The judgment appealed from is reversed.

I concur: KNIGHT, J.

WARD, Justice (dissenting).

I dissent.

The argument on the resubmission of this appeal convinced me that the original opinion filed contained certain inaccurate statements of facts, inadvertently made, which led to incorrect legal conclusions. The present majority opinion is an adoption of the previous opinion "with certain omissions and additions". I do not believe the "additions" sufficiently portray the factual background which justified the trial court in rendering judgment in favor of respondent.

Taking into consideration matters stressed in the petition for rehearing, and subsequently in oral argument, the facts appear as follows: L. Moretti, who spent the greater part of his time in Switzerland, caused to be incorporated a company which, for the sake of brevity, may be referred to as the land company. The board of directors consisted of Moretti,

A. E. Morelli and D. Morelli, the Morellis each holding one share of stock and acting as secretary-treasurer and vice-president of the company respectively. As subsequent events proved the Morellis were merely dummy directors. Poletti was employed by the company as a bookkeeper and accountant. Some time thereafter, the canning company referred to in the majority opinion was organized, and, needing funds for operation, Moretti agreed that the land company might borrow from appellant bank the sum of ten thousand dollars to be placed to the credit of the canning company. Such indebtedness, however, was to be repaid by that company. From such time until the date of the obligation of April, 1925, in connection with the latest renewal of which this suit arose, various amounts borrowed for the use of the canning company were repaid the bank. On April 28, 1925, bookkeeper Poletti, who had assumed enlarged managerial responsibilities, without objection at least from the two Morellis, obtained a loan from the bank for $15,000 ($5,000 in excess of the amount originally authorized by Moretti). The note evidencing this indebtedness was signed by A. E. Morelli as secretary. There was also furnished the bank in this connection a copy of a resolution authorizing the loan, certified by secretary Morelli to have been adopted at a purported meeting of the board of directors of the land company. While notes renewing this loan were made from time to time, the indebtedness was never fully paid. Bookkeeper Poletti subsequently became a director of appellant bank, after which the bank dispensed with the requirement of the name of an official of the land company in connection with renewals, simply advancing the money to the canning company, debiting the account of the land company and taking the latter's notes signed by Poletti. Notices of default in interest payments were mailed by the bank to the land company but when paid were marked "Paid by Poletti". At various times financial statements of the land company, prepared by the land company's bookkeeper Poletti, were furnished the bank of which, as we have seen, Poletti was a director. These statements did not show the indebtedness to the bank. Copies of such—to put it mildly—inaccurate financial statements were forwarded to Moretti in Switzerland. If nothing further appeared, there would be no divergence of opinion as to the propriety of affirming the judgment rendered by the trial court. The problem seems to be simple, but, as said by Mr. Justice Kelly, pro tem., in Bank of America N. T. & S. A. v. National Funding Corp., Cal.App., 114 P.2d 49, 52, "at this point simplicity departs," and I may add, harmony of views with my learned associates on the facts, reasonable inferences deducible therefrom and the law applicable thereto.

The majority opinion holds that "the facts establish a clear case of estoppel, if not a case of implied authority". In support of the theory that there was an implied authority bestowed upon the bookkeeper-manager Poletti to sign the promissory note in question, the majority opinion cites Union Oil Co. v. Purissima Hills Oil Co., 181 Cal. 479, 185 P. 381. In the Union Oil case, it was an officer of the corporation, the president-manager, who was, not impliedly, but expressly, authorized by the by-laws of the corporation to procure necessary appliances to conduct the business of the corporation. In the majority opinion herein attention is also called to the fact that A. E. Morelli in substance testified that he approved the signing of the notes by Poletti; in fact, that he authorized Poletti to sign. A. E. Morelli could not bestow any greater authority than he possessed. If a director, secretary or treasurer may, without direct authorization of a corporation, deputize its manager, assuming Poletti occupied such position, to borrow money in its behalf, then there is no legal reason, with the majority opinion as a precedent, why a bookkeeper, an ordinary clerk or the office boy may not be so deputized. The fact is that A. E. Morelli retired from active participation in the affairs of the company in the summer of 1930. The note in controversy is dated June 4, 1934. Many of the preceding notes have been lost, though several were introduced as exhibits. The note dated May 5, 1924, for $20,000, signed by A. E. Morelli as secretary of the land company was paid in cash. All of the notes subsequent to the resignation of A. E. Morelli were signed in the name of the land company "by L. Poletti", without any designation of position as manager or otherwise. From the inception of the transaction, payments of principal and interest were made principally by check drawn on the account of the company; some, however, were made from

Poletti's personal funds, the bank's records bearing the notation "paid by Poletti" or some equivalent indication that payment had been made by him and not the land corporation. It is true that upon a few occasions Poletti signed various communications as manager, treasurer or secretary. He claims that when A. E. Morelli severed his connection with the corporation, he appointed Poletti assistant secretary and treasurer. Assuming this to be true, A. E. Morelli had no authority to appoint or recognize Poletti in any capacity except bookkeeper. It is noteworthy that Poletti did not sign his letters to Moretti in Switzerland, the person who controlled the corporation, as secretary or otherwise. Likewise it is noteworthy that D. Morelli the vice-president was always available to sign any document that required the signature of an officer of the company. Also, it is interesting to find that all contracts, leases, etc., during this period were signed by D. Morelli, with the exception of the promissory notes connected with this transaction, and that the vice-president, D. Morelli, did not know of the indebtedness to the bank until after the 1934 note had been signed by Poletti.

In 1931, Moretti, by letter to the land company, expressed "great astonishment" that the bank still held a note against the land company and that the amount was in excess of $10,000. He stated that he had disapproved of the entire transaction in 1926; that he had directed the indebtedness to be paid from the funds of the canning company; that he believed the land company should be indemnified, and that at any rate the land company should not be responsible as it appeared the loans were made without approval of its board of directors. Poletti replied in substance that everything had been done to comply with the previous directions of Moretti. He held out hope that the cannery financial difficulties would be cleared up, the canning plant sold and the bank paid. Moretti responded advising Poletti's withdrawal from the company, and suggesting that Poletti arrange matters with a Mr. Respini, who would thereafter represent Moretti. There is no evidence that Respini approved the continuation of the loans from the bank. Poletti did not withdraw but continued to make the loans purportedly obligating the land company by his personal signature. Poletti's purpose in disobeying Moretti's instruction appears in the evidence. Poletti did not own any interest in the land company, but he did hold stock in the canning company. It was important to him that the canning company continue in business, as evidenced by his statement, "I am personally losing the snug sum of more than $8,000."

The bank knew it had no authority to loan the money to the land company on Poletti's signature. A purported authorization on file did not confer such power upon him. Poletti testified that the bank never asked him for his authority to sign the various notes. The bank attempted some explanation that Poletti was an assistant secretary of the land company, and that it held a card signifying such fact. The card could not be found. If in fact such a card had been filed with the bank, the bank nevertheless did not request Poletti to sign as assistant secertary or otherwise. No act conferring upon Poletti ostensible authority to negotiate the loans for the company was ever communicated to the bank. The bank knew or should have known that the loans did not appear upon the financial statements rendered. It knew that certain principal and interest payments had been made by Poletti personally. The evidence shows that the bank relied upon the acts of Bank Director Poletti and not upon the declarations of the land company.

Moretti in Switzerland had a right to assume that Poletti would follow his instructions, and there was no reason for him to suppose that the bank would permit an unauthorized bookkeeper to negotiate a loan obligating the land company. Neither the land company, nor Moretti, its principal stockholder, was ever apprised of the real facts, and the bank knew, or should have known, that Poletti was not authorized to make the loan. The doctrine of estoppel is not applicable to the facts of this case. Moretti's silence with regard to a matter of which he was unaware could not amount to a ratification. Morelli's purported delegation of authority was unauthorized and not even communicated to the bank. If the bank was misled, it was only through the conduct of one of its directors. See Montrose Land & Inv. Co. v. Greeley Nat. Bank, 78 Colo. 240, 241 P. 527.

In my opinion the evidence is amply sufficient to sustain the findings of the trial court, and, for the reasons stated, it is my conclusion that the judgment herein should be affirmed.

46 Cal.App.2d 431

NATIONAL AUTOMOBILE INS. CO. v. FRATIES et al.

Civ. 11608.

District Court of Appeal, First District, Division 1, California.

Aug. 8, 1941.

1. Attachment 🔑308(2), 309

In summary proceeding under statute to determine title to attached property, burden is upon the third party claimant to establish claim to property and he is entitled to present evidence in support of his claim. Code Civ.Proc. § 689.

2. Constitutional law 🔑312

In a summary proceeding to determine title to attached property, the denial of a right of a third party claimant to present any evidence in support of his claim to the attached property was error in that it constituted a possible deprivation of property without due process of law. Code Civ.Proc. § 689.

3. Attachment 🔑309

In a summary proceeding to determine title to attached property, the court is not required to observe all the formalities of an ordinary trial, but it cannot preclude the third party claimant from presenting any evidence in support of his claim. Code Civ. Proc. § 689.

4. Attachment 🔑309

In summary proceeding to determine title to attached property, a formal offer of proof by designation of particular facts expected to be proved by third party claimant was not necessary after court stated "The third party petition is denied". Code Civ.Proc. § 689.

5. Attachment 🔑309

In summary proceeding to determine title to attached property, wherein court, before plaintiff had finished introducing evidence to combat allegations of third party's claim, stated that it was nauseating to listen to examination and that it seemed that evidence ought to be referred to the grand jury, remark of third party claimant's attorney, "I don't blame you a bit", could not be construed as an acquiescence in action of court in rendering judgment for plaintiff without permitting third party claimant to give evidence in support of claim, where the remark was merely indicative of attorney's agreement with the views of the court concerning the testimony admitted. Code Civ. Proc. § 689.

6. Appeal and error 🔑1170(1)

The constitutional provision that no judgment shall be set aside for any error in any matter of procedure unless the error complained of has resulted in a miscarriage of justice was not intended to abrogate constitutional guaranties. Const. art. 6, § 4½.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by the National Automobile Insurance Company against George J. Fraties, etc., wherein eight trucks in defendant's possession were attached. E. S. Freitas filed a third party claim with the sheriff alleging that he had purchased the trucks from the defendant. On hearing to determine title under section 689 of the Code of Civil Procedure, the court found that the transfer was fraudulent and void as to creditors of defendant, and third party claimant appeals.

Reversed.

H. W. Glensor and Pierce J. Deasy, both of San Francisco, for appellant.

John J. Taheny, of San Francisco, for respondent.

WARD, Justice.

This appeal involves the denial of the right of a third party claimant to present any evidence in support of his claim.

The respondent brought action against defendant George J. Fraties and attached eight trucks in his possession. His brother, E. S. Freitas, who spelled his name differently, filed a third party claim with the sheriff alleging that he had purchased the trucks from defendant. In a hearing to determine title under section 689 of the Code of Civil Procedure, the court found that the transfer was fraudulent and void as to the creditors of defendant.

Except to say that a remark, hereinafter referred to, made by the trial court with reference to the testimony of the defendant may have been well founded, and that such testimony when considered with certain statements in a deposition of the third party claimant may factually have warranted the judgment as rendered, we are convinced that appellant, the third party claimant, was denied his constitutional right to a hearing upon the issues raised.

[1] Section 689 of the Code of Civil Procedure provides a system for formulating issues when personal property is levied upon. It is a summary proceeding. There is no provision for the granting of a new trial or a rehearing, but an appeal lies from any judgment determining title under the section. The court in its sound discretion may designate the order of proof, but upon the third party claimant rests the burden of proof, and he is therefore entitled to present evidence in support of his claim. The record before us does not show that any evidence on his behalf was introduced owing to the trial court's action in pronouncing judgment before the plaintiff, respondent herein, had finished introducing evidence to combat the allegations in the third party claim on file.

The record discloses that the hearing started at 12:30 p. m. and was heard to its conclusion without a recess; that the attaching plaintiff opened the case without any discussion as to who should first proceed. Plaintiff offered proof to show that it was a creditor, and then, without reading the contents thereof to the court, offered in evidence as an exhibit a deposition of a third party claimant taken pursuant to the provisions of section 2055 of the Code of Civil Procedure. The deposition covers some forty pages of typewritten matter. Plaintiff presented a motion to strike out several parts of the deposition. This motion was taken under submission and not ruled upon. Counsel for plaintiff stated: "Now, your Honor, the deposition of the third party claimant, Emanuel S. Freitas, was taken on August 6, 1940. It is rather a full and comprehensive deposition. I could read it to your Honor but to save time I would suggest that it just be filed and your Honor can read it or just refer to it." Thereupon the defendant was called by plaintiff. During the taking of his testimony the record shows in part the following:

"The Court: I think we are wasting a lot of time with this. I am going to deny the petition and let it stand as attached property.

"Mr. Taheny [attorney for plaintiff]: I can prove a lot more, your Honor.

"The Court: I don't think it is necessary. It is rather nauseating to sit here and listen to this examination. It seems to me it almost ought to be referred to the Grand Jury. The third party petition is denied.

"Mr. Grennan [attorney for third party claimant]: If it please your Honor, the brother would certainly have a side to his case, and it seems it is only fair, in view of the fact that these thousands of dollars are involved, that we should be permitted to put on our evidence.

"The Court: I don't know that I would expect any judicial officer or any court to listen to that character of testimony. I think you will agree with me. * * *

"Mr. Grennan: I don't blame you a bit."

[2, 3] Respondent contends that there was no immediate delivery of the trucks, nor actual and continued change of possession, and that the retention of the property by the defendant rendered the alleged transfer to his brother fraudulent and void as against the attaching creditor. In support thereof, respondent quotes from certain testimony of the defendant on the trial of the case and from certain portions of the deposition of the third party claimant. Assuming that the court read the deposition or the salient portions thereof, and that the evidence presented caused it to reach the conclusion set forth in the judgment, we are nevertheless confronted with the fact that the third party claimant was not permitted to prove that the testimony of his brother was incorrect by cross-examination of the witness, by presenting evidence to the contrary or by an explanation of any testimony given in his own deposition. The third party claimant was precluded from presenting his side of the case. It was a possible deprivation of property without due process. Section 689 of the Code of Civil Procedure provides: " * * * the third party claimant * * * shall be entitled to a hearing." In a summary proceeding a court is not required to observe all of the formalities of an ordinary trial, but this does not mean that a party thereto may be precluded from presenting *any* evidence.

[4, 5] Respondent suggests that the third party claimant did not disclose the nature of the evidence supporting his claim. An informal offer "that we should be permitted to put on our evidence" was made. We cannot hold that a formal offer of proof, by designation of the particular facts expected to be proved, was necessary after the court had stated: "The third party petition is denied." Respondent construes the state-

ment of the attorney for the claimant—"I don't blame you a bit."—as an assent and acquiescence in the action of the court. On the contrary, the attorney made it plain that he desired to present evidence. The remark was merely indicative of the attorney's agreement with the views of the court that the evidence presented by the defendant, whose testimony was in part adverse to that of the third party claimant, was nauseating and should be referred to the grand jury.

The court in its judgment determined that the consideration for the transfer was inadequate; that there was not an actual and continued change of possession, and that the transfer was ineffectual because of noncompliance with section 186 of the Vehicle Code, St.1935, p. 118. On the last point the evidence as to what actually occurred in the way of registration following the transfer of April, 1940, from the conditional vendor to the third party claimant, is incomplete. It is possible that these matters might have been cleared up in favor of one of the interested parties had further evidence been presented.

[6] Section 4½ of article VI of the Constitution was not intended to abrogate constitutional guarantees.

The judgment is reversed.

We concur: PETERS, P. J.; KNIGHT, J.

NEEL v. MANNINGS, Inc.

Civ. 13056.

District Court of Appeal, Second District, Division 2, California.

Aug. 12, 1941.

Hearing Granted Oct. 10, 1941.

1. Judgment ⇨199(3)

The trial court is not authorized to weigh evidence in passing on motion for judgment non obstante veredicto, but, if there is any substantial evidence in record to support verdict, motion must be denied.

2. Landlord and tenant ⇨167(8), 168(1)

A restaurant proprietor as lessee of premises, although not insurer of safety of its patrons, was in duty bound to use reasonable care to keep premises in a safe condition and to give warning of latent or concealed perils, but was not liable for injury to invitee resulting from danger which was obvious or which should have been observed in exercise of reasonable care by invitee.

3. Judgment ⇨199(3)

In action for injuries to patron who struck her head against board while ascending stairway to restaurant on balcony, judgment for restaurant proprietor notwithstanding verdict was affirmed where there was no latent or hidden defect in premises, that lower part of stairwell was open on both sides was obvious, from her frequent use of premises patron had knowledge of existing conditions, and in spite of such knowledge she elected to ascend stairs to purchase her lunch.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Myrtle Neel against Mannings, Incorporated, for injuries. Verdict for plaintiff, and, from a judgment notwithstanding the verdict, plaintiff appeals.

Affirmed.

G. Revelle Harrison and Albert E. Wheatcroft, both of Los Angeles, for appellant.

Sidney A. Moss, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries alleged to have been suffered when she struck her head against a board while ascending a stairway maintained by defendant. A jury returned a verdict in favor of plaintiff in the sum of $1,500 but the trial court granted a motion for a judgment notwithstanding the verdict and plaintiff has appealed from the judgment thereupon entered.

Plaintiff's injuries were received on May 2, 1939, when she was ascending the stairs to purchase a meal at a restaurant conducted by defendant on the balcony of the Grand Central Market in Los Angeles. We take from plaintiff's brief the description of the stairway, which was the only means of entrance for the patrons of the restaurant: It consisted of 14 steps approximately 7¼ inches high and 10½ inches wide. The width of the stairway or stairwell was 44 inches. It commenced at the floor of the Grand Central Public Market and extended up through the ceiling underneath the balcony and stopped at the floor level of said balcony. On each side of the lower half of the stairway there was a wall rail approximately 30 inches above the steps. Between each of said wall rails and the ceiling beneath the balcony there was an open space. The ceiling does not extend over the stairwell except at the bottom of the stairway, but it extends over the wall rails to a point on line with the inside of said wall rails or to the edge of the stairwell. The distance from the stairs to the ceiling is 7 feet at the bottom of the stairs and gradually lessens going up the stairs until it is 4 feet 2⅜ inches at the sixth stair. The upper half of the stairway is bordered by solid walls on each side, from which hand rails project into the stairwell. Both the wall rail and the hand rail are located 30 inches above the level of each step. Adjoining the lower part of the stairway on one side is a meat market and on the other side a bakery. In using the lower half of the stairway, due to the open space on each side thereof, one could look out over said meat market or the bakery as well as over a great portion of the market in three directions.

Plaintiff testified that at about noon on the day in question she, accompanied by her friend, started up the stairway. After taking a couple of steps upward her companion stepped to the left and ahead of plaintiff to permit several people who were coming down the stairs to pass them. When plaintiff had ascended about four or five steps from the bottom of the stairway she stepped towards her left to permit people who were coming down to pass and at the same time stepped up and struck her head on a board at the bottom of the balcony.

[1] The trial court is not authorized to weigh the evidence in passing upon a motion for a judgment non obstante veredicto but if there is any substantial evidence in the record to support the verdict the motion must be denied. Card v. Boms, 210 Cal. 200, 291 P. 190. In claiming that there is no substantial evidence to support the verdict defendant contends that the record is devoid of evidence that it failed to fully discharge its duty of using ordinary care to maintain the premises in a safe condition for the patrons of the restaurant; and that in any event plaintiff was guilty of contributory negligence as a matter of law in that she could not have been injured if she had not "protruded" her head beyond the space occupied by the stairwell and proceeded upward in that position without looking. We are satisfied, however, that the judgment must be affirmed regardless of the conclusions to be reached on these two contentions.

[2, 3] Plaintiff stated that she had made frequent use of the stairway. She testified: "I have been up many times when every stool was taken during the lunch hour at one time. * * * I had observed this balcony on other occasions during the 15 years that I had been going up and down these stairs and the condition was just the same as far as I could tell during those years as it was when I noticed it a couple of days after the accident". Defendant had no information that any injury to any person had occurred before the date of the accident in question. The conclusion is irresistible that plaintiff was familiar with the premises and that she must have known that they were dangerous if indeed it is to be held that the premises were in fact dangerous. Defendant as lessee of the premises, although not an insurer of the safety of its patrons, was in duty bound to use reasonable care to keep the premises in a safe condition and to give warning of latent or concealed perils, but defendant is not liable for an injury to an invitee resulting from a danger which was obvious or which should have been observed in the exercise of reasonable care by the invitee. Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801. There was no latent or hidden defect in the premises in question. That the lower part of the stairwell was open on both sides was obvious to the patrons of the cafe. From her frequent use of the premises plaintiff had knowledge of the existing conditions. Since in spite of this knowledge she elected to ascend the stairs to purchase her lunch, she cannot hold defendant liable for injuries received because of the condition of the stairway of which she was informed.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

46 Cal.App.2d 466

PEOPLE v. SAWAYA.

Cr. 3466.

District Court of Appeal, Second District,
Division 1, California.

Aug. 11, 1941.

Hearing Denied Sept. 10, 1941.

1. Criminal law 🔑511(2)

To corroborate accomplices' testimony, as required to warrant conviction thereon, other evidence must tend directly and immediately to connect defendant with commission of offense charged. Pen.Code, § 1111.

2. Criminal law 🔑510

Where crime charged rests primarily and solely on accomplices' testimony, corroboration of such testimony by other evidence tending to connect defendant with commission of offense in manner and form prescribed by statute is prerequisite to conviction. Pen.Code, § 1111.

3. Criminal law 🔑511(2)

The true test of sufficiency of evidence corroborating accomplices' testimony to support conviction of crime is whether there is inculpatory evidence of other witnesses than accomplices tending to connect defendant with offense after eliminating accomplices' evidence, and there is no corroboration in absence of such inculpatory evidence, though accomplice is corroborated as to any number of facts sworn to by him. Pen.Code, § 1111.

4. Criminal law 🔑511(2)

Testimony offered in corroboration of accomplices' testimony must of itself tend to connect defendant with commission of offense charged to warrant conviction thereof. Pen.Code, § 1111.

5. Criminal law 🔑511(2)

In burglary trial, evidence corroborating accomplices' testimony *held* insufficient to support conviction as not tending to connect defendant with commission of offense without considering accomplices' testimony. Pen. Code, § 1111.

6. Criminal law 🔑511(1)

To support conviction of crime, evidence corroborating accomplices' testimony must do more than generate suspicion of defendant's guilt. Pen.Code, § 1111.

7. Criminal law 🔑633(1)

One accused of crime is entitled to have his case fairly tried according to established rules of law, whether he is guilty or innocent.

8. Criminal law 🔑316, 327

The constitutional provision that failure of defendant in criminal case to explain or deny by his testimony any evidence or facts against him may be commented on by court or counsel and considered by court or jury does not deprive defendant of right to stand mute nor relieve prosecution of burden of establishing his guilt beyond reasonable doubt by competent and legal evidence. Const. art. 1, § 13.

9. Criminal law 🔑511(4)

Defendant's exercise of his constitutional privilege to remain silent and demand that people make case against him beyond reasonable doubt does not of itself directly and immediately tend to connect him with commission of crime charged within statute prohibiting conviction on accomplices' testimony, unless corroborated by other evidence tending to connect defendant with commission of offense. Pen.Code, § 1111; Const. art. 1, § 13.

10. Criminal law 🔑1159(5)

Where defendant chooses not to explain incriminatory circumstances testified to in corroboration of conceded accomplices' testimony and such corroborative testimony as matter of law does not tend to connect defendant with commission of offense charged, District Court of Appeal must set aside conviction based thereon. Pen.Code, § 1111; Const. art. 1, § 13.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Joe Sawaya was convicted of second degree burglary, and from an order denying his motion for a new trial, he appeals.

Reversed and remanded for a new trial.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

To a charge of burglary contained in an information filed by the district attorney of Los Angeles County, defendant entered a plea of not guilty. Trial by jury was duly waived, and the cause was submitted to the trial judge upon the reporter's transcript of the evidence adduced by the people at the preliminary hearing, which transcript was read aloud in open court by the deputy district attorney. No evidence was offered by the defendant either at the preliminary hearing or at the trial. Defendant was adjudged guilty of burglary of the second degree. When he was arraigned for judgment, the court suspended proceedings and placed the defendant on probation for the term of five years on condition that as a term of probation the defendant be confined in the county jail for a period of six months. No judgment having been pronounced, this appeal is from the order denying defendant's motion for a new trial.

The sole ground upon which a reversal is urged is that the evidence is insufficient to support the conviction for the asserted reason that the evidence offered to corroborate the testimony of the accomplices falls short of the requirements of section 1111 of the Penal Code.

The witnesses Stephen Gallina and Richard Spencer, admittedly accomplices, were apprehended when they attempted to dispose of six radios which they had stolen from the Times Theater in Los Angeles on the early morning of January 4, 1941. They confessed their guilt and testified for the prosecution at the trial of appellant. In substance, their testimony was that on the night of January 3, the appellant and the two witnesses went to a motion picture show at the theater. When they left the theater at about 11:30 or 11:45, they went out, according to one accomplice, by an exit from the balcony, closing the exit door gently so that it would appear closed when in fact it could be opened from the outside. About 1:30 a. m. they returned to the theater, entered through the balcony exit door, and took six radios from a showcase in the lobby. The next morning the witnesses attempted to sell the radios at a neighborhood radio shop, when they were arrested. Appellant did not accompany them to the shop, but was subsequently arrested at his home.

The only evidence offered to corroborate that of the accomplices consisted of the testimony given by Andrew Carson, who testified that some time between Christmas and New Year's he had a conversation with appellant and the two accomplices while they were sitting in a car. So far as pertinent to a determination of this case, the testimony of this witness was as follows:

"Joe (appellant) mentioned there was some radios at the Times Theater * * * and it should be easy to get the radios, and we could possibly get about $10 apiece for them.

"Q. Did anybody else say anything? A. There was just a bunch of us boys talking. There was no definite arrangements made to do anything.

"Q. No definite arrangements when you were to get them or even get them, is that right? A. No.

"Q. Did anyone say anything to you about going to get the radios? A. No, we had not decided whether I was to go, I mean we had not decided when to go, just talking, the four of us.

"Q. When Joe said there was some radios over there to get and worth about $10 apiece, any of the other boys say anything about the radios? A. We just agreed it could be done and that was all there was to it.

"Q. Do you remember what you said? A. No, I don't. I don't remember the exact conversation.

"Q. Did you agree to go with them? A. No, sir."

The witness further testified that he did not go with the others to the theater, and did not see appellant again between the time of the conversation and the night of January 3. On cross-examination he further testified:

"Q. You talked about many things, didn't you? A. Just an ordinary conversation.

"Q. I don't presume you know who first mentioned the radios, do you? A. Joe did.

"Q. Joe mentioned the subject of the radios? A. Yes.

"Q. He was the first one that brought the subject up? A. Yes, he was. * * *"

Respondent urges that the foregoing testimony, taken in connection with the fact that appellant and the accomplices were boyhood friends and school-day associates, coupled with the fact that appellant did not take the stand in his own behalf, measures up to the demands of section 1111 of the Penal Code. This section reads as follows: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

[1-3] In People v. Shaw, 17 Cal.2d 778, 112 P.2d 241, 244, in speaking of the kind of testimony required to corroborate that of accomplices, our Supreme Court said: "The evidence must tend directly and immediately to connect the defendant with the commission of the offense." Where, as in the instant case, the crime charged rests primarily and solely upon the testimony of the accomplices, it is essential as a prerequisite to the conviction of the defendant that the testimony of the accomplices be corroborated in the manner and form prescribed by section 1111, Penal Code. The true test of the sufficiency of the corroborative evidence has been thus tersely stated by the Supreme Court of this state in People v. Morton, 139 Cal. 719, 724, 73 P. 609, 611, quoting with approval the following language from Welden v. State, 10 Tex.App. 400: "* * * eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him."

[4, 5] It is required by law that the testimony offered in corroboration of the testimony of an accomplice shall of itself tend to connect the defendant with the commission of the offenses charged. People v. Davis, 210 Cal. 540, 555, 293 P. 32. In considering the corroborative testimony in the case at bar, it becomes necessary at every point to explain this "corroboration" in the light of the testimony of the two accomplices. In other words, the testimony of the accomplices is required to give to the "corroboration" direction to the alleged crime, before such corroborative testimony can be said to connect the defendant with the commission of such crime. It is at once evident that when the testimony of the accomplices is withdrawn from consideration, no direct and immediate connection remains between the defendant and the alleged offense, hence it cannot be successfully argued that the asserted corroboration tends to connect defendant with the commission of such offense.

[6, 7] Furthermore, it is the established law of this state that more is required by way of corroboration than mere suspicion. People v. Kempley, 205 Cal. 441, 456, 271 P. 478, and cases therein cited; People v. Davis, supra. While without the aid of the accomplices' testimony in the case now under consideration the corroborative evidence, standing alone, might be said to generate a suspicion of defendant's guilt, that is not sufficient, because in whatever light the corroborative testimony is viewed, it still requires recourse to the testimony of the accomplices to give it direction. It may be, as claimed, by respondent, that appellant is guilty, but whether guilty or innocent, he was entitled to have his case fairly tried according to established rules of law. "Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community." Hurd v. People, 25 Mich. 405.

[8-10] While conceding that "the corroborating evidence is slight", the attorney general argues that when taken in connection with the fact that at the trial appellant availed himself of his constitutional prerogative, sec. 13, Art. I, Const., and did not take the witness stand to deny either the accusations of the accomplices or the slight corroborative evidence, the latter measures up to the standards prescribed by section 1111, Penal Code. The fact that the constitutional provision provides that in a criminal case, whether or not the defendant testifies, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court or counsel and may be considered by the court or the jury, does not deprive a defendant of his right to stand mute, nor does it relieve the prosecution of the burden of establishing his guilt beyond a reasonable doubt, and by competent and legal evidence. The exercise by a defendant of his constitutional privilege to remain silent and demand that the people make the case against him beyond a reasonable doubt, does not of itself directly and immediately tend to connect him with the commission of the crime charged

against him. When a defendant chooses not to explain allegedly incriminatory circumstances of his guilt in the form of testimony offered in corroboration of testimony given by conceded accomplices, and when as a matter of law such corroborative evidence falls short of the quality and kind demanded by section 1111, Penal Code, this court is given no alternative but to set side an ensuing conviction based thereon.

The order denying defendant's motion for a new trial is reversed, and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.

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46 Cal.App.2d 871

PEOPLE v. CHILILLI et al.

Cr. 615.

District Court of Appeal, Fourth District, California.

Aug. 14, 1941.

Criminal law 🔑1130(4)

Where appellant filed no brief within extended time allowed by stipulation and no further extension of time was granted, people's motion to affirm judgment of conviction appealed from must be granted. Pen. Code, § 1253.

◆

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Sam Joseph Chililli and another were convicted of burglary and assault with a deadly weapon with intent to commit murder, and they appeal.

Affirmed.

No appearance for appellants.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellants were jointly charged in an information, in count one with the crime of burglary, and in a second count with the crime of assault with a deadly weapon with intent to commit murder. A verdict of guilty resulted as to each defendant on the first count and, as to the second count, each was found guilty of assault with a deadly weapon, an included offense. An appeal followed.

The clerk's and reporter's transcripts were filed with the clerk of this court on June 3, 1941, and June 19, 1941, respectively. A stipulation, dated July 3, 1941, was filed extending the time to July 29, 1941, within which to file appellants' opening brief. No briefs have been filed and no further extension of time has been granted. After due notice the people moved to affirm the judgments under the provisions of section 1253 of the Penal Code. The motion must be and is therefore granted. People v. Phillips, 38 Cal.App.2d 412, 101 P.2d 547.

The judgments are affirmed.

We concur: BARNARD, P. J.; MUNDO, J. pro tem.

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18 Cal.2d 445

KEENER v. KEENER.

L. A. 16881.

Supreme Court of California.
Aug. 19, 1941.

1. Divorce 🔑27(5)

In each divorce action on the ground of extreme cruelty, the infliction of grievous mental suffering constituting extreme cruelty under statute is a question of fact to be deduced from the circumstances of the case in the light of the intelligence, refinement, and delicacy of sentiment of the complaining party. Civ.Code, § 94.

2. Divorce 🔑184(6)

In an action for divorce on the ground of extreme cruelty, a correct decision of the question whether grievous mental suffering has been inflicted on one party by the other must depend on the sound sense and judgment of the trial court, and its conclusion will not be disturbed unless the evidence is so slight that it indicates an abuse of discretion. Civ.Code, § 94.

3. Divorce 🔑184(6)

Whether husband's loss of temper and repeated criticisms of wife in presence of their friends, and his statements after more than 25 years of marriage that wife should support herself, caused wife grievous mental suffering and thus constituted extreme cruelty within divorce statute, was for the trial judge. Civ.Code, § 94.

4. Divorce 🔑93(3)

In an action for divorce on the ground of extreme cruelty, which under statute includes the wrongful infliction of grievous mental suffering on one spouse by the other, the pleader need not use the exact language of the statute, but it is sufficient if the rational inference from the allegations of the pleading is that the infliction of the suffering was wrongful. Civ.Code, § 94.

5. Divorce 🔑109

A wife, who filed a cross-complaint in husband's divorce action seeking a divorce because of the infliction on her of grievous mental suffering, was not required to establish as part of her case her own freedom from fault, where husband in his answer to cross-complaint did not allege any fault on her part, and there was no evidence at the trial indicating that wife was in any way responsible for husband's course of conduct. Civ.Code, § 94.

6. Divorce 🔑93(3)

A wife seeking a divorce because of the infliction on her of grievous mental suffering was not required to plead the exact time and place of each of husband's acts, where conduct of which wife complained was continuous and was not confined to any particular time or locality. Civ.Code, § 94.

7. Divorce 🔑109

A wife seeking a divorce because of the infliction on her of grievous mental suffering was not required to prove that husband's course of conduct was inspired by malevolent motives. Civ.Code, § 94.

8. Divorce 🔑127(3)

Where the cruelty complained of in a divorce action consists of successive acts of ill-treatment, it is not necessary that there be direct testimony of other witnesses to every act sworn to by the complaining party. Civ.Code, § 94.

9. Divorce 🔑127(4)

Where corroborating witness testifying for wife seeking a divorce because of the infliction on her of grievous mental suffering stated that she heard wife's testimony and knew the facts related therein to be true, and no objection to that testimony was made by husband, corroboration was sufficient. Civ.Code, § 94.

10. Divorce 🔑150(2)

Where the parties to a divorce action joined in a written stipulation, filed with the clerk, waiving findings of fact, the trial court was not required to make findings. Code Civ.Proc. § 632.

In Bank.

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action for divorce by A. L. Keener against Nellie D. Keener, wherein defendant filed a cross-complaint for separate maintenance which she amended at the trial by adding a prayer for divorce. Plaintiff dismissed his complaint, the action was tried on the cross-complaint of defendant as a default, and, from a judgment of divorce for defendant on her cross-complaint, plaintiff appeals.

Affirmed.

Jerrell Babb, of Los Angeles, for appellant.

Roy J. Farr, of Los Angeles, for respondent

TRAYNOR, Justice.

Plaintiff filed an action for divorce on the ground of desertion against defendant to whom he had been married for over thirty years. Defendant answered and cross-complained for separate maintenance on the ground of extreme cruelty. Subsequently plaintiff filed an answer to defendant's cross-complaint and an amended complaint adding a second cause of action for divorce on the ground of defendant's alleged extreme cruelty. At the trial defendant amended her cross-complaint by adding a prayer for divorce. Plaintiff dismissed his complaint and the action was tried on the cross-complaint of defendant as a default.

Defendant alleged in her cross-complaint as amended that during the last three years of her married life plaintiff on numerous occasions lost his temper and found fault with defendant in the presence of friends and acted in a peculiar manner, that he remarked in the presence of friends that defendant was not a good or proper wife, that he told her she should get out and support herself, and that he requested her to apply for work as a kitchen cook or servant. She alleged that these acts caused her grievous mental anguish.

At the trial defendant testified regarding the acts of the plaintiff substantially in accord with the allegations of the amended cross-complaint. She testified that this conduct was continuous, made her nervous and ill and caused her great mental suffering. A corroborating witness testified that she heard the testimony of defendant, knew the facts therein related and corroborated them in their entirety.

The court granted defendant a divorce upon her cross-complaint and plaintiff appealed.

[1, 2] Plaintiff contends that the facts alleged and proved by defendant were insufficient to sustain an action for divorce on the ground of extreme cruelty. Section 94 of the Civil Code defines extreme cruelty as "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage". In each case the infliction of "grievous mental suffering" is a question of fact to be deduced from the circumstances of the case, in the light of the intelligence, refinement and delicacy of sentiment of the complaining party. Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660; Fleming v. Fleming, 95 Cal. 430, 30 P. 566, 29 Am.St.Rep. 124; MacDonald v. MacDonald, 155 Cal. 665, 102 P. 927, 25 L.R.A.,N.S., 45; Avery v. Avery, 148 Cal. 239, 82 P. 967; Cline v. Cline, 4 Cal.App.2d 626, 41 P.2d 588; Shaw v. Shaw, 122 Cal.App. 172, 9 P.2d 876; Davis v. Davis, 58 Cal.App. 100, 102, 207 P. 923; Van Camp v. Van Camp, 53 Cal.App. 17, 22, 199 P. 885. A correct decision must depend upon the sound sense and judgment of the trial court. Barnes v. Barnes, supra; Shaw v. Shaw, supra. Its conclusion will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion. MacDonald v. MacDonald, supra; Davis v. Davis, supra; Andrews v. Andrews, 120 Cal. 184, 52 P. 298.

[3] A course of conduct by which one party to the marriage continually indicates dissatisfaction with the other and makes such dissatisfaction known to friends of the parties may well cause humiliation, embarrassment and mental anguish to a degree constituting extreme cruelty. In the instant case plaintiff was a teacher in the public schools and his loss of temper and repeated criticisms of defendant in the presence of their friends and his statements, after more than twenty-five years of marriage, that she should support herself were sufficient to constitute extreme cruelty if they prove to have caused her grievous mental suffering. The trial judge was in a position to observe

the intelligence, refinement and delicacy of sentiment of the defendant and to determine whether plaintiff's conduct caused her grievous mental suffering. In the absence of an abuse of discretion, his conclusion cannot be disturbed.

[4, 5] Plaintiff contends that the defendant did not sufficiently allege or prove that his conduct was wrongful. While section 94 by its definition of extreme cruelty requires an element of wrongfulness, the pleader need not use the exact language of the statute. It is sufficient if the rational inference from the allegations of the cross-complaint is that the infliction of the suffering upon the other party was wrongful. Nelson v. Nelson, 18 Cal.App. 602, 123 P. 1099; McCahan v. McCahan, 47 Cal.App. 176, 180, 190 P. 460. It was not necessary that defendant establish as part of her case her own freedom from fault where plaintiff in his answer to her cross-complaint did not allege any fault on her part and there was no evidence at the trial indicating that defendant was in any way responsible for plaintiff's course of conduct. Plaintiff did not see fit to cross-examine defendant or to offer any evidence on his own behalf.

[6, 7] It was not necessary that defendant plead the exact time and place of each of plaintiff's acts, for the conduct of which she complained was continuous and not confined to any particular time or locality. Zartarian v. Zartarian, 47 Cal.App. 90, 190 P. 196. Moreover, plaintiff did not see fit to demur specially to the amended cross-complaint. Nor was it necessary that defendant prove that plaintiff's course of conduct was inspired by malevolent motives. Barngrover v. Barngrover, 57 Cal.App. 43, 206 P. 461.

[8, 9] Plaintiff contends that the corroboration offered by defendant was inadequate. Where the cruelty consists of successive acts of ill-treatment, however, it is not necessary that there be direct testimony of other witnesses to every act sworn to by the complaining party. Andrews v. Andrews, supra. Here the corroborating witness stated that she heard the testimony of the defendant and knew the facts related therein to be true. No objection to this testimony was made by the plaintiff. The corroboration was sufficient.

[10] Plaintiff complains of the failure of the trial court to make findings of fact. The parties joined in a written stipulation, filed with the clerk, waiving findings. Under such circumstances findings are not required. Code Civ.Proc., sec. 632. See Waldecker v. Waldecker, 178 Cal. 566, 174 P. 36.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concur.

18 Cal.2d 462

SMITH v. SMITH et al.

L. A. 17965.

Supreme Court of California.
Aug. 20, 1941.

1. Appeal and error 🔑478

An application for a "writ of supersedeas" in the Supreme Court is an auxiliary process in aid of its appellate jurisdiction to stay proceedings on the order or judgment from which the appeal is taken.

See Words and Phrases, Permanent Edition, for all other definitions of "Writ of Supersedeas".

2. Appeal and error 🔑485(2)

It is not the function of a "writ of supersedeas" to supersede or impair the force of, or pass on the merits of, the judgment or order from which the appeal is taken, but the validity of such judgment or order is reviewed on an appeal therefrom, and the writ merely suspends the enforcement of the judgment pending the appeal.

3. Appeal and error 🔑488(2)

In the absence of a statutory provision to the contrary, the enforcement of a mandatory injunction is stayed by the perfection of an appeal pursuant to statute. Code Civ. Proc. § 949; Civ.Code, §§ 156, 157.

4. Divorce 🔑87, 182

An order in divorce action directing husband to move from home forthwith was in the nature of a "mandatory injunction", since it commanded doing of an affirmative act, and further proceedings on part of court compelling husband to vacate the family home were automatically stayed by appeal from the order. Civ.Code, §§ 156, 157; Code Civ.Proc. § 949.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Injunction".

5. Injunction 🔑230(1)

A proceeding in contempt is a process for the enforcement or execution of an order or judgment of the court which is in the nature of an injunction.

6. Divorce 🔑182

Where court in divorce action by an order in the nature of a mandatory injunction directed husband to vacate family home and an appeal was taken from the order, proceedings for enforcement of the order were automatically stayed by the appeal, and court had no jurisdiction pending the appeal to adjudge the husband guilty of contempt and threaten to execute punishment imposed. Civ.Code, §§ 156, 157; Code Civ.Proc. § 949.

7. Appeal and error 🔑477

Generally, supersedeas is not appropriate when there is an automatic statutory stay of an order by appeal, but the writ may serve in a corrective capacity where the trial court has proceeded to hear a contempt matter arising out of the order and is attempting to enforce execution of its judgment after the appeal was perfected. Civ. Code, §§ 156, 157; Code Civ.Proc. § 949.

8. Appeal and error 🔑479(1)

A writ of supersedeas may be granted as a corrective measure to rectify proceedings already had in violation of statutory supersedeas. Civ.Code, §§ 156, 157; Code Civ.Proc. § 949.

9. Divorce 🔑182

Where court in divorce action entered an order in the nature of a mandatory injunction commanding husband to vacate family home and contempt proceeding was instituted against the husband on the same day that appeal from order was perfected and hearing on charge did not occur until two days later after the proceedings had been stayed by a statutory supersedeas, writ of supersedeas would issue commanding trial court to refrain from taking action on portion of the order directing the husband to vacate family home or on a judgment finding that the husband was guilty of contempt in so far as the judgment was based upon the order.

10. Divorce 🔑312

Where trial court in divorce action ordered husband pendente lite to turn proceeds of certain securities over to wife's counsel to be by them delivered to a trustee for the support of children, order was in effect either an order for the payment of money for the support of children, or for the delivery of personal property, and its enforcement would not be stayed automatically by perfecting an appeal, since, if it was an order for payment of money, an undertaking was necessary, and, if an order for the delivery of personalty, there was no stay of execution unless the property was placed in custody of an officer of the court. Code Civ. Proc. §§ 942, 943.

In Bank.

Action for divorce by Loucille Rawleigh Smith against Quentin Roland Smith. From an order made by the Superior Court, defendant appealed, and thereafter filed a petition for a writ of supersedeas to stay proceedings on the order.

Writ of supersedeas granted.

George Stahlman, Harry Duckett, and Morris Lavine, all of Los Angeles, for petitioner.

Arthur Wm. Green, of Los Angeles, for respondent Loucille Rawleigh Smith.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondent Superior Court.

CARTER, Justice.

Petitioner seeks a writ of supersedeas staying proceedings on an order, pendente lite, made by respondent superior court in a divorce action.

Respondent Loucille Rawleigh Smith and petitioner are husband and wife, having two minor children. The family has been residing in their home. Petitioner alleges that the home is community property; that is denied.

On May 13, 1941, said respondent commenced an action for divorce against petitioner in respondent superior court including therein a petition for temporary alimony, support for the children and to compel defendant to do certain things. After a hearing on that petition and on May 16, 1941, the court made the order here in question, adjusting the domestic affairs of the parties pending the divorce action, and providing among other things: "Court orders defendant to *move from the home forthwith,* * * *. Defendant to authorize the broker to sell out the brokerage account, deliver the proceeds from said sale to plaintiff's and defendant's attorneys, and they are to choose a trustee with whom to deposit the money, said money to be used to support the plaintiff and the children." The "home" mentioned in the order is the family home to which reference is heretofore made. Respondents in their answer to the petition for the writ of supersedeas alleged that the order to vacate the home was made because of petitioner's breaking the furniture, shooting firearms and threatening Mrs. Smith in the home. On May 20, 1941, petitioner appealed to this court from the above-quoted portions of the order. On May 20, 1941, an order to show cause why petitioner should not be punished for contempt for failure to comply with said order was issued. On May 22, 1941, the court adjudged petitioner guilty of contempt on the ground that petitioner has failed and still does fail to comply with the order; the court granted a temporary stay of execution on that judgment. Respondents allege that the operation of the contempt judgment has been stayed by habeas corpus proceedings which were set for hearing June 17, 1941. It cannot be ascertained from that judgment whether petitioner was found to have violated all of the requirements of the order or only the portions from which the appeal was taken. The affidavits in support of the order to show cause are not in the record. Petitioner alleges that the contempt consisted of his failure to vacate the home; respondents allege that it consisted of conduct in violation of the order. Respondents claim that the acts upon which the contempt judgment was based occurred prior to the perfection of the appeal; petitioner claims that the order to show cause was served on him the same day he filed his notice of appeal but later in that day, and of course the hearing and judgment for contempt occurred after the appeal was taken.

[1, 2] Petitioner urges that the portion of the order commanding him to vacate the home was void because the court had no jurisdiction to make it in that it violates sections 156 and 157 of the Civil Code. He also claims that no proper hearing was had as a basis for the order. This, however, is a proceeding to obtain a writ of supersedeas as a corrective remedy. An application for a writ of supersedeas in this court is an auxiliary process in aid of its appellate jurisdiction to stay proceedings on the order or judgment from which the appeal is taken. Stewart v. Hurt, 9 Cal.2d 39, 68 P.2d 726; City of South Gate v. City of Los Angeles, 6 Cal. 2d 593, 58 P.2d 1288; McCann v. Union Bank & Trust Co., 4 Cal.2d 24, 47 P.2d 283; Rosenfeld v. Miller, 216 Cal. 560, 15 P.2d 161. It is not the function of such a writ to reverse, supersede or impair the force of, or pass on the merits of the judgment or order from which the appeal is taken; the validity of such judgment or order is reviewed on the appeal therefrom. Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 P. 123; In re Graves, 62 Cal.App. 168, 216 P. 386; see also Feinberg v. One Doe Co., 14 Cal.2d 24, 27, 92 P.2d 640. Its purpose is merely to suspend the enforcement of the judgment pending the appeal. See cases cited, supra.

[3] Perfecting an appeal from certain judgments or orders effects a statutory supersedeas or stay of the execution or enforcement thereof. Code of Civil Procedure, sec. 949. In the absence of a statutory provision to the contrary, the enforcement of a mandatory injunction is stayed by the perfection of an appeal pursuant to section 949 of the Code of Civil Procedure. Byington v. Superior Court, 14 Cal.2d 68, 92 P.2d 896; Feinberg v. One Doe Co., supra; Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P.2d 706; Ohaver v. Fenech, 206 Cal. 118, 273 P. 555; Baar v. Smith, 201 Cal. 87, 255 P. 827.

[4] The portion of the order here involved commanding petitioner to vacate the family home, whether it be valid or invalid, is in the nature of a mandatory injunction. See Luitwieler v. Superior Court, 54 Cal.App. 528, 202 P. 165. Such an order is obviously mandatory on its face. It commands the doing of an affirmative act, to-wit: vacation of the property upon which petitioner is now residing. We conclude therefore that further proceeding on the part of the court compelling petitioner to vacate the family home is automatically stayed by the appeal therefrom on May 20, 1941.

[5, 6] It cannot be doubted that a proceeding in contempt is a process for the enforcement or execution of an order or judgment of the court which is in the nature of an injunction. Feinberg v. One Doe Co., supra. Here the petitioner was cited for contempt for violating the order and adjudged guilty, and petitioner alleges that the court threatens to execute the punishment imposed; respondents assert the petitioner is admitted to bail pending habeas corpus proceedings. It had no jurisdiction to make such an adjudication inasmuch as all proceedings for enforcement of the order were automatically stayed on May 20, 1941, the date the appeal was perfected and prior to the hearing and judgment in the contempt proceeding.

[7-9] Respondents urge that supersedeas is not appropriate when there is an automatic statutory stay as in the case at bar. Foster v. Foster, 5 Cal.2d 669, 55 P. 2d 1175. As a general rule that is true, but here the court has proceeded to hear the contempt matter and thereby enforce execution of its judgment after the appeal was perfected. Under such circumstances the writ may serve in a corrective capacity. As stated by this court in the case of Feinberg v. One Doe Co., supra, 14 Cal.2d page 28, 92 P.2d page 642: "There would, of course, be no need for the issuance of any writ if the lower court was not mistakenly attempting to enforce obedience to the order appealed from. Foster v. Foster, 5 Cal.2d 669, 55 P.2d 1175; Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P.2d 706. But the grounds of the application to this court for the writ of supersedeas is the fact that the lower court has already issued an order to show cause why appellants should not be found guilty of contempt for refusal to comply with the order appealed from." A writ may be granted as a corrective measure to rectify proceedings already had in violation of a statutory supersedeas such as we have here. McAneny v. Superior Court, 150 Cal. 6, 87 P. 1020; Owen v. Pomona Land, etc., Co., 124 Cal. 331, 57 P. 71; Holcomb v. Juster, 39 Cal.App. 462, 179 P. 445. There is nothing in the case of Messenkop v. Duffield, 211 Cal. 222, 294 P. 715, inconsistent with such a rule because there the *judgment was completely executed before* the supersedeas became effective. Respondents also urge in this connection that petitioner's conduct in violation of the order here involved occurred prior to the time that the appeal was taken and that supersedeas either statutory or otherwise cannot be retroactive. This contention is not persuasive because the order to show cause in the contempt proceeding was issued on May 20, 1941, the same day the appeal was perfected, and the hearing on the contempt charge and the adjudication thereon did not occur until May 22, 1941, two days after the proceedings had been stayed by a statutory supersedeas. It is the process of the court invoked to enforce the judgment from which the appeal is taken which is involved in supersedeas proceedings, not the time of the conduct of the parties giving rise to the operation of such process. In the case at bar, the process, the contempt proceeding, was invoked after the automatic stay of the order.

[10] What has heretofore been said applies, of course, only to that portion of the order commanding petitioner to vacate the home. As we have seen, an appeal was also taken from the portion of the order commanding petitioner to have his broker sell his securities and turn the proceeds over to the counsel for petitioner and Mrs. Smith to be by them delivered to a trustee who was to use the same to support the children. This order is in effect either an order for the payment of money for the support of the children, or for the delivery of personal property. In either case its enforcement would not be stayed automatically by perfecting an appeal. If it is considered an order for the payment of money an undertaking is necessary to accomplish a stay of execution (Code Civ.Proc., sec. 942); if it is for the delivery of personal property there is no stay of execution unless the property is placed in the custody of an officer of the court. Code of Civ. Proc., sec. 943.

It is therefore ordered that a writ of supersedeas issue commanding said respondents to refrain from taking any proceedings on that portion of said order directing petitioner to vacate said family home or on that certain judgment finding petitioner guilty of contempt rendered by said superior court on May 22, 1941, insofar as said judgment is based upon a violation of the above-mentioned portion of said order.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concur.

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. ADAMS et al.

SAME v. HOLMES et al.

L. A. 17511.

Supreme Court of California.
Aug. 4, 1941.

Rehearing Granted Sept. 3, 1941.

1. Eminent domain 🔑148

The taking possession of land in eminent domain proceeding by plaintiff under court order does not vest landowner's rights to payment for land so as to entitle owner to interest from date of taking possession to date of payment.

2. Eminent domain 🔑202(4)

Generally, evidence of value in use of land, in terms of money, for a particular purpose is not admissible in eminent domain proceeding.

3. Evidence 🔑555

In eminent domain proceeding, opinions of market value given by experts who take into consideration adaptability of property for its highest available use, are admissible, provided such use is not, as a matter of law, so highly speculative and conjectural as to have no relation to market value.

4. Evidence 🔑543(3)

If a witness, in eminent domain proceeding, by reason of his skill, learning or technical training, understands adaptability of lands in question for particular purpose, and the demand for land for such purpose, he may state market value of land, though entirely unacquainted with other elements which would be considered by different buyers competing for same property.

5. Evidence 🔑543(3)

In eminent domain proceedings to obtain reservoir site, defendants' witnesses, including witnesses qualified to speak on subject of realty values, qualified mining experts, and engineers qualified to consider adaptability of land for reservoir use, each of whom was familiar with land involved and knew of its adaptability to certain uses having in mind highest use with which he was familiar, were qualified to testify to market value within his knowledge and experience.

6. Eminent domain 🔑262(5)

Where highest use known to witness, in eminent domain proceeding, and a market value based upon a consideration of such use, was given, a statement by another witness of a lower market value based upon a consideration of a lesser use only could not be prejudicial to condemnor.

7. Eminent domain 🔑202(4)

In eminent domain proceeding, where several witnesses testified as to adaptability of land involved for a particular use, and, having in mind highest use with which each witness was familiar, testified to market value, the pyramiding of uses or values of uses would be forbidden.

8. Eminent domain 🔑134

"Market value", in eminent domain proceeding, is not multiple, and the value in use of property for a particular purpose is not the market value but is merely a factor in determining such value.

See Words and Phrases, Permanent Edition, for all other definitions of "Market Value".

9. Eminent domain 🔑131

The market value of property condemned determines amount of the award, in an eminent domain proceeding, and not value of property in use.

10. Eminent domain 🔑131

The "market value", in eminent domain proceeding, is highest price estimated in terms of money which land would bring if exposed for sale in open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which land was adapted and for which it was capable.

11. Eminent domain 🔑134

The "market value" of land, in eminent domain proceeding, is determined by taking into account the highest possible use to which the land is, or may reasonably be put and what purchasers would be willing to offer for it in view of such highest possible use.

12. Eminent domain 🔑134

In determining "market value" of land in eminent domain proceeding, the special adaptability of the land for the use for which it is taken may be taken into account, and if such adaptability would increase value of the land in eyes of purchasers generally in open market, quite apart from the necessities or needs of particular condemnor, the owner may be entitled to such increase as a part of its market value.

13. Eminent domain 🔑202(4)

In eminent domain proceeding to obtain reservoir site, permitting defendants' witnesses, after testifying as to adaptability of the land for the highest use of which they had knowledge, to give their opinions of reasonable market value, was not erroneous on ground that it expressed in terms of money the value of the land for particular uses.

14. Eminent domain 🔑262(5)

In eminent domain proceeding to obtain reservoir site, where defendants' witness who considered the land adaptable for reservoir use as its highest use, testified to two reservoir plans and expressed his opinion as to market value of land under the first plan at a lower figure than that in the second plan, the error, if any, in permitting witness to make more than one estimate was not prejudicial, where it appeared that exclusion of witness' second estimate would not have affected outcome of trial.

15. Eminent domain 🔑202(1)

Under statute directing jury in eminent domain proceeding to find value of each parcel, estate, or interest, separately, there is no requirement that evidence of value must be separately received, or of exclusion of testimony given on the subject with relation to more than one parcel or interest. Code Civ.Proc. § 1248.

16. Eminent domain 🔑202(1)

In eminent domain proceeding, evidence of aggregate value of combined acreage adaptable to a particular use is not prohibited. Code Civ.Proc. § 1248.

17. Eminent domain 🔑201

The defendants, in an eminent domain proceeding, are not bound by the parcel subdivision or classification of their lands by plaintiff in its complaint for the sake of convenience of description.

18. Eminent domain 🔑205

In eminent domain proceeding to obtain reservoir site, evidence, including expert testimony and a view of premises by trial court and jury, supported market value of each parcel as found by the jury.

19. Eminent domain 🔑202(4)

In eminent domain proceeding to obtain reservoir site, where land was held in different ownerships, it could be shown that one portion if and when combined with other portions was adapted for reservoir use.

20. Eminent domain 🔑202(4)

The adaptability of land of defendant for reservoir purposes may be taken into consideration in eminent domain proceeding, although his land alone does not constitute an entire reservoir site and a complete reservoir site requires joining of his land to a number of other tracts of land belonging to different owners.

21. Eminent domain 🔑134

In eminent domain proceeding to condemn land for reservoir site, where land is held in different ownerships, the fact of practicability of uniting lands in one ownership and cost and expenses thereof and time consumed in so doing, are proper elements to be considered by jury under proper instructions in determining whether market value of land was enhanced by reason of its adaptability for reservoir purposes when joined to other land.

22. Evidence 🔑501(7), 555

In eminent domain proceeding, where a witness testifying as to value bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are chief elements in calculations which lead to his conclusions, his testimony should be rejected.

23. Evidence 🔑501(7), 555

Elements affecting value that depend upon events or combinations of occurrences which, while within realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration in determining market value of land, in eminent domain proceeding, since that would be to allow mere speculation to become a guide for the ascertainment of value.

24. Eminent domain 🔑262(5)

In eminent domain proceeding to obtain reservoir site, where, after defendants' witness testified as to market value property based upon its adaptability for reservoir use, he was cross-examined in great detail with respect to availability of, and demand for, the acreage as a terminal storage site, and witness outlined several water importation projects in support of his opinion, the admission of similar testimony on redirect examination and on direct examination of following witnesses whereby it was shown that projects, far from being purely remote, conjectural and speculative, lay well within realm of probable achievement and economic feasibility, was not prejudicial to condemnor, who itself fixed scope of the inquiry.

25. Evidence ⚷502, 558(1)

In eminent domain proceeding, where a qualified witness has testified to market value of land and has stated that he has considered its adaptability for the highest available use within his knowledge, the cross-examination of such a witness should be given a wide scope.

26. Evidence ⚷502, 558(1)
Trial ⚷89

Great latitude is allowed in cross-examination of witnesses who have testified to market value of land, and unless it appears to trial court that such testimony is based upon improper considerations, it will not be withdrawn from consideration of jury.

27. Trial ⚷89

The admission on direct examination of some of witness' testimony which should have been admitted only on cross-examination is not sufficient ground for striking all of testimony of the witness.

28. Eminent domain ⚷262(5)

In eminent domain proceeding to obtain reservoir site, even if evidence offered for purpose of showing reasonable market value of land should have been stricken, action of trial court in admitting such evidence and thereafter failing to strike it did not constitute prejudicial error, where reasonableness of the award indicated that verdict of jury was not influenced by any testimony erroneously admitted.

29. Appeal and error ⚷1050(1)

Ordinarily, admission or exclusion of opinion evidence, where it is not of a determinative character, is not sufficient to justify a reversal.

30. Evidence ⚷555

That the realization of any of water importation projects outlined by engineers, who testified in eminent domain proceedings as to market value of property based upon its adaptability for reservoir use, would depend upon solution of problems which might arise in connection with acquisition of water rights, lands, rights of way, easements, state or federal franchises, or other interests essential to consummation of the plans, did not render their testimony too remote or speculative to merit consideration by jury.

31. Eminent domain ⚷202(4)

Where engineers testified in eminent domain proceeding as to potential demand for and adaptability of property to use as a terminal storage reservoir under economically feasible conditions, and other proper elements of evaluating reasonable market value of land, ordinary problems inherent in development of property for such use would affect only weight, and not the admissibility of such evidence.

32. Eminent domain ⚷134

The method of fixing the reasonable market value of land, in eminent domain proceeding, by the capitalization of income does not forbid consideration of the highest use to which the property may be put and the probable income therefrom as an element of the value only.

33. Evidence ⚷547

Where witnesses, in eminent domain proceeding to obtain reservoir site, testified as to reasonable market value of land based upon its adaptability for reservoir use, and outlined several water importation projects in support of their opinions, witnesses' calculations of probable earnings of projects described were admissible for purpose of demonstrating feasibility of the projects.

34. Evidence ⚷555

Fact that witnesses, in eminent domain proceeding to obtain reservoir site, who testified as to reasonable market value of land based upon its adaptability for reservoir use, considered as an element of evaluation, the probable influence of prospective water importation projects upon minds of prospective purchasers, did not render testimony inadmissible, on ground that it was tantamount to fixing a future value, which would exist only upon consummation of a project, or to capitalizing earnings.

35. Eminent domain ⚷134

Where land sought to be condemned was peculiarly valuable for reservoir purposes, major factor to be considered in making an award of damages was what the land was worth in the market for reservoir purposes, and not what it was worth to condemnor for reservoir purposes.

36. Trial ⚷244(3)

In eminent domain proceeding to obtain reservoir site, where the admission of testimony of witnesses, who testified as to reasonable market value of land based upon its adaptability for reservoir use, and outlined several water importation projects in support of their opinion, was not prejudicially erroneous, the giving of instructions thereon was not erroneous, as improperly emphasizing such evidence.

37. Eminent domain ⚷219

In eminent domain proceeding, where much time elapsed in trial of case and evidence was voluminous, the use of charts and tabulations for purpose of summarizing and collecting portions of the evidence which counsel desired to discuss, even though not admitted in evidence, was not objectionable provided such aids to argument were so prepared as fairly and accurately to depict the proof which they purported to cover.

38. Eminent domain ⚷219

In eminent domain proceeding, where much time elapsed in trial of case and evidence was voluminous, trial court did not abuse its discretion in permitting use of charts and tabulations for purpose of summarizing portions of evidence which counsel desired to discuss in argument, although they were not admitted in evidence, in absence of showing that inaccuracies in data were of sufficient substantiality to constitute prejudicial error.

39. Appeal and error ⚷978(2)

The question of prejudicial misconduct of counsel was one for the trial court to pass upon in disposing of motion for new trial.

40. Trial ⚷133(6)

Where record revealed that any danger of prejudice from remarks indulged in by counsel for both sides was removed by timely admonishment and instructions to jury by trial court, the fact findings of trial court, in overruling motion for new trial, that verdict was not the result of prejudice was sustained.

CURTIS, SHENK, and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Consolidated actions in eminent domain by the Metropolitan Water District of Southern California against E. Bennett Adams and others, and by the same plaintiff against Lawrence Holmes and others. From judgments in accordance with jury's award in favor of defendants, the plaintiff appeals.

Affirmed.

For prior opinion, see 99 P.2d 659, in which rehearing was denied in 100 P.2d 357.

James H. Howard, Arthur A. Weber, Charles C. Cooper, Jr., Donald M. Keith, Hill, Morgan & Bledsoe, and Vincent Morgan, all of Los Angeles, for appellant.

John W. Preston, of Los Angeles, Miguel Estudillo, of Riverside, Oliver O. Clark, of Los Angeles, and C. L. McFarland, of Riverside, for respondents.

CARTER, Justice.

Plaintiff is a metropolitan water district. At the times here involved it was engaged in the construction of an aqueduct from the Colorado river to constituent areas of the district, and required the lands here in controversy for use as a terminal storage reservoir in its water transportation and distribution system.

These lands, comprising over 8,000 acres or 526 parcels, are located about 13 miles from the town of Riverside in a compact area known as the Cajalco basin. In 1933 the district initiated acquisition of the property by appraisal and purchase, and in March, 1935, brought suit to condemn the unacquired remainder. Metropolitan Water District v. Adams, No. 26462 in the superior court. Immediate possession of most of the property was obtained by order of court in August, 1935, and about the same time another action in eminent domain (Metropolitan Water District v. Holmes, No. 27011 in the superior court), was commenced for the purpose of condemning additional land contiguous to that involved in the main case.

[1] The causes were consolidated, and at the conclusion of a prolonged jury trial, lasting more than a year, verdicts were returned and judgments entered awarding defendants for the acreage which is the subject to this appeal, the sum of $507,355, with interest. Although plaintiff gave separate notices of appeal from the two judgments, a joint set of briefs was filed treating the consolidated causes as one. The judgment in the Adams case, however, was challenged only with respect to a provision allowing interest upon the principal awards for the period elapsing between the time the district took possession of the property and the date of entry of judgment. Upon a prior submission of the causes to this court, the interest point was determined, and the judgment in the Adams case was affirmed. Metropolitan Water District v. Adams et al., decided December 2, 1940, 16 Cal.2d 676,

107 P.2d 618. That decision is authority for a like holding on substantially the same point herein raised with respect to the lands covered by the Holmes judgment.

On trial of the actions, because of the large area of land and numerous parcels to be condemned, the court segregated the property into five trial groups. The lands which are the subject of the present review were among 58 parcels collectively known as group 1. During the period of the trial the district acquired 36 of the 58 parcels, and after judgment acquired two more. This left 20 parcels. The fairness of the awards for 10 of them, which were in principal sums aggregating less than 20 per cent of the value fixed by defendants' witnesses, is not challenged. The remaining 10 parcels contain over 850 acres, portions of which combine to form areas especially adapted to reservoir use. The reasonableness of the allowance for this acreage is seriously questioned and is the subject of the controversy on this appeal.

The numerous contentions urged by the district in the voluminous set of joint briefs may, with the exception of the interest point already determined, be grouped under three main headings: 1. Prejudicial error in rulings on the admission of evidence touching the subject of market value; 2. Like error in instructions to the jury; and 3. Misconduct of counsel. Under the first heading the questions argued present the problem of determining the scope of evidence which may properly be received to show the highest and most valuable use of land to be condemned, when such use is dependent upon the existence of outside resources and the successful promotion of possible or probable projects for their development. To what extent may such projects be outlined? May details of construction plans, cost, and profit be given? Or is this type of evidence too remote, speculative, and conjectural? Do the elements of remoteness or conjecture go to the admissibility of the evidence, or only to its weight? If a future project which will result in development of the land for highest use is economically feasible, should not this fact be shown? Can the plaintiff condemner complain of prejudicial error where the evidence containing the alleged elements of speculation and conjecture was first adduced on cross-examination of one of defendants' expert witnesses, and thereafter to some degree without objection on direct and cross-examination of other expert witnesses?

On the trial of the present cause, the evidence showed that the various parcels comprising the entire area taken by the district were susceptible of development and use in connection with three valuable and feasible enterprises: 1. Subdivision and sale of property for carob plantations and a townsite; 2. Development of valuable mineral resources, notably tin; and 3. Development of certain acreage as a reservoir site for terminal storage, that is, for the storage of water imported from without the watershed. The highest and most valuable use of the property lay in its adaptability for the third development, which was in turn dependent upon the availability of outside water sources and the successful promotion of an economically feasible project for the importation of a sufficient flow of water at reasonable cost. Defendants produced three expert witnesses who were thoroughly qualified to speak on the subject of this development, to testify to possible projects, availability of an outside water supply, details of cost and construction, land values, and other elements involved in bringing the reservoir site to its highest use for terminal storage, and to express an opinion of market value. The qualification of these experts is not questioned, but it is contended that they based their opinions upon possibilities or probabilities so remote and speculative as to destroy the value of their testimony, and render it prejudicial. A resume of the evidence will show whether this claim is well founded.

In 1916 defendant Lawrence Holmes, a horticulturist, and his wife, Gertrude, first entered the Cajalco valley, and they have since resided there. Approximately 1100 acres largely owned or controlled by them were considered to represent the greater portion of the value of the basin because of their strategic location and their adaptability to varied commercial uses. It was the plan of the Holmeses to develop the valley for the cultivation of the carob tree, a leguminous evergreen, on a commercial scale, conserving water in the valley, building dams, and creating lakes. This was to be accomplished by subdivision and sale of land for carob plantations and other agricultural purposes, with a nucleus reserved for a townsite representing the hub of the community development in the basin, and by the construction of dams in the canyon, creating a series of five reservoirs or lakes. During promotion of the enterprise over 60,000 carob trees were planted, and it was found that there were but few acres in the basin which would not produce excellent carobs. There were also producing carob plantations in other parts of Southern California, so that there was a commercial demand for the product which could be fostered through proper advertising.

After watching the run-off from Cajalco creek for five or six years, and as a preliminary to creation of five planned lakes, Mr. Holmes decided to build two reservoirs in the canyon. The first dam was completed in 1925, and the second the following year. With the possible exception of a phenomenally dry season, water flowed in the Cajalco creek the year round. There was no vegetation in the reservoir lakes and little, if any, alkali or other deposit which would prevent their use for irrigation and recreational purposes. Wells throughout the plantation area furnished water for domestic use. Land fronting the lakes was desirable for residential sites. The remaining parcels were adapted to citrus or carob culture or the raising of other agricultural products. Over the 12-year period from 1920 to 1932 there were more than 150 separate transactions covering sales of property to more than 100 individual purchasers. The years 1921–1927 were especially fruitful. Some buyers made successive purchases as many as three to seven times. The terms of sale provided for planting and care of trees and payment of taxes for five years, and there was a progressive increase in price beginning with $400 an acre in 1922 and ending with $700 an acre in the fall of 1931. None of the purchasers offered property for resale, nor was there any expression of discontent over the investment. By 1931, 69 houses had been erected and 58 families were dwelling in the community. There was a store and also a school and the owners of the carob plantations were considered as permanent residents.

Meanwhile the public project of bringing waters of the Colorado river into this state had been undertaken. Plaintiff district, a $220,000,000 corporation, had started the construction of an aqueduct and was engaged in acquiring suitable sites for storage of the water to be imported. Such storage, called terminal storage, as distinguished from regulatory storage, is required where waters are brought from substantial distances, in order to insure against the interruption of service by a breakdown or interference along the line of transmission. The Cajalco basin had long been recognized as a desirable site for either regulatory or terminal storage. In addition to five natural dam sites capable of storing many thousand acre feet of water, it contained suitable accessible material for the construction of earth fill dams, and water-bearing formations capable of supplying a correlative annual water crop.

According to defendants' witnesses, although the statement is not undisputed, the basin afforded the only suitable terminal storage site on its side of the mountains, and hence it was practically invaluable for that purpose. Long before a plan for importing waters of the Colorado river was ever conceived, the whole Cajalco area had been the subject of study in connection with comprehensive surveys by local consumers and their expert engineers of Southern California water supplies. Well recognized was the adaptability and value of the basin for terminal storage use in projects for bringing water to the local market from various sources 15 to 90 miles distant. These sources, which included the north slope of the San Gabriel mountains, the Mojave river, the Santa Ana river and its tributaries, Lake Arrowhead and Warm creek, were capable of yielding many thousand acre feet of surplus water which annually ran to waste. A number of projects contemplating storage use of the Cajalco basin were advanced for the capture and transportation of this supply. One of defendants' expert witnesses, Mr. Finkle, had made five or more studies of the area, the first in 1889, and the others in 1916, 1917, 1933, and 1935. Another expert, Mr. Rowe, studied the basin as early as 1918, and made a preliminary survey in 1924. In that year, also, plaintiff's expert witness, Mr. Sonderegger, acting under private employment by the Temescal Water Company, studied and reported upon a project which proposed the use for terminal storage of a portion of the lands here involved. At the time the district's demand for the property became known, other projects were under serious investigation by Engineers Finkle, Rowe, and Browning, acting under private employment by local water users. Under the plan embraced in their report, terminal storage was abandoned and waste permitted in the Santa Ana river, after passage of water through the power house, because the district's activities made the Cajalco basin unavailable for their use, and they found no substitute location.

On October 17, 1931, the Cajalco valley settlement received warning of the district's intention to take lands in the basin through an announcement printed in the Los Angeles Times. This article stated that the chairman of the board of directors of the district had exposed attempts to organize a ring of land speculators to "mulct the taxpayers for the sake of private and unearned profits" by acquiring control of lands needed for the water system, and holding them for resale to the district at an exorbitant profit. Illustrative of the sharp language in which the entire publication was couched, is the following quotation from the concluding paragraphs:

"Any person attempting to gain control of land for the purpose of holding up the Metropolitan Water District and the taxpayers in the district should have his name published to the world so that his shameful operations might be known to every man. As a responsible officer of the district, I here and now give notice that I shall use every means at my command to hold up to public view the names of any persons seeking thus to profit at the expense of our people. The people who voted these aqueduct bonds are entitled to a square deal, and I am sure that every member of the board of directors and every responsible officer of the board will join with me when I pledge to the people of Southern California the unceasing efforts of the Metropolitan Water District to assure our people that they shall receive a square deal—a dollar's worth of value for every dollar invested in the Metropolitan aqueduct."

This article is considered to have had a very depressing effect upon the value of real estate in areas affected by the district's project. It placed the entire Cajalco enterprise under a blight. Individual land purchasers were discouraged and sales dropped. This situation worked to the advantage of the district. Instead of commencing suit immediately to condemn the 526 parcels or 8,000 or more acres required by it in the Cajalco area, it delayed nearly three and one-half years, during which time it made a number of purchases, buying in all about 138 parcels aggregating about 2,500 acres. On land so purchased no trees were planted or cared for, no houses built or repaired. The result was to practically wipe out the plantation development and to deflate the real estate values. At the time the present cause came on for trial only six or twelve houses remained standing, plantings were given over to gophers and squirrels, young trees were dying, lake beds had been partially filled in, and the market value of the property for residential and development purposes was seriously affected.

In adducing evidence to show that the land was particularly valuable by reason of the several uses to which it was adapted, defendants called on three groups of expert witnesses. In the first group were five witnesses qualified to speak on the subject of real estate values. They testified to the adaptability of the area for carob culture and other agricultural use, and for residential, recreational, and townsite purposes. They presented separate valuations of 16 parcels, portions of 10 of which represented acreage particularly adapted to reservoir use. They were not engineers and did not consider reservoir adaptability in the expression of their opinions of the value of the reservoir acreage. The respective amounts at which they fixed the worth of such acreage ranged from $211,850 to $374,424.

In the second group were three qualified mining experts who testified to the adaptability of the land to such purpose, and to the value of 200 acres containing useful mineral deposits, particularly tin. Their valuations ran from $500,000 to $650,000. The issue of mineral value, however, was removed from the case by a stipulation reserving to defendants the exclusive right to mine any and all minerals contained within the lands at a depth lower than 300 feet beneath the natural surface.

The third group of experts, consisting of Messrs. Rowe, Finkle, and Baker, considered that the highest use to which the land was adapted was reservoir use, and in consideration of such use, they testified to its market value. These men were all engineers and their full qualification to speak as expert witnesses on the subject of reservoir valuation is undisputed. Mr. Rowe said that he knew nothing of the value of the acreage for other than reservoir purposes. The other two witnesses were not asked whether they were qualified to consider, or had considered, any other use in making their evaluation.

Mr. Rowe, the first of the three experts to testify, stated on direct examination that in the Cajalco basin there were two reservoir sites capable of impounding and storing 3500-acre feet and 8500-acre feet of water, respectively, or a total of 12,000-acre feet. There were, he said, available supplies of water which could be acquired and brought to the local market for domestic and irrigation uses and that for this purpose the lands afforded a required site for terminal storage at an economical price. He was not questioned as to the source of the water supplies available for importation for terminal storage. He stated that there was a demand for water and for the lands for reservoir use, and that in his opinion the value of the acreage was $715,000. Upon cross-examination he was questioned in great detail by the district's counsel as to the origin of water available for importation, the difficulties which might be experienced, and the facilities which might be required to bring the water from point of origin to the terminal storage site, the necessity for obtaining for such use lands held in public and private ownership and easements thereon, the possibility of developing electric energy as a source of income to reduce the cost of water to the consumer, the probable cost of these developments, and the prices paid for reservoir lands. Upon redirect examination he testified that in his opinion the plans and projects to which he had testified upon cross-examination were economical, feasible, and practical, and that by means of the projects outlined, water could be procured and furnished to local water users at a cost which such users could afford to pay, having in mind the uses to which they would apply such water, and as cheaply as any water that could be otherwise obtained.

All of the above evidence was received substantially without objection.

The testimony given by the other two engineers, Finkle and Baker, was along the same line, with the exception that their direct examination included inquiry into the matters which were the subject of the cross-examination of Mr. Rowe. Voluminous data was admitted concerning proposed projects for water importation contemplating use of the Cajalco basin for terminal storage, including details of construction and cost designed to show that the projects were economically feasible. Practically no objection was interposed on the ground that the inquiry was too sweeping until the direct examination of Mr. Baker, the last of the three experts to testify, was well under way. Counsel then protested, stating:

"Now, Your Honor, please, this is highly improper on direct examination, to proceed into the detail of other and different reservoirs, or reservoir sites, or construction. * * * We object to this as highly improper direct examination, incompetent, irrelevant and immaterial. * * *" The court overruled the objection. Thereafter, during the subsequent examination of the witness, objections somewhat along the same line were interposed. On cross-examination, however, proposed water importation and reservoir projects were again made the subject of detailed inquiry.

Two combinations of acreage for reservoir purposes were proposed. Under plan No. 1, which contemplated a reservoir of 3,500-acre feet and one of 8,500-acre feet capacity, to impound a total of 12,000-acre feet, involving the consolidation and use of portions of nine of the so-called reservoir parcels, witness Baker valued the reservoir acreage at $700,000. Witness Finkle valued it at $738,500. Under plan No. 2, which contemplated reservoirs of 3,500-acre feet and 14,000-acre feet capacity, respectively, to impound a total of 17,500-acre feet, involving the use of one entire parcel and portions of nine other parcels, witness Finkle valued the reservoir acreage of $994,610. The jury award was $507,355.

At the conclusion of the testimony of the engineers, when defendants rested their case, plaintiff made a motion to strike from the record and withdraw from the consideration of the jury, the testimony of each real estate and engineer expert witness expressing an opinion as to the market value of the property. The motion, grounded upon the contentions herein discussed relative to admissibility of evidence, was denied by the trial court. Subsequently the cause was submitted to the jury under comprehensive instructions which warned them against indulgence in speculation or conjecture, or reliance upon improper elements and factors in arriving at a verdict.

On this appeal the first point presented for consideration is whether defendants' valuation witnesses were qualified to express an opinion on market value, in view of the fact that they could not base such opinion on a knowledge of the adaptability of the land to all uses, but only to particular uses. The real estate men were qualified only to value the land for carob culture and other agricultural use, and residential, recreational, and townsite purposes; admittedly they knew nothing of its worth as mining or reservoir property. Similarly the mining experts could testify only to adaptability and value for mining. Likewise the engineers who considered only reservoir use, were not qualified to speak on the subject of the other two classes of use. Appellant contends that a witness who admits that he does not know the market value of land considering all of its available uses, is not qualified to express an opinion of its value in terms of money, especially where the owners of the land claim great value for uses concerning which the witness confesses his ignorance. The law, says appellant, does not permit a party to circumvent the rule against stating a value in terms of money for a particular use, by presenting groups of witnesses who speak only concerning special uses.

[2-4] As a practical matter, it will at once be seen that if appellant were correct in this contention, it would be almost impossible in many instances to secure reliable opinions of market value for lands adaptable to particular uses in specialized fields. The present case affords a striking illustration, for it is unlikely that witnesses could be found able to qualify as experts in all three of the highly specialized and diversified fields of real estate, mining, and water rights. The general rule, it is true, does not permit evidence of the value in use of land, in terms of money, for a particular purpose (Sacramento, etc., R. R. Co. v. Heilbron, 156 Cal. 408, 410, 104 P. 979; Joint Highway District No. 9 v. Railroad Co., 128 Cal.App. 743, 754, 18 P.2d 413; City of Stockton v. Ellingwood, 96 Cal. App. 708, 716, 275 P. 228; City of Stockton v. Vote, 76 Cal.App. 369, 403, 244 P. 609,) but these authorities recognize the admissibility of opinions of market value of land given by experts who take into consideration the adaptability of the property for its highest available use, provided such use is not, as a matter of law, so highly speculative and conjectural as to have no relation to the market value. Thus in the case of City of Stockton v. Ellingwood, supra, where the plaintiff sought condemnation for reservoir purposes of land adaptable to both agricultural and reservoir use, the court said (96 Cal.App. page 716, 275 P. page 231):

"If a witness, by reason of his skill, learning or technical training, understands the adaptability of the lands in question for a particular purpose, and the demand for land for such purpose, he may state the market value of the land, although he may be entirely unacquainted with the other elements which would be considered by different buyers competing for the same property. * * * For instance, it is common knowledge that many of the mining properties in the foothills of the Sierras afford considerable forage, and in outward appearance resemble ordinary range lands. A witness, by reason of his technical skill, learning, capacity and training where the question is involved, might be allowed to express his opinion as to the market value of the properties, and though his opinion as to market value took into consideration the value of the premises for mining purposes, it could not be logically argued that such testimony should be stricken from the record because other witnesses saw only a surface value as a range for sheep or cattle. * * *" This holding is cited with approval in Joint Highway District No. 9 v. Railroad Co., supra, 128 Cal.App. at page 759, 18 P.2d 413.

[5] In the present case each witness for defendants was familiar with the land and knew of its adaptability to certain uses; each, therefore, having in mind the highest use with which he was familiar, was qualified to testify to market value within his knowledge and experience.

[6, 7] Where the highest use known to the witness, and a market value based upon a consideration of that use, is given, a statement by another witness of a lower market value based upon a consideration of a lesser use only, cannot be prejudicial to the condemner. The pyramiding of uses or values of uses would of course be forbidden, but that was not attempted here. The opinions of market value given by the witnesses who knew nothing of the adaptability of the land for terminal storage ranged from $211,850 to $374,424, whereas the opinions given by the engineers who considered the highest use to be reservoir use ranged from $700,000 to $994,610. As the award of $507,355 was less than 75 per cent of the lowest and 55 per cent of the highest value fixed by any witness who considered reservoir use, it would be as logical for defendants to protest the smallness of the verdict, as showing an exclusion of consideration of the highest use, as it is for appellant to assert that the amount allowed is so large as to indicate that it resulted from prejudicial error.

Appellant's further contention, argued under the main heading: "Testimony was erroneously admitted, expressing in terms of money, values of the parcels for particular uses" merely presents the subject above discussed from a slightly different angle. Appellant claims that the non-engineer witnesses, who testified concerning the value of the land exclusive of any consideration of its adaptability for reservoir use, stated its value for a particular use rather than its market value, as did also the engineer witnesses who considered nothing but the value of a portion of the property for reservoir purposes. Market value, says appellant, is not multiple, but is one sum for each parcel—one sum expressing the value of the land for all uses to which it is adaptable and for which it may be used.

[8-10] It is true that market value is not multiple; the value in use of property for a particular purpose is not the market value, but is merely a factor in determining such value. It is also the general rule, as above stated, that it is improper to express an opinion of value in use in terms of so much money. (Cases, supra.) A reconciliation of the varying language of many decisions touching this subject, and a clarification of the rules pertaining to it, may be found in the Joint Highway case. Joint Highway Dist. No. 9 v. Railroad Co., supra, 128 Cal.App. pages 753-759, 18 P.2d page 417. Quoting from the discussion:

"In our opinion the difficulty encountered in reconciling the various decisions and the language used by the various courts is due in part to the fact that the word 'value' is frequently used but it is often impossible to determine the sense in which that word is employed. * * * The distinction between value in use and value in exchange or market value has been generally recognized by the courts and it is well settled that it is the market value which governs in proceedings in eminent domain and not the value in use to either the owner or condemnor. * * * We believe it perfectly clear that certain land may be of but small value in use for one purpose and of much greater value in use for another purpose. It may therefore be said to have a different value for one purpose than for another if the word value be understood as meaning its value in use. But a given piece of land has only one market value and not a certain market value for one purpose and a different market value for another purpose. This is true because by what has been termed the classic definition, 'market value' is fixed as the 'highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable.' Sacramento R. R. Co. v. Heilbron, supra, 156 Cal. page 409, 104 P. 979, 980. This market value may be greater or less than the value in use to either the owner or the condemnor, but in the eyes of the law it is a fixed amount determined by 'the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use.' Sacramento R. R. Co. v. Heilbron, supra, 156 Cal., page 412, 104 P. 979, 981."

After thus defining the distinction between value in use of property and its market value, the court answers the very contention here made by appellant, saying at page 759 of 128 Cal.App., at page 419 of 18 P.2d:

"Appellant further attacks the competency of respondents' evidence on market value upon the theory that such testimony was merely of 'market value in itemized terms of money for the property's highest available use.' We have above indicated that in our opinion property has but one market value, and not a certain market value for one particular use and a different market value for another use. If, under the established rules, a witness is shown to have sufficient qualifications to give an opinion on market value, he may do so even though he knows nothing of the value in use of the property for uses other than its highest available use. [Quoting from City of Stockton v. Ellingwood, supra.] We believe that if we may properly speak of the market value of the land for its highest available use, such market value must necessarily be the same as the market value of the land."

[11, 12] In a late annotation (124 A.L.R. 911), the rule is similarly declared in the following language:

"The market value of the land is determined by taking into account the highest possible use to which the land is or may reasonably be put or be adopted and what purchasers would be willing to offer for it in view of such highest possible use. 18 Am.Jur. 879, Eminent Domain, sec. 244." Quoting from page 914:

"As stated above, the test of determining the owner's compensation is the market value of the land. But since the highest possible use to which the land may reasonably be adapted may be taken into consideration in determining what the market value of the land is, it is generally recognized that in determining the market value of the land to which the owner is entitled, the special adaptability or availability of the land for the use for which it is taken may be shown and taken into account, and if such adaptability or availability would increase the value of the land in the eyes of purchasers generally in the open market, quite apart from the necessities or needs of the particular condemner, the owner may be entitled to such increase as a part of its market value." See, also, City of Stockton v. Ellingwood, supra; McCandless v. United States, 298 U.S. 342, 345, 56 S. Ct. 764, 80 L.Ed. 1205.

[13, 14] While the authorities thus make clear the distinction between evidence of the value in use of land in terms of money for a particular purpose, and opinions of market value in terms of money, based upon a consideration of the highest available use of the land of which the witness has knowledge, it often requires a close reading of the evidence to determine whether testimony falls into the first or inadmissible class, or into the second or admissible class. In the present case the witnesses were questioned at length as to the adaptability of the land to various uses. Then after contemplating the highest use of which they had knowledge, they gave their opinions of reasonable market value. This was not erroneous. No witness was asked to state the monetary value of the land for any particular purpose. No witness testified in terms of dollars and cents to a value in use, or any value other than reasonable market value. While one engineer, Mr. Finkle, testified to two reservoir plans and valued the land under the first plan at a lower figure than that under the second plan, the value was given in each instance as an expression of market value. This statement of value approached closely that of a value in use, but it was not such. In fixing the first figure the witness considered certain acreage adaptable for reservoir purposes as its highest use and gave the market value of that acreage in consideration of that use. In thereafter fixing a second figure, the witness testified that he thought additional acreage was also adaptable to reservoir purposes as its highest use, and in consideration thereof fixed the market value of the additional acreage combined with most of that embraced in the original figure. The facts of the case, as already set forth, indicate that the exclusion of this latter testimony would not have affected the outcome of the trial, and the error, if any, in permitting the witness to make more than one estimate was therefore not prejudicial. The evidence, substantially as a whole, followed the normal line of proof adduced in cases of this character to prove market value.

Another charge made by appellant is that testimony was erroneously admitted of the aggregate value of combined portions of parcels adaptable to reservoir use. The three engineers testified that certain acreage comprising combined portions of nine parcels, possessed reservoir adaptability for the storage of foreign water to be imported from remote sources. One engineer, as above stated, suggested a second combination of acreage, embracing a larger reservoir area composed of portions of nine parcels and an entire tenth parcel. The engineers were permitted to express opinions as to the aggregate market value of these blocks of combined acreage. Testimony was also elicited from other witnesses as to the aggregate market value in bloc of the non-reservoir portions of the so-called reservoir parcels. Appellant contends that this aggregate valuation of combined acreage was improper, that it was violative of section 1248 of the Code of Civil Procedure, and that it resulted in complex computations which could not have but created confusion in the minds of the jury.

[15-18] The Code of Civil Procedure, section 1248, requires the court or jury to hear such legal testimony as may be offered and thereupon to ascertain and assess:

"1. The value of the property sought to be condemned * * * and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed." While the statute directs the jury to find the value of each parcel, estate, or interest, separately, it makes no requirement that evidence of value must be separately received, nor does it provide for the exclusion of testimony given on the subject of value with relation to more than one parcel or interest. Evidence of aggregate value of combined acreage adaptable to a particular use is not prohibited. Even were the rule to the contrary defendants would not be bound by the parcel subdivision or classification of their land made by appellant in its complaint for the sake of convenience of description. The land of defendants Holmes, for example, might properly be said to constitute one parcel or area. Its subdivision would become of importance only in relation to the determination of severance damages, which here were neither claimed nor allowed, or in relation to the necessity of proving by the testimony of engineers, the market value of that portion of the acreage adapted to reservoir use, and proving by the testimony of non-engineers, the market value of the remainder. The record shows that the evidence adduced as a whole was amply sufficient to support the market value of each parcel as found by the jury. This evidence included not only the expert testimony but a view of the premises by court and jury. There is no indication that any confusion was caused by complex computations, or that the jury experienced any difficulty in determining the market value of the land according to the parcels by which it was designated.

[19-21] Certainly appellant suffered no prejudice from the fact that the reservoir site contemplated a combination of acreage having boundaries different from those of designated parcel numbers, and embracing portions of parcels. Even where land is held in different ownerships, it may be shown that one portion, if and when combined with other portions, is adapted for reservoir use. Speaking on this subject in City of Stockton v. Vote, 76 Cal.App. 369 at page 405–407, 244 P. 609, at page 623, the court said:

"The Brack case, supra [Brack v. Mayor and City Council of Baltimore, 125 Md. 378, 93 A. 994, Ann.Cas.1916E, 880], is also authority for the proposition that adaptability of a defendant's land for reservoir purposes may be taken into consideration, although his land alone does not constitute an entire reservoir site and a complete reservoir site requires the joining of his land to a number of other tracts of land belonging to different owners. The record in this case shows that the lands included within the proposed reservoir site are owned by at least 32 different persons; but we do not find in the transcript anything further that would lead to the declaration, as a matter of law, that it is impractical to join all of the lands with the lands of the defendant to form such reservoir. * * * If it should appear in the case at bar that there are other lands which the defendant does not own and cannot acquire, then and in that case, which is a fact for the jury to pass upon, the value of the land for reservoir purposes should be eliminated. In other words, the practicability of uniting the lands in one ownership for reservoir purposes, and the cost and expenses thereof, and the time consumed in so doing, are elements of fact which would bear upon the market value of the premises in question, and, we think, would be considered by any bona fide purchaser of the land purchasing for any purpose for which the land is reasonably adapted, and where the land is only a part of a larger tract owned by a number of individuals, all of these facts should be submitted to the jury under proper instructions to take into consideration whether the location of the land does or does not add to its market value by reason of its adaptability for reservoir purposes when joined to other lands." See, also, discussion and review of authority in City of Stockton v. Ellingwood, supra, 96 Cal.App. pages 726-739, 275 P. 228; McCandless v. United States, supra.

From a practical standpoint it would appear that in the present case the jury enjoyed a distinct advantage in having before it for valuation all of the land adapted to use as a reservoir site, with evidence of the aggregate value of the acreage comprising it, as well as of the aggregate value of the acreage suited to other uses.

The point urged most strongly by appellant is that the defendants were erroneously permitted to present for the consideration of the jury a valuation of their properties contingent and based upon the realization of any one of four highly speculative, remote, conjectural and hypothetical projects for the development and sale of water and electrical energy. In brief, the challenged evidence is that which was elicited from defendants' engineer witnesses, first on cross-examination and later also on direct, for the purpose of testing the credibility of their statements that the reservoir acreage was particularly adapted to use for terminal storage, and that there was a potential demand and market for lands so adapted. The witnesses were allowed to outline in great detail several projects which they considered feasible, economically and otherwise, for the importation of varying amounts of available water into the Cajalco basin from locations 15 to 90 miles distant, said water to be used at points en route for the development of electrical energy, and then to be stored and sold. The elements involved in a consummation of these projects were described, that is, the necessity for acquiring by condemnation or otherwise available water supplies, water rights, lands, rights of way, franchises, state and federal licenses, and the like. Details of required construction work, such as tunneling, were given. Numerous estimates were made in dollars and cents, including estimates of the total cost of the respective enterprises ranging from $2,400,000 to over $8,000,000, and estimates of profit to be derived from the sale of electrical energy and stored water. The testimony covered all elements which might be considered by a prospective purchaser of the Cajalco reservoir acreage for terminal storage purposes.

Appellant contends that the scope of this evidence and the remote, conjectural, and speculative elements which it embraced, so confused and misled the jury that their awards reflected a "speculative value for an unrealized specifically planned use, rather than a present market value" of the property. If any one of the projects upon which defendants' engineer witnesses based their opinions of market value was too speculative or conjectural, says appellant, then those expressions of market value should have been stricken.

[22, 23] The rule which requires the rejection of testimony evaluating remote, conjectural, speculative, and hypothetical uses and elements is of long standing. It is stated in City of Stockton v. Ellingwood, supra, 96 Cal.App. at page 722, 275 P. at page 234, quoting from 10 Cal.Jur., page 1020, as follows:

"Where a witness testifying as to value, bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are chief elements in the calculations which lead to his conclusions, his testimony should be rejected. This applies with great force where the opinion is based upon pure speculation. Thus, in a proceeding to condemn land for reservoir site, estimates of value based upon speculative matters, increases of population, extension of water system, and the profits which would result from the distribution and sale of the water, are not admissible." In Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick, 201 Minn. 442, 277 N.W. 394, 399, 124 A.L.R. 897, it is said:

"Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth. (Citing cases.)" See, also, East Bay Mun. Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178.

While the authorities are thus in full accord in their rejection of speculation and conjecture as a basis for an opinion of market value, they are far from definite in their demarcation of the point at which the conjecture, speculation and remoteness may be said to vanish, leaving only those elements which necessarily enter into the calculations of a prospective purchaser and should properly be taken into account as affecting market value. In the present case defendants were confronted with the problem of establishing the reasonable market value of the reservoir acreage based upon a consideration of its availability for a dual reservoir use, that is, regulatory storage, and terminal storage, meaning storage near the point of distribution of water imported from outside sources. Obviously, a broader scope of inquiry is required to determine adaptability and potential demand for property for the latter use than for the former. It is this difference between the two types of storage, coupled with the fact that the present day colossal water projects with their remote storage requirements, were barely within the conception of engineers of a former generation, which distinguishes late holdings from those of the early cases and necessitates a gradual broadening of the restricted rulings of former days to keep pace with modern developments.

Adaptability of property to terminal storage and a potential demand for the site for such purpose obviously cannot exist apart from economically feasible projects for the importation of water. The evaluation of such a site must necessarily include a consideration of the following elements: Existence of a sufficient foreign water supply available for importation. A demand for the supply which may be met economically and feasibly. A peculiar fitness of the land for terminal storage. A plan for the water importation and terminal storage which is reasonably probable of achievement, and is not dependent upon the realization of purely remote, conjectural, speculative or hypothetical water projects. In the present case appellant launched the inquiry into these elements by its sweeping cross-examination of the first engineer witness to testify for defendants with respect to the availability of and demand for the acreage as a terminal storage site. In support of his opinion, given on direct examination, that the land was peculiarly fitted to said use, the witness, under cross-examination, outlined the several water importation projects, to which testimony appellant later took exception. Detailed facts and figures were given to prove economic feasibility, potential demand, and reasonable probability of achievement. Similar testimony was adduced on both direct and cross-examination of defendants' other two engineer witnesses. This evidence showed that the projects, far from being purely remote, conjectural, and speculative, lay well within the realm of probable achievement and economic feasibility. They were not conceived or outlined for the mere purpose of proving a point in this litigation or creating a market for the property, but represented the fruit of years of study and effort on the part of expert engineers to best plan for the conservation and use of available water supplies and storage sites in certain districts of southern California, in order to meet and satisfy an existing and fast growing public demand.

[24-27] Appellant is in no position to complain of the volume of the data adduced relative to these projects. When a qualified witness has testified to the market value of certain land and has stated, as he may, that he has considered its adaptability for the highest available use within his knowledge, the cross-examination of such a witness should be given a wide scope. His testimony on market value is based upon the theory (1) that the land is adaptable to such highest use, and (2) that the use would be practical, feasible, economical, and profitable, thereby showing at least a potential demand, without which the adaptability of the land for the use could not properly be considered in the fixing of market value. In testing this theory on cross-examination, the field of questioning is almost unlimited, and hence the length of the trial of cases of this character. The case of East Bay Mun. Utility Dist. v. Kieffer, supra, (99 Cal.App. page 251, 278 P. page 481) in holding that "the admission of evidence which leads to conjectural speculations is equally harmful, whether on cross-examination or direct", at the same time recognizes that "great latitude is allowed in the cross-examination of witnesses who have testified to the market value of land", and unless it appears to the court that such testimony is based upon improper considerations, it will not be withdrawn from the consideration of the jury. See discussion in City of Stockton v. Ellingwood, supra, 96 Cal.App. at pages 737-744, 275 P. 228.

In the present case appellant itself fixed the scope of the inquiry by its minute cross-examination of the first engineer witness. Once the sweeping inquiry was opened on cross-examination, its continuance on both direct and cross-examination of later witnesses was not harmful to appellant. As stated in Joint Highway Dist. v. Railroad Co., supra, 128 Cal.App. at page 766, 18 P. 2d at page 422:

> "The fact that some of respondents' witnesses may have been permitted to give other testimony on direct examination, which testimony should have been permitted only on cross-examination, is not sufficient ground upon which to predicate a motion to strike all of the testimony of all of said witnesses. We are unable to see where any error found in the record has resulted in any prejudice to appellant."

[28, 29] While data so detailed and voluminous as that found in the present record could hardly be expected to be free from every objectionable feature or item of conjecture, it appears that the criticisms of appellant in the main are such as go to the weight of the testimony but do not affect its admissibility. After eliciting much of the challenged evidence, appellant allowed it to remain in the record without a motion to limit its application to the issue for which it was admissible, to wit: to show feasibility, potentiality, and adaptability, or in other words, to show existing water supplies, feasible for importation and utilization in a proposed reservoir for which the lands were adaptable, and had a potential value. Freely conceding that evidence was admitted which should have been stricken, it does not necessarily follow that the action of the trial court in admitting such evidence and thereafter failing to strike it constituted prejudicial error, requiring a reversal of the judgment. As said in Joint Highway Dist. v. Railroad Co., supra, 128 Cal.App. at page 765, 18 P.2d at page 422, quoting from City of Stockton v. Ellingwood, supra:

"Ordinarily, the admission or exclusion of opinion evidence, where it is not of a determinative character is not regarded as sufficient to justify a reversal." In the present case the reasonableness of the award indicates that the verdict of the jury was not influenced by any testimony erroneously admitted and that there was no error in the rulings of the trial court of sufficient consequence to justify a reversal.

[30, 31] The fact that the realization of any of the water importation projects outlined by the engineers would depend upon the solution of problems which might arise in connection with the acquisition of water rights, lands, rights of way, easements, state or federal franchises, or other interests essential to consummation of the plans, did not render their testimony too remote or speculative to merit consideration by the jury. Such uncertainties and difficulties are only those which confront every prospective purchaser of a site for terminal storage. They are commonly met and conquered in every present day large scale water project. If it were necessary to eliminate them before permitting the expression of an opinion of market value of a terminal storage site, it is safe to say that no value based upon adaptability of the land to that use could ever be reliably established. Given a sufficiently urgent public demand for additional water, an available supply for importation, and an economical and feasible plan for its transportation, there is certain to be forthcoming the necessary capital to finance the undertaking upon suitable terms, with all essential governmental sanctions, and power in the public agency managing the development to procure, by condemnation or otherwise, all necessary lands, easements, water rights, or rights of way. In short, the ordinary problems inherent in the development of property for terminal storage affect only the weight and not the admissibility of evidence attesting the potential demand for and adaptability of the site to such use under economically feasible conditions, and other proper elements of evaluation. McCandless v. United States, supra, discussion at page 346 of 298 U.S., 56 S.Ct. 764, 80 L.Ed. 1205.

In the present case none of the engineer witnesses based his opinion of market value upon the realization of any particular completed project. Each contemplated the projects described as an element so related to the adaptability and value of the reservoir acreage that no informed prospective buyer would fail to take such element into consideration in fixing the price he would be willing to pay for the land. Each engineer rested his opinion upon the conclusion that there was an existing demand for the importation of water; that the demand could be met economically and feasibly from specified outside sources by use of the described facilities; and that the achievement of the importation was a reasonable probability that would be considered by any informed prospective purchaser. The fact that these witnesses were able to support their expressions of opinion by detailed facts and figures gave strength to their testimony.

[32-34] Appellant is incorrect in charging that the engineers actually arrived at their opinions of market value by "capitalizing income", although they refrained from making use of that term. The method of fixing a valuation by the capitalization of income, which has been frequently condemned (East Bay Mun. Util. Dist. v Lodi, 120 Cal.App. 740, 760, 761, 8 P.2d 532; City of Stockton v. Vote, supra; East Bay Mun. Util. Dist. v. Kieffer, supra; San Diego Land, etc., Co. v. Neale, 78 Cal. 63 20 P. 372, 3 L.R.A. 83) does not forbid the consideration of the highest use to which the property may be put and the probable income therefrom as an element of value only. The engineers' calculations of the probable earnings of the projects described were admissible for the purpose of demonstrating the feasibility of the projects. No mathematical relation was shown between these estimations of earnings and the expressions of opinion of market value. But such estimations, showing economic feasibility, were factors to be considered with other elements of evaluation in their effect upon the weight to be accorded the opinions of market value given by the engineers. There was no statement by any engineer that the market value expressed by him was the equivalent of the price the land would bring if any of the projects should be consummated. Apparently in reaching an opinion of market value each engineer considered, as an element of evaluation, the probable influence of the prospective projects upon the minds of prospective purchasers. This was not, however, tantamount to fixing a future value which would exist only upon consummation of a project, or to capitalizing earnings, and it was not erroneous.

[35] The record is singularly free from any effort on the part of defendants to secure a larger award by taking advantage of the necessities of the condemner and stressing the strategic location of the reservoir acreage for its purposes. As already stated, where land sought to be condemned is peculiarly valuable for reservoir purposes, the major factor to be considered in making an award of damages is "what the land is worth in the market for reservoir purposes, not what it is worth to the condemnor for reservoir purposes". City of Stockton v. Ellingwood, supra, 96 Cal.App. at page 715, 275 P. at page 231. Again, as said in Joint Highway Dist. v. Railroad Co., supra, 128 Cal.App. at page 755, 18 P.2d at page 417:

"It frequently happens that a condemnor is willing to pay almost any price for a given piece of land, strategically located, rather than forego a contemplated project; but it is well settled by the authorities, above cited, that advantage may not be taken of the necessities of the condemnor. In other words, the price which a single prospective purchaser might be willing to pay does not establish market value, which market value must be determined, in the last analysis, by the 'rule of common estimation.'" See, also, San Diego Land, etc., Co. v. Neale, supra; Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 28 P. 681; Temescal Water Co. v. Marvin, 121 Cal.App. 512, 9 P.2d 335. It is failure to observe the above rule which has led to error in many instances and has resulted in the restricted rulings on admissibility of evidence of the type considered in many of the cases upon which appellant relies. This is brought out by the late annotation in 124 A.L.R., pages 910, et seq., where it is said at page 914:

"The test of determining the owner's compensation is the market value of the land. But since the highest possible use to which the land may reasonably be adapted may be taken into consideration in determining what the market value of the land is, it is generally recognized that in determining the market value of the land to which the owner is entitled, the special adaptability or availability of the land for the use for which it is taken may be shown and taken into account, and if such adaptability or availability would increase the value of the land in the eyes of purchasers generally in the open market, quite apart from the necessities or needs of the particular condemner, the owner may be entitled to such increase as a part of its market value."

The reservoir acreage involved in the present case was shown by defendants to be uniquely adapted to use as a site for terminal storage. It comprised within itself all territory necessary for such development and was strategically located for such use as a link in either appellant's enterprise, or in any of the several projects outlined by the engineer witnesses. In other words, appellant's particular necessity was not used by the engineers as a controlling element of evaluation in arriving at an opinion of market value. They outlined other projects which were not merely fanciful but were subjects of actual contemplation, economically feasible, and reasonably probable of achievement, thus showing a potential demand for the property for terminal storage by purchasers or condemners other than appellant.

[36] More than 90 instructions were given by the trial court to the jury, about 47 for each side. Appellant attacks eight of those given at the request of defendants, the main complaint being that they erroneously emphasized portions of evidence improperly received and submitted to the jury. Much of the argument on this point is answered by the conclusion herein reached that the trial court's rulings on the admissibility of evidence were not prejudicially erroneous. The trend of the instructions was simply to follow these rulings. An examination of the charge in its entirety shows that the jurors were repeatedly directed not to indulge in or consider mere speculation or conjecture, and that limitations were also placed upon their consideration of other matters. On the whole they were fully and fairly instructed, as indicated by their return of reasonable verdicts, well within the range of the evidence. The error in instructions, if any, was not prejudicial.

[37] Appellant contends that a number of matters placed before the jury during argument by defendants' counsel were without support in the evidence and were erroneous. Especial complaint is made of certain charts and tabulations which were exhibited during the argument, smaller copies of some of them being handed to the jurors. In a case in which so much time had elapsed and in which the evidence was so voluminous, the use of the charts and tabulations, even though not admitted in evidence, was not objectionable for the

purpose of summarizing and collecting portions of the evidence which counsel desired to discuss, provided these aids to argument were so prepared as to fairly and accurately depict the proof which they purported to cover. Appellant charges that the data was so unfair as to constitute prejudicial error.

[38] The record shows that during the course of the argument, and over the exceptions and objections of counsel for appellant, increasing reference was made to the charts and other matter, until finally all counsel for the respective parties repaired to the chambers of the trial judge to discuss the question of whether the continued use of such aids should be permitted. After a full hearing the trial court, in the exercise of its discretion, permitted counsel to make further recourse to the data in resuming his argument before the jury. It cannot be said that this ruling constituted an abuse of discretion. There were apparently some inaccuracies in the data, but there is no showing that they were of sufficient substantiality to constitute prejudicial error.

[39, 40] Numerous other assignments of misconduct on the part of defendants' counsel are urged as grounds for reversal of the judgment. The record shows that throughout the argument to the jury, counsel on both sides indulged in remarks which could better have been omitted, but it also shows that any danger of prejudice to the rights of either party was removed by timely admonishment and instruction to the jury. Furthermore, this question of prejudicial misconduct was one for the trial court to pass upon in disposing of appellant's motion for new trial. The denial of that motion was tantamount to a ruling that the verdicts, both as to the challenged and the unchallenged awards, were neither excessive nor the result of prejudice. The record supports this conclusion.

The judgment is affirmed.

We concur: GIBSON, C. J.; TRAYNOR, J.; PULLEN, J. pro tem.

CURTIS, Justice (dissenting).

I dissent.

These cases were before the District Court of Appeal, Fourth Appellate District, and decided by a single opinion. That court reversed the judgments of the trial court. A majority of this court voted to grant said petition for the sole reason that one of the grounds upon which said judgments were reversed was that the jury, under instructions of the trial court, had allowed interest on the judgments in favor of the defendants. As stated in the majority opinion, that question has been decided in favor of the defendants (Metropolitan Water District v. Adams, et al., 16 Cal.2d 676, 107 P.2d 618) and is no longer an issue in the present case. The opinion in the instant action was written by Presiding Justice Barnard and concurred in by two acting members of that court, and reported in Cal.App., 99 P.2d 659. After deleting from said opinion all reference to the question of interest on the judgments, the remaining portion of said opinion is adopted as my dissenting opinion in said cause. The portion of said opinion thus adopted as a dissent from the majority opinion is as follows:

"These are actions in eminent domain. The plaintiff, engaged in constructing an aqueduct in connection with the bringing into the state of water from the Colorado river, sought to condemn certain lands required by it for reservoir purposes in what is now known as the Cajalco reservoir, situated in Riverside county. The lands required for this purpose embrace 526 parcels, with a total of more than 8,000 acres, and the reservoir was designed to hold some 225,000-acre feet of water. The trial here in question, in which these two actions were consolidated, involved fifty-eight of these parcels of land, was had before a jury and lasted exactly a year. During the trial the plaintiff acquired thirty-six of these parcels and after judgment acquired two more, leaving twenty parcels which are involved in this appeal. The main controversy here relates to ten of these parcels, totaling 862 acres, owned or controlled by the defendants Holmes. The defendants claimed that portions of each of these parcels formed two areas which were specially adapted for use for reservoir purposes, the two areas covering something over 400 acres.

"While this appeal is presented upon a bill of exceptions the record, including exhibits, is voluminous. In the interest of brevity, references herein to the evidence must be by a general summary, in most instances, rather than by going into details. The defendants presented five witnesses who qualified as what we may call real estate experts, but who testified that they knew nothing concerning the values of the lands for reservoir purposes. They considered the highest and best uses of these ten parcels, which may be referred to as the reservoir parcels, although only portions thereof were suitable for the reservoir use claimed by the defendants, as their use for agricultural and subdivision purposes. The defendants also produced three engineer witnesses who testified that they knew nothing of the value of these lands other than for reservoir purposes and who considered their adaptability to such purposes as their highest and best use.

"With respect to the ten parcels mainly involved here the defendants' engineer witnesses testified that there are thereon two natural reservoir sites, one capable of holding 3,500-acre feet of water and the other 8,500-acre feet; that to use these reservoir sites it was necessary to bring water in from outside sources as no considerable water was available in that watershed; that a demand and market for such reservoir sites was to be anticipated in the reasonably near future; and that such use of these portions of the lands constituted their highest and best use. In support of the claim that such a market for lands adapted to reservoir use existed these witnesses were allowed to outline in the greatest detail four projects which they considered feasible, economically and otherwise, for the bringing in of 12,000-acre feet of water to be stored in these two proposed reservoirs and then sold for irrigation purposes, the projects including the use of the water en route at some four or five points for the purpose of developing electrical energy which was also to be sold. These projects involved bringing the water various distances, ranging from twenty to thirty-five miles.

"These four projects may be generally described as follows: 1. Arrowhead. It was proposed to acquire from the Arrowhead Corporation whatever water rights it has in the upper Mojave basin on the other side of the San Bernardino mountains from these lands; to adjust the claims of those now using the waters of the Mojave river; to acquire from the Arrowhead Corporation and complete certain uncompleted tunnels and works which it was asserted could be used to divert this water into Lake Arrowhead; to acquire from the Arrowhead Corporation the right to so raise the existing dam which creates Lake Arrowhead as to permit an additional storage in said lake of 25,000-acre feet of water, including the right to flood the lands surrounding the lake to the extent necessary to effect such additional storage; to bring said water from Lake Arrowhead to the San Bernardino valley by tunnels and penstocks and through four proposed power houses; and to then conduct a part of this water to these proposed reservoirs by conduits and by obtaining the permission of a private corporation to enlarge and use an existing canal owned and used by it. The cost of this project was estimated at from $4,000,000 to $4,372,500. 2. Rock creek. This was a somewhat similar project, in which it was proposed to divert sufficient water from Rock creek; to temporarily store such water in two proposed reservoirs on the northerly slope of the San Gabriel mountains; to convey the water through an open ditch and through a tunnel to be driven through the mountains to Cajon creek; and then to take this water through this creek, through various power houses, and through various conduits to the proposed reservoirs in question. This project was estimated to cost $6,125,373. 3. Mojave. In this project, estimated to cost from $7,052,750 to $8,264,600, it was proposed to bring 40,000 acre-feet of water from the Mojave river through the San Bernardino mountains. Twenty-eight thousand acre-feet was then to be sold in the San Bernardino valley and the remaining 12,000 feet taken on to the reservoir sites in question, the water being used on the way to develop electrical power at various proposed power houses. 4. Warm creek. This was a more modest project, estimated to cost from $2,400,000 to $2,509,650. It involved the annual diversion, during the rainy season, of 12,000 acre-feet of water from Warm creek, a tributary of the Santa Ana river, and the taking of this water through canals belonging to a private corporation and to the Riverside Water Company to the reservoir sites in question.

"These witnesses fully described these projects which they said would be considered by a prospective purchaser of the reservoir lands in question, giving estimates of the cost of acquiring the necessary water and other rights, the cost of constructing various items of the proposed projects and the annual cost of operating the projects, and assuming that money could be borrowed for the purpose of constructing and putting through the projects at a named rate of interest. They also presented figures showing the exact amounts that could be received from the sale of electrical energy at a definite and fixed price and the amounts that would have to be received from the sale of water stored in these reservoirs in order to make the whole enterprise profitable. In making these assumptions, in the case of each project, they allotted a price of $700,000 to $738,500 for the purchase of the two reservoir sites on the Holmes land, including this purchase price as a part of the cost of the proposed project. Having thus supported their claim that these two areas were available as reservoir sites, that a market or demand therefor existed and that their use for that purpose was economical and otherwise feasible, two of these engineer witnesses then testified that the market value of these two areas, comprising the proposed reservoir sites and constituting a portion of each of the ten parcels now in question, was from $715,000 to $738,500. One stated that the market value of the portion of the lands owned by the Holmes which included the two reservoir sites was $715,000, that this portion consisted of 417 acres which he valued at about $1,715 an acre, and that of this he valued a part at $3,000 an acre, a part at $5,000 an acre, and a part at $1,500 an acre. The other valued the area within the two reservoir sites, about 400 acres, at $738,500, 'so far as Mr. Holmes owns the basin lands'. The third engineer witness valued all of the Holmes land at $700,000.

"Some excerpts may be given to illustrate the nature of the testimony of the engineer witnesses and upon which their opinion as to the market value of portions of these parcels was based. One witness, in describing the Arrowhead project, said in part:

" 'The cost of pumping figured at eight mills would be $37,570, as an annual charge. The cost of installation, which takes me clear down to the Temescal Canyon, is $506,000. That is included in my four million dollar estimate. The Gage Canal would be used from its intake to practically its end as such—a distance of approximately 13 miles. There would be no expense involved in the use; there would be an exchange.

" 'As to the length of conduit, in addition to the tunnels, there is a 3,000 foot penstock line to a power house. A penstock is the pressure pipe that leads from the forebay of the power house down to the turbines. Then there are 8,200 feet of conduit to another penstock; then 19,400 feet; then 9,000 feet of penstock; then 10,750 feet of conduit; then 21,500 feet which takes it up to the intake of the Gage Canal, and then 2300 feet of conduit from the Gage Canal up to the Holmes' reservoirs. Then there would be 2,400 feet of extension for the Gage Canal, which would make a total of 85,550 feet of conduit, or roughly, 16½ miles.

" 'The breakdown of my elements of expense involved in connection with this project, first—the acquisition of the Arrowhead rights, $200,000; the completion of the Arrowhead project; the completion of the Deep Creek tunnel and increasing the dam, $287,500; then the power drop pipe line and the outlet tunnel of 9,000 feet is $1,258,750. That takes us to the Gage Canal. From there into Cajalco and over the summit out of Cajalco down into Temescal Wash, $506,000 additional. These items, with the exception of the acquisition of the Arrowhead rights, are taken inclusive of 25%. That makes a total up to that point of $2,052,000, which leaves $1,747,750 for the Cajalco reservoirs and dam sites and the cost of construction of the two dams there.'

"With reference to the Gage Canal, to which he referred, this witness further testified:

" 'I think an exchange could be worked out. This water will be used in Orange County, and there has been a "dicker" on for several years, an interpretation of a contract there, and I think that could be straightened out in this exchange. That would be one of the factors that would have to be considered by my prospective purchaser unless he would want to enter into some payment with the Gage Canal Company. That would depend upon future negotiations, the result of which at the present time would be unknown.'

"In speaking of the proposed Mojave project, he said:

" 'The establishment of the two dams and reservoirs at the Cajalco site is but a part of another program of enterprise. It is the terminal storage on the Mojave project and is the terminal storage of only a portion of the water from the Mojave river. In other words, I propose to bring 12,000 feet of that 40,000 acre-feet diversion to the Cajalco reservoir.'

"He further testified:

" 'I am presupposing that a purchaser would buy the Holmes lands and pay $715,000.00 for them for the purpose of tying in with the Mojave project that I have spoken of. That valuation is based upon an assumption that it would be an economical project and a profitable one. * * *

" 'I am basing my estimate of value, as I said I did with reference to the Mojave project, upon the ability of some one to purchase not only the Holmes' sites and dam sites and construct those dams and to pay the price I have mentioned, but on his ability also to procure this water and profitably conduct the enterprise. * * *

" 'My statement as to market value, presupposes a particular purchaser who would pay $715,000 for the Holmes' reservoir sites and dam sites, and that he would buy those dam sites and reservoir sites as a part and parcel of a large enterprise involving a large expenditure of money; that he would buy the property and pay for the property that particular price because of his particular ability to acquire water on it at a particular price and at a particular expenditure. He might have in mind the consideration of the possible difficulties that might exist in the obtaining of the water. I think he would be convinced the difficulties are not insurmountable; some might be imaginable.'

"Another witness testified:

" 'The total cost for my Mojave project is $6,225,373. The project will produce 6,375,600 kilowatt hours per year on an average to the Edison Company plant; 4,900,000 kilowatt hours at the Fontana; and at the Narrows, 13,925,400 kilowatt hours; selling at five mills would produce $126,005. I figured an annual depreciation of $62,254, or 1 per cent straight line depreciation. I figured the yearly operation to be $70,000. I figured 4½ per cent interest on a municipal organization at the present market; that is an organization which has a taxing power. I figured my customer for the Holmes' land might be a private corporation or a public corporation. If it were a sound, private corporation they obtain their money at 4½ per cent, so it would make no real difference. The interest item was $280,142. The depreciation fund is invested in either retiring—if they have any securities out bearing interest, and of course, to amortize the debt and also figure the depreciation, would be figuring the same thing twice, so that cannot be repeated in this calculation. The $70,000 covers operation, maintenance, salaries of officers, current repairs, and there are no other items of expense. * * * My gross figure from the sale of power is $412,396, and subtracting the cost would give a net of $286,391, which is the amount of money I would have to get from the sale of water without giving the project any profit per annum. This divided by 12,000 acre feet of water would mean that the net cost of water delivered without distribution facilities to any of the users would be about $23.80 per acre foot for firm water.'

"And further:

" 'In my figures to which I have testified relating to the Mojave project, we allowed $300,000 for the acquisition of water rights in the valley in addition to the $250,000.00 to the Lake Arrowhead Company, and we then added a million dollars for profit on the two reservoir sites and dam sites, of 8500 and 3650 acre feet capacity, respectively.'

"There was evidence that permits would have to be obtained from federal and state authorities before any of the four proposed projects could be undertaken, and it was frankly admitted that there were many existing private rights and interests which would have to be acquired or settled with in order to put through any of the proposed projects. One witness testified:

" 'The cost of acquiring water rights (Mojave Project) is included in the figures I have already given you. It would cost $300,000.00, which is not exactly for water rights. I believe it would be desirable to expend about that sum to prevent any unfounded objections, because the water is really surplus water, but many people object even to taking that. It is for that sort of thing either for litigation or for paying for water rights.'

"A report introduced in evidence concerning water development in the Mojave Basin, contained the following:

" 'The physical situation encountered in creating the greatest possible use would be complicated even if no development now existed, but when the necessities of existing city and irrigation developments are considered and also the at present unused legal rights to water involved, the situation is extremely complex.'

"And another witness testified:

"'I think it would be prudent for my prospective buyer to iron out all of these difficulties before he buys the Holmes' land. He would want to satisfy himself as to the availability of that water before he pays $700,000 for the reservoir site on the property.'

"It may be here noted that these witnesses not only assumed, in connection with their proposed projects, that the necessary water rights and reservoir sites therein contemplated were procurable, but they assumed that these could be obtained at figures which are quite small in comparison with the amounts allotted to similar purposes in putting into use the two reservoir sites on Mr. Holmes' land. For instance, they assume they could acquire both the lands needed for reservoir purposes and the necessary water rights in their proposed projects at about $125 an acre while they allowed more than $1,700 an acre for the Holmes land without any water rights.

"The first of these engineer witnesses testified in general as to the adaptability of certain portions of these lands for reservoir purposes, to the fact that water was available for storage therein, that a market and demand existed, and then gave his opinion as to the market value of the areas especially suited for reservoir purposes, being portions of the ten parcels now in question. In the case of this witness the testimony along the lines above referred to, as to the feasibility of certain of these proposed projects for the purpose of bringing in water to store in the proposed reservoirs, with the cost thereof and the income therefrom, was brought out upon cross examination by the plaintiff. In the case of the other two witnesses these matters were gone into upon their direct examination by the defendants. In each instance, objections were made to the expression of an opinion as to the value of these lands for these purposes and of the market value of the lands, which were overruled. Motions to strike were also made upon the ground, among others, that the opinions of value were based upon inadmissible evidence of matters which were too remote and speculative to be considered by the jury or to justify the expression of an opinion of value which was, in fact, based thereon. These motions to strike were denied.

"Generally speaking, the ten parcels which included the two claimed reservoir sites contained some 862 acres, about 400 acres of which were said to be especially suited for reservoir purposes and which were included in the four projects proposed by the defendants. The total value given to these ten parcels by the defendants' real estate experts ranged from $211,000 to about $374,000. The defendants' engineer witnesses valued these ten parcels at more than $700,000. The jury allowed for them $507,305, exclusive of an allowance for interest. The court entered judgments in accordance with the jury's award and the plaintiff has appealed.

"A number of points raised by the appellant relate to errors in connection with the admission of evidence, and the submission of the same to the jury, in connection with the claimed existence and feasibility of use of two smaller reservoir sites upon a portion of the property involved, and may be treated together. In this connection it is contended that the respondents were erroneously permitted to present for the consideration of the jury a valuation of their properties contingent and based upon the realization of any one of four highly speculative, remote, conjectural and hypothetical projects for the development and sale of water and electrical energy; that these proposed projects were too remote and speculative because, among other things, they were presented to the jury as prospective sources of profit which would result from the sale of electrical energy at a fixed rate and the sale of water at competitive rates, and because each of these projects involved the acquisition of lands, water rights, rights of way, easements and franchises and the right to use other privately and publicly owned facilities and each was, moreover, dependent upon the discretionary action of state and federal authorities; that each of the respondents' valuation witnesses were not qualified to express an opinion on the market value of the lands because each admitted that he knew nothing about their value except for one purpose; that testimony was erroneously admitted expressing in terms of money the values of the parcels for particular uses; that testimony was erroneously admitted of the aggregate value of the combined portions of several parcels which were claimed to be adapted for reservoir use, and other testimony of the aggregate value of the other portions of these parcels for which no reservoir use was claimed; and that the court erred in overruling the objections to the admission of evidence to the effect that under the four proposed projects water could be furnished to consumers at a rate which the consumers could afford to pay and as low as any water which was available to such consumers, to evidence comparing the cost of developing water storage at Cajalco to the cost of such storage in two hundred and twenty-five other reservoirs in southern California, and to evidence of specific plans and figures in connection with the four proposed projects in a manner to visualize them for the jury as completed and working projects.

"The respondents contend that the market values of these lands, as testified to by their engineer witnesses, were not contingent or based upon their testimony relating to these four proposed projects; that the opinions as to market values expressed by these witnesses were not based upon the realization of any remote or speculative project but were opinions on market values given by qualified witnesses, taking into consideration the highest and best use for which the particular land was available, namely, its use for a reservoir site; that the witnesses merely considered this use as one that an informed buyer would reasonably consider in arriving at a price he would be willing to pay; and that these witnesses merely gave the evidence to which we have referred to show that a demand for such reservoir sites existed, that these lands were economically and practically adapted to such a use, and that there was a reasonable probability that such projects were feasible and that the lands could reasonably be expected to be required for that purpose within a reasonable time. It is argued that the evidence of the cost of such proposed projects and of the probable cost to consumers of water and electrical energy were admissible as showing the feasibility of using these lands for other reservoir purposes and the probability of an early demand for that purpose. It is further argued that, in any event, the matter of remoteness and speculation in connection with these proposed projects affects only the weight of the evidence and not its admissibility.

"In the support of their contention that the evidence in question was admissible the respondents particularly rely upon McCandless v. United States [9 Cir.], 74 F. 2d 596 [Id.], 298 U.S. 342 [56 S.Ct. 764, 80 L.Ed. 1205], and City of Stockton v. Ellingwood, 96 Cal.App. 708 [275 P. 228]. The McCandless case involved land situated in the Territory of Hawaii. There was evidence that a portion of the land which the government sought to condemn was suitable for the raising of sugar cane if water could be made available. The landowner offered to prove that he owned other land some eight or ten miles away which produced ample water; that it was practical and economically feasible to transport such water to the land in question; that the bringing in of such water could be anticipated with reasonable certainty; and that the cost thereof would be less than the cost of furnishing water to similar lands. The court rejected this evidence as too remote and speculative and instructed the jury it must disregard any possibility of bringing outside water to the land in question, except as such water might be brought from an adjoining tract owned by the same owner. Upon appeal the court pointed out the usual rule that the most profitable use to which land can probably be put in the reasonably near future may be shown and considered by the jury as bearing upon its market value, and after saying that any incompleteness or insufficiency in the offer of proof with respect to the cost of the improvement and the increased value of the land, as suggested by the government, could probably be remedied by additional evidence if necessary, held that the offered evidence related to the value of the land when used for a purpose to which it could probably be put and that its exclusion was prejudicial error. In that case the owner of the land sought to be condemned owned the water supply and sought to prove that it was feasible to bring it to the land in question for use thereon. The court held that such evidence was not too speculative or remote and further intimated that the cost of making the improvement might be shown. Aside from the question as to the weight that should be accorded to this decision in this state, it seems apparent that the instant case involves a degree of remoteness and speculation much greater than the one there being considered. Apart from any other consideration, there is a wide difference between permitting evidence of the cost of reasonably possible improvements to land, through such things as providing for the irrigation or drainage thereof, amd permitting evidence of the cost of large and hypothetical projects for purposes not directly connected with the land, which may incidentally involve using the land as a part of the greater scheme. In the instant case, the proposed projects which were so clearly pictured to the jury involved many remote and conjectural contingencies, including the existence of a water supply, the right to remove it to another water shed, the acquisition of reservoir sites and sites for power houses and rights of way for canals and transmission lines, some but not all of which were on public domain, permits from state and federal authorities, the right to use public highways and the facilities of other companies, the existence of a market for power at a fixed price and a market for water at competitive prices, the procuring of financial resources and the investment of several millions of dollars, the element of possible profits therefrom, and necessity of finding a purchaser willing to undertake a particular project of that magnitude.

"In City of Stockton v. Ellingwood, supra, the trial court had refused to strike out testimony as to values which were claimed to be based upon improper considerations by which the witnesses had considered the lands in connection with their use as a part of a completed project. The evidence showed that in considering the availability of lands for reservoir purposes some of the witnesses had testified that it was possible by constructing works to use these lands as reservoir sites, storing water for use in irrigation, and that they believed projects could be developed which would include the use of these lands for reservoir purposes. The court pointed out that even though, as the appellant claimed, 'the experts were inclined to envisage a completed project, in testifying as to the adaptability of the properties concerned for reservoir purposes,' it was also true that 'the record contains only general testimony as to the demand for reservoir sites, and no specific testimony indicating a present demand for the particular reservoir site in question', and that 'no witness attempted in this case to figure out the profits of the enterprise'. The court there held that while portions of the testimony of certain witnesses might well have been stricken, no prejudicial error had resulted from the refusal to strike out the opinions of value given by the witnesses for the reason that the action was tried by the court without a jury and, in effect, because it might be assumed that the court had disregarded such small parts of the evidence as were improper. (See discussion of that case in Temescal Water Co. v. Marvin, 121 Cal. App. 512 [9 P.(2d) 335].) That case cannot be considered as controlling in such a case as the one now before us, where a mass of specific and definite testimony as to the use of the lands in question as a part of completed projects was submitted to the consideration of the jury, including not only detailed estimates of costs and running expenses but the profits which could be expected, based upon fixed rates of interest and prices for electrical energy and upon the sale of water, only about a third of which was to be stored upon the lands in question.

"While holding that the adaptability of land to certain uses may be shown, the Ellingwood case in general effect opposes rather than supports the proposition that specific supposititious projects involving the use of the land may be outlined to the jury with detailed estimates of the cost thereof and of the profits that may be made therefrom. The trend of authority in this state is also to the contrary.

"In San Diego Land etc. Co. v. Neale, 88 Cal. 50 [25 P. 977, 11 L.R.A. 604], it is said:

" 'The cost of works necessary for the utilization of the land for reservoir purposes was an element in the calculation as conjectural and speculative as would be the cost of a railroad and running stock necessary for the operation thereof in fixing the value of land condemned for railroad purposes. * * *

" 'The question was, not what the property was worth to a person intending to acquire it and the dam site and the remainder of the reservoir by purchase or condemnation for the purpose of supplying water over the territory tributary to the system, but what was the market value of the property itself. In other words, what the defendants could have obtained for their land if it had been offered for sale in the market, a reasonable time being given within which to make the sale. The plaintiff must compete in the market with bona fide purchasers generally, but its necessities cannot be taken advantage of. * * * The condition of the property, the uses to which it may be put, having regard to the existing advantages for making a practical use of the property, and such advantages as may be reasonably expected in the immediate future, are all matters for consideration in estimating the value of the lands ([Mississippi & R. River] Boom Company v. Patterson, 98 U.S. 403 [25 L. Ed. 206]); but no attempt to ascertain the value by estimating the cost of works necessary for its use for a particular purpose, the cost of operation, prospective sales and estimated profits, increased demands through growth of population, etc. * * *'

"In Santa Ana v. Harlin, 99 Cal. 538 [34 P. 224], after saying that a free investigation should be permitted as to the adaptability of the land to the purposes to which it is naturally adapted, the court said: 'Such proof should be limited to showing the present condition of the property and the uses to which it is adapted, and may not be extended to speculative inquiries as to possible future uses under altered circumstances, which may or may not arise.' In that case the court further said: 'the present market value of the land is the measure of damages, and not its value in use to the owner or to the parties seeking to condemn it'. In Sacramento etc. R. R. Co. v. Heilbron, 156 Cal. 408 [104 P. 979], we find:

" 'It is seen, therefore, that this court by its latest utterances has definitively aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it is taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that therefore while evidence that it is "valuable" for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value. For such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land, and distracts the mind of the jury from the single question—that of market value—the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use.'

"In [San Joaquin & Kings River] Canal & Irr. Co. v. Stevinson, 63 Cal.App. 767 [220 P. 427], a judgment in favor of the landowner was reversed on the ground that the trial court had erroneously permitted 'the defendant to present a proposed elaborate scheme for the reclamation and irrigation of the land, including the details and estimated cost thereof and the cost of the annual maintenance of the same'. The court there said: 'We conclude that the introduction of testimony of a proposed scheme of improvement, such as was shown in this case, is not proper for the purpose of showing the adaptability of the land. * * *' And, also, 'In view of the character of the testimony thus admitted, its importance and its probable effect upon the minds of the jurors, we feel that substantial injury resulted to plaintiff and that a new trial of the action should be had.'

"In City of Stockton v. Vote, 76 Cal.App. 369 [244 P. 609], a judgment in favor of the landowner was reversed on similar grounds, the court having admitted rather detailed evidence of suggested projects involving the use of the land. The court there said:

" 'From these reports and the testimony of the experts the entire project was before the jury as clearly as could be in the form of a completed enterprise. The dam was there before them, 200 feet in height, canals on either side of the river came into being, conducting water down to a point near Jenny Lind, where through penstocks the water was being dropped from 200 to 250 feet upon waiting waterwheels which, in turn, gave motion to great dynamos, producing a current carrying light and heat to thriving cities in the valley while the impounded waters, having discharged this duty, were carried forward through diverting ditches to some 34,000 acres of lands lying below the foothills at an approximate cost of $42 per acre, a limited portion of the water being taken through conduits to the cities needing impounded water for municipal purposes, the cost of the enterprise being gradually written off by the revenue derived from the sale of the impounded waters for power and irrigation purposes. It is true that this picture existed only on paper but the reports referred to enabled the jury to visualize the speculative project as an actuality and measure the market value of the flowage easement sought over the defendant's lands according to the standard thus presented.'

"And also:

"'A reference to the testimony which we have heretofore set forth and the predicate contained in the questions asked, as well as the answers of the witnesses, show that their estimated market value of the land was really an estimate of what they thought the land was worth for a specific purpose.'

"Somewhat similar rules of law were applied in the case of City of Oakland v. Parker, 70 Cal.App. 295 [233 P. 68]. In East Bay Mun. Utility Dist. v. Kieffer, 99 Cal.App. 240 [278 P. 476, 279 P. 178], the court said:

"'The defendant was permitted to show the volume of water flowing in the Mokelumne River, the capacity of the Lancha Plana reservoir and the capacity of a reservoir which could be constructed in the Arroyo Seco basin, the amount of electric power which could be developed, the irrigable lands in need of water, the cities and towns, including those in the plaintiff district, which could be supplied with water and power from such a combined reservoir system and the amount now consumed by them, the available use of the system as a means of flood control and of protecting the delta lands of the Sacramento and San Joaquin Rivers against salt water. The defendant was not permitted to show the present selling prices of water and power, the increase in the market value of the irrigable lands mentioned which would result from a "dependable water supply," the increase in value of delta lands which would be caused by holding back the salt water, and other evidence tending to show the returns to be received from the sale of water and electric power. The defendant sought to make such proof by his own witnesses and by cross-examining plaintiff's witnesses. * * * But the relation between the value of land in a proposed reservoir and the current price of water and electrical energy is too remote and conjectural to be of any reliable assistance to the jury in determining the market value of the land taken. Although the evidence rejected consisted of proof of past and present facts, the inference sought to be drawn therefrom is highly speculative. Speculative and conjectural calculations of prospective receipts and expenditures and consequent profits to be derived from a prospective enterprise not only throw no light on the issue of the market value of the land to be used in the enterprise, but operate to confuse and mislead the minds of the jurors. * * * The admission of evidence which leads to conjectural speculations is equally harmful, whether on cross-examination or direct.'

"In East Bay Mun. Util. Dist. v. Lodi, 120 Cal.App. 740 [8 P.(2d) 532], it is said:

"'The testimony of the appellants' witnesses as to damages, estimated the cost of appellants' project, and then the sale of energy developed by the project. A quotation from the answer of one of the witnesses will suffice as an illustration of the basis adopted by all of them, to wit: "I capitalized the values that were there. I arrived at this value by assuming that the plant would cost $363,000.00, and that the sale output of energy would be at the rate of 4½ mills per kilowatt, and then capitalized this net profit at 8 per cent, and the sum which invested at 8 per cent, would yield the amount of net profit, fixed the market value." We have paraphrased the witnesses' answer slightly in order to shorten the same. That this basis of fixing the damages is incorrect is a settled law of this state.'

"The test in such a case as this is the market value of the land and not its value in use for a special purpose. The issue here was what the land was worth at the time in question and not what it would be worth as part of a future development after millions of dollars had been spent in making it available for such particular use.

"Nearly all of the rules of law set forth in the cases above cited were violated in submitting the evidence in this case to the consideration of the jury. Elaborate prospective schemes for large developments and expensive works, with detailed plans of construction and estimates of cost, including the cost of operation of the completed projects and the rate of interest to be paid on money borrowed, with the amounts of water and power expected to be developed, with the prices to be received therefor and the profits to be realized therefrom, were outlined at great length. The uncertainties and difficulties involved in obtaining water rights, rights of way, and the permission of governmental agencies were minimized and brushed aside. The value of property in use for a particular purpose to the owner or to his prospective purchaser was shown in dollars and cents. A complete picture of the proposed projects was given, by which they were visualized before the jury as completed projects operating at fixed costs and selling water and power at prices which were not only established, but sufficient to return a large profit on the entire investment. One witness even figured for the jury a profit of a million dollars on the enterprise after allowing a stated price for this land, which amount he later gave as its market value.

"It plainly appears that the market values thus testified to were what these witnesses thought a buyer could pay for the property and still make a profit. One witness specifically stated that he was presupposing that a purchaser would pay $715,000 for the Holmes land for the purpose of tying it in with one or more of the proposed projects and that his figure of $715,000, which he gave as the market value, was based upon the ability of someone to purchase a part of the Holmes land at that price and after constructing the works he suggested to 'profitably conduct the enterprise.'

"The testimony of these witnesses clearly shows, as said in City of Stockton v. Vote, supra, 'that their estimated market value of the land was really an estimate of what they thought the land was worth for a specific purpose.' As pointed out in the authorities above cited, the settled law of this state will not permit a witness to arrive at the value of land by taking the costs of suggested improvements and capitalizing these on the basis of a certain return therefrom. While the witnesses here did not use the word 'capitalize', it is rather clear that they did just that.

"The evidence of the value of this land for a specific use in connection with prospective enterprises, which was submitted to the jury, involved a consideration of many elements which were exceedingly remote and highly speculative and conjectural. As was said in East Bay Mun. Util. Dist. v. Kieffer, supra, such calculations 'not only throw no light on the issue of the market value of the land to be used in the enterprise but operate to confuse and mislead the minds of the jurors.'

"The fact that it took nearly a year to try the one issue as to the market value of this land, the main controversy involving only about 400 acres, is, in itself, suggestive of what must have occurred and what actually took place. The greater part of the time appears to have been devoted to the introduction of testimony along the lines above suggested. In addition to that, voluminous reports and a great deal of testimony were introduced relating to water conditions over a large part of southern California. One of respondents' engineer witnesses even gave the annual rainfall over a period of many years at a point near Los Gatos, in the Santa Cruz mountains. While, admittedly, this was done in error the explanation of the witness as to why he made the error and what he intended thereby constitutes one of the highlights in legal literature. The fact that certain witnesses, having knowledge of the value of the land for only one purpose, gave a detailed valuation to an area made up of portions of many parcels which were being submitted to the jury as separate parcels while other witnesses, having knowledge of values of the land for other purposes and uses only, gave their estimates of the value of the entire parcels would have a tendency to add to the confusion which must have existed in the minds of the jurors, but need not be further considered here.

"In our opinion, the record discloses a situation where the market values testified to by these witnesses rested upon elements so remote and speculative that it should not have been submitted for the consideration of the jury. Both the opinions of value thus given and the testimony along the lines above mentioned, upon which such values were based, should have been stricken and not allowed to be considered by the jury.

"Nor do we think, as the respondents argue, that the elements of remoteness and speculation, to which we have referred, affect only the weight of the evidence and not its admissibility. In San Diego Land, etc., v. Neale, supra, the court said: 'But we think that where a witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief elements in the calculations which lead him to such conclusions, it should be rejected altogether.' In City of Stockton v. Ellingwood, supra, the court says that if 'it appears to the court that the witness' testimony is based upon improper consideration, or upon what is usually termed as speculative only, it should be stricken from the record or withdrawn from the consideration of the court or the jury'. In Spring Valley W. W. v.

Drinkhouse, 92 Cal. 528 [28 P. 681], after pointing out that it is permissible to show the uses for which lands are adapted, the court said: 'Nor would this rule, as supposed by respondent, justify the admission of speculative opinions based upon the necessities of the plaintiff or what the plaintiff could afford to give for the land rather than to do without it. If it should appear during the course of the examination that a witness had given an opinion as to value formed upon any such considerations, it would be the duty of the court to strike such opinion evidence out as resting upon an illegal and improper basis.' We think the same rule applies if the opinion as to value is based upon the value of the property for a particular use to the owner or for a particular purpose to a purchaser from the owner.

"The appellant attacks certain instructions as erroneous and as emphasizing portions of the evidence which were improperly received and submitted to the jury. Only a part of these assignments will be here mentioned, these being referred to by the numbers used in the briefs. In number 2E, after referring to the several projects proposed by witnesses for the defendants, involving the use of a portion of these lands, the court told the jury that if 'you find that the evidence which tends to support such projects is credible and is of more convincing force as to the economy, feasibility and practicability of such projects than is the evidence opposed to it and from which it results that the greater probability is in favor of the economy, feasibility and practicability of the project, you should so find.' The only issue which should have been submitted to the jury was the market value of the land in question. This instruction should not have been given for the reasons already indicated and because it tended to center the attention of the jury upon a collateral issue. Instruction number 20, which related to certain elements going to make up market value, contained the following: 'The court further instructs the jury that market value is essentially based on assumption, not on fact.' While, technically, it may be true that the element of assumption plays a part in arriving at market values in cases of this kind, such assumption must be based upon facts and this portion of the instruction was both inadequate and misleading. Ordinarily, in cases of this nature, a jury may be trusted to sufficiently indulge in assumptions, without its being specifically invited to excuse the absence of facts. In instruction number 27, the jury was told that the cost of bringing in water for storage in reservoirs upon this land 'is an element to be considered by you in determining the value of the land here involved.' This is subject to the same objection as instruction number 2E, both of which invited the jury to substitute its judgment for that of a potential purchaser in determining whether the lands possessed such reservoir adaptability as to affect their market value. Instruction number 28 told the jury that, in the event they found from the evidence that it would be necessary to bring in water from a distance in order to use the reservoirs on this land and that in so doing it would be necessary to cross other lands, they might, in determining the feasibility of the project, assume that rights of way could be obtained from such private lands by condemnation proceedings. This not only tended to minimize the difficulties in connection with a remote and speculative matter but withdraw a question of fact from the jury and imposed an undue burden upon the appellant. In instruction number 29, the jury was told that 'to the extent that probable demand by prospective purchasers or condemners affect market value it is to be taken into account by you in determining the market value of the property here involved'. Market value is to be measured by conditions under which the seller is not required to sell and the buyer is not required to buy, and it was error to instruct the jury to take into consideration the effect of possible future condemnation proceedings upon the market value of the property.

"The appellant assigns error in a number of instances in connection with matters placed before the jury during the arguments by counsel for the respondents, as being both erroneous and without support in the evidence. We will consider only a part of these matters, and these briefly. Complaint is made of certain charts and tabulations which were shown to the jury during the argument, smaller copies of some of them being handed to the jurors. Although these charts were not admitted in evidence we can see no objection to the use of such aids for the purpose of summarizing and collecting portions of the evidence which counsel desired to discuss, in a case in which so much time had elapsed and in which the evidence was so voluminous, provided such charts were so prepared as to fairly and accurately depict and state the part of the evidence purported to be covered thereby. In a number of instances here, however, the charts so used misstated the evidence and stated matters not in evidence. Through these charts, and also by one of respondents' counsel in his argument, the jury was told that the appellant, in building the dams for its Cajalco reservoir, used 1,333,000 cubic yards of material taken from a part of the Holmes lands, that the appellant had thereby saved 50 cents a cubic yard in hauling charges and had also saved 14 cents a ton-mile for hauling cement, and that 'just taking the saving and the cost of the building of the dam due to the proximity of this quantity of material on the Holmes lands, it results in a saving of $665,000', and that such saving 'may well dictate the market value of that property. $665,000 for only 100 acres of land—the material contained in it'. The question at issue was the market value of the land and the cost to the appellant of building a dam in connection with the use of the land which was being condemned had no connection with that issue. There was, moreover, no evidence in the record which supported such an argument. The respondents argue that any error in this was harmless because the highest value found by the jury for any of the land was $1000 per acre, and that the jury valued the particular land from which these materials were taken at less than the amount the appellant saved in hauling.

"In another instance the jury was told that 700-acre feet of water from the Holmes Basin, taken at $450 an acre foot, was worth $315,000. There was no evidence that water was worth that much. In fact, one of respondents' engineer witnesses testified that water could be delivered at that point by one of his proposed projects for about $23.80 per acre foot. What was here attempted was to utilize a report which was put in evidence in which the author capitalized the value of both land and water in another connection and under entirely different circumstances and for another purpose. As used here, the statement was both improper and misleading. Again, the jury was told by one counsel for the respondents that the cost to the respondents of trying this case was more than $88,000. This was, of course, highly improper and although the court, in finally giving its instructions, included one to the effect that no allowance should be made for the cost of this litigation to the respondents it may well be doubted whether the prejudicial effect of giving such information to the jury could be entirely removed. One counsel for the respondents further told the jury in his argument that: 'The cost of using our reservoir lands at our prices is much less than any other substitute plan, and is less than one-half of the cost of the water which the Metropolitan is bringing here.' The impropriety of such argument is to obvious to require comment.

"Respondents' counsel repeatedly stated to the jury that $3\frac{1}{2}$ years had elapsed between the time the appellant decided to build its reservoir at the Cajalco location and the time these suits were filed. Not only did this fact, if it was a fact, have nothing to do with the issue submitted to the jury but it was further used as a basis for an argument that the appellant had thereby saved more than a million dollars in interest. One counsel said in his argument:

" 'Mr. Morgan also forgot to remind you that during this period of benevolent waiting to bring this suit the District saved about $1,250,000 on interest alone. The District, by waiting three and a half years, ladies and gentlemen, did not have to put out the money for the construction of that project which their own estimates show is over $9,000,000. They did not have to dispose of the bonds which carry, I think, four or five per cent interest. They did not have to pay that interest, and they saved it.'

"Another counsel told the jury the filing of the action was purposely delayed 'because it would save them over a million dollars in interest.' It was further argued to the jury that the appellant 'is a self-liquidating corporation', and that it is common knowledge that appellant's project is being 'financed by money that is being furnished by the U. S. Government.' It was argued to the jury that the law under which the appellant was condemning this land is iniquitous and unjust. One counsel told the jury that Mr. Holmes was compelled to give up his land without his consent 'because they had a right to take it at a price far less than its market value.' Another counsel said in his argument: '* * * let me say now that this corporation plaintiff in this case has the support, if our Honor please, of what I call the most iniquitous law, the most unjust law that has been put in our statute books for years and years. What do I mean? Am I using strong language? Let me tell you: let me start, first, and briefly give you a history of this condemnation law. Long back in the days, when we didn't have these $200,000,000 corporations the law was such that your land could not be taken away from you until they paid you just compensation for that land. That is true. I appeal to the constitution before it was amended, as it has been in 1914 and 1928. You can call for that constitution and it will bear me out in that remark. And that is true in other states of this Union where the land cannot be taken away from the landowners until the compensation is paid.' The objectionable nature of the matters above referred to is so apparent as to require no comment, and in an action tried before a jury it can hardly be held that their cumulative effect was other than prejudicial.

"In other parts of their arguments counsel for the respondents were guilty of misconduct in what amounts to appeals to prejudice on the part of the jury. The more flagrant instances of this may be treated under two heads. In the first place, it was wrongfully charged that the appellant had accused Mr. Holmes of fraud in connection with the sale of portions of his land some years before this action was filed. This charge was neither supported by the evidence nor material to any issue in the case. In spite of this, the charge was made again and again during the presentation of the evidence and in the argument, and was so repeated and enlarged upon as to be made to assume the aspect of a major issue in this case. The numerous references to this matter justify the inference that this was intentionally done. Having thus built up the idea that the appellant was in this case charging Mr. Holmes with fraud, the respondents repeatedly urged the jury to vindicate Mr. Holmes by means of its verdict. A few excerpts from this portion of the argument will suffice:

" 'I therefore say to you that the mere mention of it, as it is in the minds of every fair and just and thoughtful man and woman, is enough not only to refute the charge but to damn the fellow who makes the charge. And I say to you that when this great big $220,000,000 corporation finds it necessary to belittle the properties at Cajalco and to beat down the estimation of the market value of those properties by undertaking to assassinate, not by evidence, but by mental suggestions to poison your minds, the character of the man who owns that property, * * * I say that in the hearts of just men and women in Southern California, and wherever this action of that District in time to come may become known, that District will never live down the reputation that having tried in this case to assassinate the character of the man who owned the property in order that they might receive the property he was compelled to give without his consent—he didn't want to sell it—because they had a right to take it at a price far less than its market value, and far less, less than one-tenth of the price that actually has been received over the years for the sale of the land that lay in the same identical bowl known as Cajalco basin. * * * She has been here when some of the most brutal attacks, by innuendo and insinuations, against her husband have been made.

" '* * * There was only once when she broke, and that was when the indignities, the insinuations, the innuendoes which she had suffered about her husband's honesty were mentioned by Mr. Clark during his argument. Then when I heard the sobbing, the outburst of that anguished wife behind me, I turned around. The tears were rolling down her cheeks, but that faith which I hope to find, that faith which I do not now understand, came to her rescue, buoyed her up, lifted her, and she smiled, and she said, "Go on. Go on." * * *

" 'We say to you * * * that no verdict shall be returned by you from which the Metropolitan Water District or any of its legions of employees or attaches or anybody else will ever be able to lift a hand during the few short years of the lifetime of Lawrence Holmes or in the lifetime of any of their young children and say, from that verdict it is a necessary inference that Lawrence Holmes, the father of the children, was a liar and a thief when he sold these lands to these people who bought carob plantations in the great community of Cajalco.'

"The court emphasized the matter of fraud by giving the following instruction:

" 'You are instructed that when a person is charged with fraud, the law presumes that he is innocent of the charge, and the burden of proving the fraud rests upon him who charges the fraud. This presumption is evidence in the case, and it approximates in strength the presumption that a person is innocent of crime.'

"Many times during their arguments counsel for respondents pictured the appellant to the jury as a great corporation which was using its wealth and power to impose upon the respondents. One counsel, after saying that the delay of three and one-half years in bringing the suit could not be justified 'by anything known in the common estimation of mankind', said:

"'But I say the evidence in this record shows that one of the most atrocious things, in so far as the fixing of the value of these properties is concerned by you—you good men and women—that delay of three and one-half years was one of the most atrocious and insufferable things of which a condemner could be guilty, and that does not exclude the Metropolitan Water District.'

"After commenting upon the depression and the dire needs of the people living in the Cajalco district he then said it was a necessary inference that the appellant had thus delayed filing its action 'in order that they could beat those people down to the point where they could not hang on any longer and would sell off for just what the District would choose to give them. Then that being done to come into this court and for those who had the resources to hang on for a little while longer, the District then to file the suit and then say, look at what we bought.'

"Again and again counsel referred to the influence and power and terror that could be exerted by such a tremendous corporation as the appellant; to the unlimited resources, man-power and money of the appellant; that 'when this great big $200,000,000 corporation finds it necessary to belittle the properties of the Cajalco'; that the jury was not concerned with the wishes of any such corporation or of any 'prince or potentate'; that 'this power is so tremendous, what little can we do against this power'; that during the three and one-half year period every one of these owners knew he would have to give up his land and 'surrender it to a superior force'; that 'You may have looked forward to the time when you would occupy your little home surrounded with evergreen trees, but you are in the way of this corporation. They file the action and they say "we need your place and we are going to take it"'; and that for three and one-half years these defendants had lived with a 'threat hanging over their heads like the sword of Damocles'. One counsel said: 'We know the unequal contest here' and then after four references to the $220,000,000 corporation, said: 'On the one hand you have them, the corporation, the plaintiff in this case, and on the other hand you have a disorganized, weak defendant, fighting for their homes.' Other counsel said:

"'You know, there is something funny about being employed by a great big corporation. It is a peculiar psychological complex that has baffled the psychologists ever since the first big corporation was formed. I don't need to remind you other than briefly of the early days of the Standard Oil Company, and of all the atrocious things that were charged (most of which were proved) against it. It was one of the first of what have finally come to be known as the predatory corporations of America, whose abuses of capitalistic privileges and power mark one of the darkest chapters in the economic and financial history of America. And from that time on down we have our steel company, and all the others. And you remember—What was it?—a billion dollar fine or something? But there is something very peculiar about the fact of being employed by a great big corporation. * * *

"'Bear this in mind, friends, that as we listen to the end of the calling of that roll, the only sound we hear is the patter of those disappearing feet of the District; but bear in mind, when your verdict shall have been returned, finally shall have been written to the chapters in this case, you will find those footfalls coming back and in increasing crescendo the sound of those pattering steps falling on your ear, because, when it is all said and done, the King, the King, the Metropolitan Water District, that believes the King can do not wrong, will be found sitting on his throne in the empire that was Cajalco, the possessor and the user of all that we have.'

"The respondents contend that the improper elements thus injected into the case and any misconduct during the argument were those normally to be expected in the heat of such a contest, that many of them were the result of sufficient provocation, and that no prejudice resulted since the amounts found by the jury were less than the highest amounts at which the respondents' witnesses valued the respective parcels. It is often difficult to tell whether verdicts have been affected by such improper matters. It is significant here, however, where a direct appeal was made to the jury to vindicate Mr. Holmes upon a supposed charge of fraud, that the amounts allotted to the parcels owned or controlled by him are substantially larger than those allowed others for similar lands. As to the awards in general, while the jury did not follow the values given by the respondents' engineer witnesses it allowed amounts almost double the values given by the respondents' nonengineer witnesses, and greatly in excess of the values given by the appellant's witnesses. How the jury arrived at the exact amounts fixed by the verdicts cannot be told but these repeated appeals to the emotions and prejudices of the jury are filled with such potential elements of danger that it is not possible to say, under the circumstances of this case, that the verdict was not affected thereby.

"The respondents argue that the appellant is not in a position to complain of the misconduct of counsel during argument, in the instances above referred to and many others, since the appellant did not, as each one occurred, request the court to instruct the jury to disregard the same. No such request was made, although objections were made in many instances. However, very early in the argument when an exception was taken to a statement of counsel attacking the appellant for running away from a certain matter, counsel for respondents stated: 'May I say this, that I am perfectly willing, after the arguments are concluded, so far as I am concerned, they may note in the printed record any exception to it they desire.' Counsel then proceeded and many of the matters in question are found in his later argument.

"While the rule referred to is often applied, this usually occurs in cases where the misconduct is not aggravated either in nature or extent. That rule should not apply here where, in effect, the appellant was invited to refrain from interrupting the argument and to make its exceptions on appeal, and where the instances of improper argument were so numerous and so serious that such instructions, if requested and given, could not reasonably be expected to have cured the error. Moreover, under the circumstances here appearing, a duty rested upon the trial court which should have been exercised of its own motion. In our opinion, the amount and nature of the improper arguments which were here permitted to be addressed to the jury were such as to be potently prejudicial, and were, in themselves, sufficient to require a reversal. While the respondents are entitled to the full market value of their lands, the appellant is entitled to a fair trial on that issue."

I, therefore, am of the opinion that for the reasons stated above said judgments should be reversed.

We concur: SHENK, J.; EDMONDS, J.

18 Cal.2d 427

DILLON v. BOARD OF PENSION COM'RS OF CITY OF LOS ANGELES et al.

L. A. 17553.

Supreme Court of California.

Aug. 18, 1941.

Rehearing Denied Sept. 15, 1941.

1. Limitation of actions ⇨51(2)
Municipal corporations ⇨220(9)

The right to receive periodic payments under a pension is a continuing one, and any time limitation upon right to sue for each installment commences to run from time when that installment actually falls due, but before claimant can claim periodic payments, right to pension must be established and an action to determine existence of right necessarily precedes and is distinct from an action to recover installments.

2. Mandamus ⇨105

Mandamus was the proper remedy to review the soundness of a decision of the Board of Pension Commissioners denying a pension to widow of a city police officer and to establish as a matter of law that widow was entitled to the status of a pensioner.

3. Limitation of actions ⇨43

A cause of action "accrues" when a suit may be maintained thereon and the statute of limitations begins to run at that time.

See Words and Phrases, Permanent Edition, for all other definitions of "Accrue".

4. Limitation of actions 🔑66(15)

A widow of deceased policeman of City of Los Angeles could at any time following his death demand a pension from the Board of Pension Commissioners and upon refusal could maintain a suit to enforce her claim, but widow could not delay the running of limitation by postponing time of demand upon proper officials and limitation began to run at time when widow first had power to make such demand. St.1925, p. 1086, § 183, as amended by St.1927, p. 2023; Code Civ. Proc. §§ 312, 338, 1109.

5. Limitation of actions 🔑65(1)
Municipal corporations 🔑220(9)

Where charter of City of Los Angeles required an application to the Board of Pension Commissioners before court proceedings could be instituted to establish right to a pension, claimant could not sue for pension while claim was being considered by the Board, but running of the statute of limitations was suspended during any period in which the claimant was prevented from taking action to protect her rights. Code Civ. Proc. § 356; St.1925, p. 1086, § 183, as amended by St.1927, p. 2023.

6. Limitation of actions 🔑61

Where police officer committed suicide in April, 1934, and within six months widow made application to the Los Angeles Board of Pension Commissioners for pension which application was denied on February 26, 1935, mandamus proceeding commenced on December 5, 1938, to require Board to award widow a pension was barred by three-year statute of limitations, since upon death of husband widow had power to apply immediately to Board for a pension and to bring mandamus action on its failure to comply and her cause of action therefore "accrued" at the time of death of her husband which exclusive of time Board deliberated was more than three years before action was commenced. Code Civ.Proc. §§ 338, 356; St.1925, p. 1086, § 183, as amended by St.1927, p. 2023.

7. Municipal corporations 🔑220(9)

Under Los Angeles charter provision requiring that any claim against the city other than for damages be presented within six months after last item of account or claim has accrued, a claimant can assert his right to a pension before Board of Pension Commissioners at any time after event giving rise to claim has occurred so long as claim is made within six months after any payment would have accrued, and if pension is granted he is entitled to receive payments in future but can recover only those past payments which would have accrued within a six months' period prior to time of making of the claim. St.1927, p. 2014, § 376.

8. Limitation of actions 🔑34(2)

The Los Angeles charter provision, requiring that any claim against the city other than for damages be presented within six months after the last item of the account or claim has accrued, does not affect the time limitation upon the right of the widow of a deceased policeman to bring an action of mandamus in the superior court to compel payment of pension, since limitation on such action begins to run when the right first accrues and is governed by the three-year statute of limitations. Code Civ.Proc. §§ 338, 356; St.1927, p. 2014, § 376.

9. Limitation of actions 🔑61
Municipal corporations 🔑220(9)

The Los Angeles charter provision requiring that any claim against the city other than for damages be presented within six months after the last item of the account or claim has accrued does not require a claimant to make a succession of claims for pension every six months in order to keep alive his right pending court action, but requires the filing of only one claim with the Board of Pension Commissioners, and if the claimant does so and his claim is refused he may thereafter maintain mandamus action in superior court within three years from time when right first accrued. Code Civ.Proc. §§ 338, 356; St.1927, p. 2014, § 376.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding by Virginia M. Dillon for a writ of mandamus to compel the Board of Pension Commissioners of the City of Los Angeles to issue an order for payment of a pension to petitioner as the widow of a deceased city police officer. From a judgment of dismissal, plaintiff appeals.

Affirmed.

For prior opinions, see 100 P.2d 803, and 109 P.2d 660.

Pollock & Pollock, Edward I. Pollock, David Pollock, Theodore A. Horn, and Louis Miller, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Robert

J. Stahl, Deputy City Atty., all of Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiff's husband, a police officer for the City of Los Angeles, committed suicide in April, 1934. Within six months, plaintiff made application to the Board of Pension Commissioners of the City of Los Angeles for a widow's pension under article 17, section 183 of the Charter of the City of Los Angeles, St.1925, p. 1086, as amended by St.1927, p. 2023. The board denied the application in February, 1935. In December, 1938, plaintiff filed the present proceeding in mandamus to compel the board to issue an order for the payment to her of a pension including a cash sum equal to the pension funds accrued in the three years preceding the date of the filing of the petition plus the amount of pension that will have accrued from that date to and including the date of such order with interest. The petition alleged that plaintiff's husband, in the course of his duties as police officer, suffered two accidents which caused severe injuries to his body and nervous system, giving rise to a condition of mental unbalance during which he took his life. Defendants demurred to the petition on the grounds that the petition did not state sufficient facts regarding the nature and extent of the deceased's injuries and his mental condition before death, and that any cause of action was barred by the statute of limitations. The trial court sustained the demurrer without leave to amend, holding that the cause was barred by the statute of limitations. Upon being refused leave to file a second amended petition, plaintiff appealed from the judgment of dismissal.

[1, 2] Section 338 and 312 of the Code of Civil Procedure, which are applicable to actions in mandamus (Code Civ.Proc. § 1109), provide that an action upon a liability created by statute, other than a penalty or forfeiture, must be commenced within three years after the cause of action has accrued. Whether or not the plaintiff's action is barred by this statute of limitations, therefore, turns upon when her cause of action accrued. The right to receive periodic payments under a pension is a continuing one (see Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 59 P.2d 104), and any time limitation upon the right to sue for each instalment necessarily commences to run from the time when that instalment actually falls due. Before plaintiff can claim these periodic payments, however, she must establish her right to a pension. If the Board of Pension Commissioners refuses to acknowledge this right upon application, she can properly bring an action of mandamus in the superior court to review the soundness of the Board's decision, and to establish as a matter of law that she is entitled to the status of a pensioner. French v. Cook, 173 Cal. 126, 160 P. 411; Sheehan v. Board of Police Com'rs, 197 Cal. 70, 239 P. 844. An action to determine the existence of the right thus necessarily precedes and is distinct from an action to recover instalments which have fallen due after the pension has been granted.

[3-6] A cause of action accrues when a suit may be maintained thereon, and the statute of limitations therefore begins to run at that time. Osborn v. Hopkins, 160 Cal. 501, 506, 117 P. 519, Ann.Cas.1913A, 413. The cause of action to establish the right to a pension accrued to plaintiff at the time of her husband's death. At any time following the death she could demand a pension from the board and upon refusal could maintain a suit to enforce such action. The city charter requires an application to the board before court proceedings can be instituted, but it is established in California that a claimant cannot delay the running of the statute of limitations by postponing the time of demand upon the proper officials; the statute therefore begins to run at the time when the plaintiff first had the power to make such demand. Barnes v. Glide, 117 Cal. 1, 48 P 804, 59 Am.St.Rep. 153; Jones v. Police Com'rs, 141 Cal. 96, 74 P. 696; Curtin v. Board of Police Com'rs, 74 Cal.App. 77, 239 P. 355; Wittman v. Board of Police Com'rs, 19 Cal.App. 229, 125 P. 265; Harrigan v. Home Life Insurance Co., 128 Cal. 531, 58 P. 180, 61 P. 99; San Luis Obispo v. Gage, 139 Cal. 398, 73 P. 174. Since, however, action by the board must precede court proceedings to obtain a pension, a claimant who has applied to the board cannot sue for the pension while the claim is under consideration by the Board. It is well recognized that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights. Code Civ.Proc. § 356; Wolf v. Gall, 174 Cal. 140, 145, 162 P. 115; Hutchinson v. Ainsworth, 73 Cal. 452, 15

P. 82, 2 Am.St.Rep. 823; Hoff v. Funkenstein, 54 Cal. 233; Union Collection Co. v. Soule, 141 Cal. 99, 74 P. 549; Elliott & Horne Co. v. Chambers Land Co., 61 Cal. App. 310, 312, 215 P. 99; see Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; 16 Cal.Jur. 562, 564. The running of the statute of limitations, therefore, is tolled during the period of the board's deliberations, that is, from the time the claim is filed until the board's decision is rendered. In the present case plaintiff, upon the death of her husband, had the power to apply immediately to the Board for a pension and to bring an action in mandamus upon its failure to comply. Her cause of action therefore accrued at the time of the death of her husband. The present action, commenced more than three years after that time, exclusive of the period of the Board's deliberations, is barred by Section 338 of the Code of Civil Procedure. Talbot v. City of Pasadena, 28 Cal.App.2d 271, 82 P.2d 483, so far as it is inconsistent with this conclusion, is disapproved.

[7] This decision is not contrary to that of Dryden v. Board of Pension Commissioners, supra, in which the court interpreted section 376 of the Charter of the City of Los Angeles which requires that any claim against the city other than for damages be presented within six months after the last item of the account or claim has accrued. Stats.1927, p. 2014. With regard to pensions, the court interpreted the provision as meaning that a claim could be made to the board within six months after the time when any given payment would have accrued had the right to a pension been established. Thus, a claimant can assert his right to a pension before the board at any time after the event giving rise to the claim has occurred so long as the claim is made within six months after any payment would have accrued. If the pension is granted he is entitled to receive payments in the future but can recover only those past payments which would have accrued within a period six months prior to the time of the making of the claim. This result is compelled by the peculiar wording of this charter provision, which establishes as the point of reference for the running of the six months' period, not the time when the right to the pension first accrues, but the time at which the last item of the claim accrues. In the case of pensions, items accrue indefinitely.

[8, 9] The charter provision, however, does not affect the time limitation upon the right of the plaintiff to bring an action of mandamus in the superior court. That limitation, which begins to run when the right first accrues, is governed by the Code of Civil Procedure. A claimant may assert the right to a pension before the board at any time within six months after the time when any payment would accrue under the pension; but if the Board denies the claim, the claimant has no remedy by mandamus in the courts if more than three years have elapsed from the time when the right first arose exclusive of the time the matter was under consideration by the Board. The charter provision does not, of course, require a claimant to make a succession of claims every six months in order to keep alive his right pending court action, but requires the filing of only one claim with the Board. If he does so and his claim is refused he may thereafter maintain an action in the superior court at any time within three years from the time when the right first accrued.

Since the plaintiff's action here was commenced more than three years after the time when her cause of action accrued, the judgment of the trial court is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; PULLEN, J. pro tem.

CARTER, Justice (dissenting).

I dissent.

According to the allegations of appellant's petition for a writ of mandate, appellant is the widow of Arnold Dillon, a former member of the Los Angeles Police Department. Dillon died on April 15, 1934. In September, 1935, appellant filed an *application* for a pension with the respondent Board of Pension Commissioners of the City of Los Angeles. That application was denied by respondent on February 26, 1935. On December 5, 1938, appellant filed in the superior court a petition for a writ of mandate to compel the respondent to make an order awarding her a pension and that said pension be paid. The superior court entered a judgment of dismissal after a demurrer was sustained and a request to amend refused. From that judgment appellant appeals. The demurrer was sustained on the ground that the proceeding was barred by the statute of limitation.

The basis of appellant's claim to a pension is found in article 17, section 183 of the Charter of Los Angeles. That section provides: "Whenever a member of the Fire or Police Department shall die as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or after retirements * * * then an annual pension shall be paid in equal monthly installments to his widow * * * in an amount equal to one-half (½) of the average monthly rate of salary which such deceased member shall have received in such department during the three years immediately preceding the time of his death or the date of his retirement * * *. Said pension shall be paid to the widow during her lifetime or until she remarries * * *."

The Los Angeles Charter, article XXVIII, section 376, in respect to claims against the city, provides that no suit may be brought on a demand unless a claim is filed within six months after the last item of the claim accrues.

The statute of limitation here invoked is section 338(1) of the Code of Civil Procedure, establishing a three-year period of limitation on actions upon a liability created by statute. It cannot be doubted that that section is applicable to an action for the recovery of the pension here involved.

To ascertain whether or not appellant's action is barred, it is of course necessary to determine when her action accrued as that is the point of commencement of the running of the statute. That problem has been solved by this court in the recent case of Dryden v. Board of Pension Commissioners, 6 Cal.2d 575, 59 P.2d 104. There a police officer of Los Angeles was killed in the line of duty. *Ten months* after his death the widow filed an application for a pension with the Board of Pension Commissioners. The application was denied and the widow sought in the superior court to compel the payment of the pension by *mandamus*. The superior court held that her action for the writ of mandate was barred because of her failure to file a claim within six months after her husband's death as required by section 376 of the Los Angeles City Charter. This court reversed the lower court holding that an obligation to pay a pension is a *continuing one*, each monthly instalment being a separate cause of action accruing at the time it became due, and that therefore the claim may be filed at any time after death but petitioner could cover no more than the instalments accruing within the six months' period preceding the filing thereof. This court said in that case at page 580 of 6 Cal.2d, at page 107 of 59 P.2d:

> "The right to pension payments *is a continuing right*. Petitioner by her conduct may have barred herself from collecting payments which have accrued, but this does not mean that she is without means to enforce the right to *present* and *future* pension payments, as distinguished from past and accrued pension payments provided she proceeds to do so in the manner required by law. The distinction between a single covenant and a continuing covenant is well settled in the law. McGlynn v. Moore, 25 Cal. 384, 395; German-American Savings Bank v. Gollmer, 155 Cal. 683, 102 P. 932, 24 L.R.A.,N.S., 1066; Mulborn v. Montezuma Improvement Co., 69 Cal.App. 621, 232 P. 162; Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 P. 951; Grotheer v. Panama-Pacific Land Co., 41 Cal.App. 19, 22. 181 P. 667; Congregation of Roman Catholic Church of Ascension v. Texas & P. Ry. Co. (C. C.) 41 F. 564. A case directly in point is Gaffney v. Young [et al.], 200 Iowa 1030, 205 N.W. 865, 867. In the Gaffney Case, the deceased husband of the petitioner in said action, died on January 18, 1912, of illness as result of exposure suffered in the performance of his duties as a policeman. Petitioner filed application for pension on September 10, 1924, more than twelve years after the death of her husband. The claim was rejected. There were no charter provisions requiring the presentation of a claim within six months or within any other period of time, but in the Gaffney Case, as in the Hermanson Case [Hermanson v. Board of Pension Com'rs], 219 Cal. 622, 28 P.2d 21, the plea of the statute of limitations was raised. The court passed directly upon the question and said:
>
> " 'The question here is whether, when the right of the appellee to a pension accrued and vested in her on the death of her husband, the right to enforce it may be wholly lost and barred by a failure to do so within the period of any statutory limitation. The act providing for the creation of the pension fund and for the payment of pensions from it fixes no limit of time within which application for a pension must be made or action to enforce the right commenced. The appellee's right to the pension, assuming it to exist, and to the payments to be made monthly would continue during her life, so

long as she remained unmarried and of good moral character. *The right was and is a continuing one,* and, so far as present and future payments are concerned, we are of the opinion it was one she could enforce at any time upon proof of the facts sustaining it. * * *

" 'If appellee was, on the death of her husband, entitled to a pension, *her right to present and future payments* from the pension fund is not barred by any provision of the statute of limitations. * * *

" 'Counsel for appellants relies upon Nicols v. Board of Com'rs, 1 Cal.App. 494, 82 P. 557, and Lund v. [Minneapolis etc.] Relief Ass'n, 137 Minn. 395, 163 N.W. 742, as holding that a claim for a pension may be barred by the statute of limitations. * * * In neither of these cases was the fact that the *right to the pension was a continuing one considered.*' (Italics ours.)

"It may be added that in the case of Nicols v. Board of Commissioners, supra, the claim made was in its entirety for past accrued payments. The same question was therefore not before the court on the facts of that case, and for that very good reason is not even considered.

"It is our opinion that the petitioner is entitled to all those periodic pension payments which fell due within a period of six months prior to her application to the Board of Pension Commissioners, and to all those periodic pension payments which have accrued since that date and which will continue to accrue in the future under the provisions of section 183 of the Charter.' "

It necessarily follows that if the obligation is a continuing one, and that the obligation to pay each installment accrues when the same becomes payable, and the issue for determination is whether or not a claim has been filed in time, the same rule applies as when the statute of limitation is involved. There cannot logically or reasonably be two accrual dates for the obligation to pay a pension, that is, one to be applied with respect to the time when a claim must be filed and the other with respect to the time of commencement of the statutory period of limitation. The Dryden case is wholly decisive of the issue here presented.

The attempt of the majority opinion to escape the sound conclusion of the Dryden case is neither persuasive nor based upon an accurate analysis thereof. The majority opinion concedes that under the Dryden case "any time limitation upon the right to sue for each instalment necessarily commences to run from the time when that instalment actually falls due," but then proceeds to the conclusion that when mandamus is involved, as in the case at bar, the matter to be determined is the right to the status of a pensioner as distinguished from the right to each instalment as it becomes payable. It omits to state that the proceeding in the Dryden case was also a proceeding to obtain a writ of mandate and the status of petitioner as a pensioner was fully as much involved in that case as in the case at bar; it was not an action to recover instalments of the pension. But in any event there is no true basis for a distinction between the two types of proceeding. In an ordinary common law action to recover pension instalments the gist of the action would be the primary consideration of whether the plaintiff was entitled to a pension, that is, his status as a pensioner.

The Dryden case is not properly distinguishable on the ground that the court there determined that the meaning of section 376 of the Charter was "that a claim could be made to the board within six months after the time when any given payment would have accrued *had the right to a pension been established.*" The proceeding in the Dryden case was, as above seen, for the express purpose of establishing the right to the pension, and *was not* one to recover an installment of the pension *after* the right thereto had been ascertained. Nor may that case be distinguished on the ground that there is any difference between when the time commences to run within which a claim must be presented and when the statute of limitation commences to run. The Dryden case relies upon and quotes extensively from the case of Gaffney v. Young, 200 Iowa 1030, 205 N.W. 865. The Gaffney case involved a statute of limitation in respect to pensions rather than a claim requirement, and held that the statute commences to run from each instalment as it became payable.

The majority opinion then arrives at the unsupportable conclusion that a pension claimant may file his claim and have it considered *at any time* for future instalments and those accruing within six months prior to the time the claim is filed, *but if the board rejects the claim he is without remedy if more* than three years, exclusive of the time the board is considering the claim has expired since the death from which the right to a pension is derived. Such strange results are not compelled by the claim provision. Logically and reasonably the point of commencement of the running of the time should be the same whether the claim provision or the statute of limitation is involved.

It may be that the result of such a conclusion is that a claim must be filed for each instalment of pension, but there is nothing unusual or unreasonable in such a condition. Conditions may arise from time to time such as the marriage of the pension claimant, which would defeat her right to the continuation of the pension. The filing of the claim for each installment would insure the discontinuance of payments for pensions no longer payable. It is required that municipal civil service employees must file claims for their salaries. Shannon v. City of Los Angeles, 205 Cal. 366, 270 P. 682.

It is recognized that the statute does not run on a continuing obligation under a contract except as to those obligations falling due prior to the statutory time before the commencement of the action. De Uprey v. De Uprey, 23 Cal. 352; Hinkel v. Crowson, 83 Cal.App. 87, 256 P. 479; Bissell v. Forbes, 1 Cal.App. 606, 82 P. 698; Trigg v. Arnott, 22 Cal.App.2d 455, 71 P.2d 330; Lee v. DeForest, 22 Cal.App.2d 351, 71 P.2d 285; Reuter v. Pacific Mut. Life Ins. Co., 5 Cal.App.2d 333, 43 P.2d 576. There is no valid reason why the same rule should not apply to pensions. A pension claimant should be able to file a claim at any time for installments falling due within six months prior to the date of filing, and to have a remedy either by mandamus or ordinary civil action within three years after the rejection of the claim by the board.

It is conceded in the majority opinion that a cause of action accrues when a suit may be maintained thereon, and the statute of limitation begins to run at that time. Osborn v. Hopkins, 160 Cal. 501, 117 P. 519, Ann.Cas.1913A, 413. It is also held that no proceeding for mandamus will lie until after a claim has been filed and rejected. Therefore, since no suit can be maintained until after the filing and rejection of a claim, no cause of action accrues which puts into operation the statute of limitation. It is conceded that the case of Dryden v. Board of Pension Commissioners, supra, correctly holds that a claim may be filed at any time for installments falling due within the last preceding six months. The inescapable conclusion that must necessarily follow is that the statute does not run until three years after a claim is rejected, which claim may be filed at any time, yet the majority opinion arrives at the opposite conclusion. Such inconsistency is obvious on the face of the opinion. The only attempt to reconcile that illogical conclusion is the assertion that the charter provision as to claims cannot affect the state statute of limitation. It cannot be doubted however that the charter may affect some of the elements necessary to be determined preliminarily in applying the statute of limitation, namely, the condition precedent to the bringing of any suit, that is, the filing of a claim. A municipality may require the filing of a claim as a prerequisite to action on any claim against it. Dryden v. Board of Pension Com'rs, supra; Yolo County v. Sacramento, 36 Cal. 193; Farmers & Merchants' Bank of Los Angeles v. Los Angeles, 151 Cal. 655, 91 P. 795; Geimann v. Board of Police Commissioners, 158 Cal. 748, 112 P. 553; Chapman v. City of Fullerton, 90 Cal.App. 463, 265 P. 1035; Southern Pac. Co. v. Santa Cruz, 26 Cal.App. 26, 145 P. 736; Brown v. Board of Police Commissioners, 2 Cal.App.2d 245, 37 P.2d 737; Shannon v. Los Angeles, 205 Cal. 366, 270 P. 682. It necessarily follows that to the extent at least as to when the cause of action to recover pension installments accrues, the charter claim provision does control the state statute of limitation, and the latter becomes operative only upon the rejection of the pensioner's claim.

In my opinion the law should be as held in the Dryden case, supra, that the right to a pension is a continuing one; that the statute of limitation does not commence to run until a claim is filed and rejected, and then only as to installments covered by the claim. Petitioner should therefore be permitted to file another claim and maintain an action thereon if the same is rejected.

18 Cal.2d 468

WILL et al. v. SOUTHERN PAC. CO. et al.

L. A. 17862.

Supreme Court of California.

Aug. 20, 1941.

Rehearing Denied Sept. 15, 1941.

1. Appeal and error 🔑933(4)

An order granting a new trial without stating the reasons therefor was presumed on appeal not to have been made on ground of insufficiency of evidence to sustain verdict. Code Civ.Proc. § 657.

2. Master and servant 🔑333

In action against railroad and its employees for death of intestate resulting from grade crossing collision, verdict exonerating employees from liability was an implied finding that employees were not guilty of negligence, and that the train as it approached crossing was being operated with due care, so that liability for death of intestate could not be imposed on the railroad under doctrine of "respondeat superior" on ground that death resulted from employees' negligent operation of train.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

3. Master and servant 🔑333

Where liability is sought to be imposed under the doctrine of respondeat superior because of an act or omission not participated in or directed by the principal, a judgment in favor of agent ex propria vigore relieves principal of responsibility.

4. Railroads 🔑352

In action against railroad and its employees for death resulting from grade crossing collision, where verdict exonerated the engineer and fireman from liability and gave rise to implied finding that train was traveling at a proper speed, and that employees gave proper warnings at crossing, railroad could not be held liable on asserted negligence in allowing an embankment on its right of way which to some extent obstructed view of its tracks in one direction.

5. Railroads 🔑307(6)

Where railroad has undertaken to warn travelers of approach of its trains by means of a crossing device, such as an automatic signal, upon which the public is encouraged to rely, failure to use due care in the maintenance of the device may constitute negligence, regardless of the giving of statutory warnings by employees on train.

6. Railroads 🔑327(1)

The tracks of a steam railroad are a sign of danger and one intending to cross them must avail himself of every opportunity to look and listen.

7. Railroads 🔑328(1)

The degree of care to be exercised in crossing a railroad depends upon the circumstances of the particular case, and if there are obstructions to view, one is required to take greater amount of care.

8. Railroads 🔑330(2)

The same quantum of care is not required of a traveler approaching a railroad crossing at which a bell or signal has been erected to warn him of danger as is required at crossing not equipped with a crossing signal.

9. Railroads 🔑330(2)

A railroad company will not be permitted to encourage persons to relax their vigil concerning the dangers that lurk in railroad crossings by assuring them, through the erection of safety devices, that the danger has been removed or minimized, and at the same time to hold them to the same degree of care as would be required if those devices had not been provided.

10. Railroads 🔑330(2)

A person approaching a guarded crossing cannot blindly rely upon the absence of warning by watchman or the silence of an automatic signal and proceed without further regard for his own safety, but he must still use reasonable care in looking and listening for any approaching train, and failure to do so is contributory negligence.

11. Railroads 🔑350(28)

Where motorist approached grade crossing at which automatic crossing signal was not working, at a speed of 15 to 25 miles per hour, and at a point 44 feet from the place where automobile was struck by train traveling at 45 to 60 miles per hour motorist had unobstructed vision of from 500 feet to a mile, and train on misty morning could have been seen 500 to 800 feet away, whether motorist was contributorily negligent so as to preclude recovery for his death was for the jury.

12. Trial 🔑228(3)

An instruction that in order to charge a railroad with negligence for defect in signalling device at crossing which it is bound to keep in proper condition and repair, it must be shown that the railroad had notice of the defect and that it failed for a reasonable time thereafter to repair such signalling device when read together with other instructions was not erroneous on the ground that the use of the word "bound" told the jury that the railroad was an "insurer" of operation of safety device, since the word "proper" means substantially the same as reasonable precaution or "due care" particularly when the obligation of railroad was stated in other instructions.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Care", "Insurer" and "Proper"

13. Trial ⚿295(10)

In action for death of intestate resulting from grade crossing collision, no objection could be made to instructions where charge to the jury read as a whole fully and fairly stated the duties of the respective parties and did not invade the province of the trier of the facts by assuming that any particular conditions were present at the time of the accident.

14. New trial ⚿52

Where jurors agree to vote for a verdict in amount to be calculated by an averaging of the sums being voted by some or all of them, verdict constitutes one arrived at by "chance" and should be set aside.

See Words and Phrases, Permanent Edition, for all other definitions of "Chance".

15. Trial ⚿315

It is not improper for jurors as the basis for discussion of amount of damages in an action for death to average sums being voted by some or all jurors if there is a later consideration of the amount and vote upon it even if they agree upon that amount.

16. New trial ⚿144

Where jurors in action for death in considering the amount which should be awarded to the plaintiff averaged sums being voted and after the computation was made, jurors discussed amount so computed and finally nine of jurors agreed on a sum $1,000 less than the average, the evidence did not justify the order for new trial on ground that verdict was arrived at by "chance".

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Larry Will and others against the Southern Pacific Company and others for the death of Roy Clayton Will which occurred in a grade crossing collision. From an order granting a motion for a new trial after the jury had returned a verdict in favor of plaintiff against the named defendant, plaintiffs appeal.

Reversed.

For prior opinion, see 108 P.2d 731.

Rehearing denied; CARTER, J., did not participate.

Frank J. Barry, of Los Angeles, Leonard W. Hartigan, of Glendale, and Patrick H. Ford, of Los Angeles, for appellants.

W. I. Gilbert, Frank Karr, and O. O. Collins, all of Los Angeles, for respondents.

EDMONDS, Justice.

After a jury had returned a verdict against the respondent railroad company awarding damages for the death of Roy Clayton Will, which occurred in a crossing accident, the trial judge granted a motion for a new trial. The appeal is from that order.

The complaint alleged that the engineer and fireman of the train, who were joined as defendants, negligently drove the engine and cars with great speed and rapidity to and across Chevy Chase Drive without ringing any bell or blowing any whistle. The appellants also charged Southern Pacific Company with negligence in maintaining a crossing having signaling devices that did not operate and an embankment which obstructed the view of an approaching train. The jury's verdict was in favor of the employees but against the railroad company.

[1] The respondent's motion for a new trial was made upon the grounds that the verdict was reached by resort to lot; that one instruction was prejudicially erroneous; that the verdict was inconsistent in that by it the jury held the railroad liable but exonerated its employees; and that the verdict was against both the law and the evidence. The motion also specified that the evidence is insufficient to support the verdict, but the form of the order requires this court to presume that it was not based upon that ground. Phillips v. Powell, 210 Cal. 39, 290 P. 441; Code Civ.Proc. § 657.

The appellants assert that none of these points were well taken. In support of the order, the railroad company says that the verdict is against the law because, being in favor of the trainmen it amounts to a conclusive finding that the bell sounded, the whistle blew and the speed was not excessive; in other words, that the train was operated with due care. It asserts that on the other issue, which concerns the maintenance of the crossing, no negligence was proved. The company urges further that the evidence offered by the appellants conclusively proves Will to have been guilty of contributory negligence as a matter of law. The respondent also contends that the trial court's order should be sustained because the court charged the jury that the railroad company was "bound to keep [the signaling device] in proper condition and repair."

The accident occurred on tracks which run in a general northerly and southerly direction. The automobile driven by Will approached these tracks from the east on Chevy Chase Drive, a street which intersected them at a right angle. The train was traveling south on a track which was 67 feet from the easterly line of the railroad right of way.

Evidence introduced by the appellants shows that, at the time of the accident, there was a building on the northeast corner of the street and the property of the railroad. Commencing near this building and extending to a point 15 feet east of the first rail on the easterly tracks was a dirt embankment five feet in height and about 27 feet wide. There was a railroad crossing sign more than 100 feet from the right of way, and, nearer the tracks, a combination cross-arm and wig-wag sign bearing the designation "Railroad Crossing." There was also a sign marked "Slow" in large letters at the line of the railroad right of way.

The accident occurred at 7:30 o'clock in the morning. There is undisputed evidence that, as the automobile approached the crossing, it was traveling at a speed of from 15 to 25 miles per hour; that the train was traveling from 45 to 60 miles per hour; and that the wig-wag signal was not working. Will was familiar with the crossing, as he had driven over it every day for three months prior to the accident.

There is some conflict in the evidence concerning the extent to which the building and embankment obstructed the vision of one approaching the crossing from the east. However, all of the witnesses called by the appellants agreed that, at a point 44 feet east of the track on which the collision occurred, one could see to the north for a considerable distance. The estimates of this distance ranged from 500 feet to a mile.

The automobile of Will was one of three or four which were proceeding in a westerly direction along Chevy Chase Drive. At least one automobile was coming from the west. Earl Nevins, who testified on behalf of the appellants, said that as he was driving westerly toward the crossing, he saw the automobile driven by Will in his rear view mirror. He slowed down to about eight miles per hour and the automobile of Will passed him when he stopped about 14 feet from the easterly track which was about 35 feet from that used by south bound trains. At this time Nevin observed and heard the train approaching about 200 feet away. According to his testimony, Will was driving at a speed which he estimated at from 15 to 20 miles per hour, which continued until the collision occurred.

[2, 3] By its verdict, the jury impliedly found that the railroad employees were not guilty of negligence and that the train, as it approached the crossing, was being operated with due care. More specifically, the verdict amounts to a finding that the speed at which the train was traveling was not excessive and that the proper warnings of its approach had been given. And as the cause of action against the railroad on account of the negligent operation of the train is based upon the doctrine of respondeat superior, the verdict exonerating the engineer and fireman necessarily absolved the company insofar as any negligence in the operation of the train is concerned. The rule in this regard is that where liability is sought to be imposed under the doctrine of respondeat superior because of an act or omission not participated in or directed by the principal, a judgment in favor of the agent ex propria vigore relieves the principal of responsibility. Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171; Fimple v. Southern Pac. Co., 38 Cal.App. 727, 177 P. 871; Thompson v. Southern Pac. Co., 31 Cal.App. 567, 161 P. 21.

[4] The appellants seek to avoid this effect of the verdict because they are seeking a recovery against the railroad company not only under the doctrine of re-

spondeat superior but also because of an alleged violation of an independent duty. Relying upon the rule applied in Barsoom v. City of Reedley, 38 Cal.App.2d 413, 101 P.2d 743, and Waltemath v. Western States Realty Co., 9 Cal.App.2d 583, 50 P.2d 451, they claim that the verdict does not exonerate the railroad company under the second charge of the complaint. However, although a railroad is required to give proper warnings at crossings and to run its trains at safe speeds, a verdict which impliedly finds that a train was traveling at a proper speed upon warnings of its approach discharges the company from any liability based upon asserted negligence in allowing an embankment on its right of way, which, to some extent, obstructed a clear view of its tracks in one direction. The situation is practically the same as in the case of Thompson v. Southern Pac. Co., supra, where the court ruled adversely upon the plaintiff's contention that the railroad participated in the accident because it permitted weeds to grow which obscured a view of the track. Assuming that he was exercising due care, said the court [31 Cal.App. 567, 161 P. 25], "it is quite clear from the record that he would have been apprised of the danger if the bell had been properly rung and the whistle sounded," and it held that the verdict in favor of those in charge of the train exonerated the railroad company.

[5] The railroad company was also charged with negligence because of its asserted failure to maintain the automatic signals at the crossing in working order. This is an omission which is not directly connected with the operation of the train, in so far as the duty of the railroad to give warning of its approach is concerned, and under the facts the verdict of the jury exonerating the trainmen is not determinative of this issue. When a railroad has undertaken to warn travelers of the approach of its trains by means of a crossing device, such as an automatic signal, upon which the public is encouraged to rely, failure to use due care in the maintenance of this device may constitute negligence regardless of the fact that it may have given other warning of the train's approach. In the absence of a specification that the motion for a new trial was granted upon the ground that the evidence is insufficient to support the verdict, it must be assumed that the railroad company was negligent in this regard.

[6-9] In arguing that the verdict is not against law, the appellants concede that if the uncontradicted evidence shows facts proving that Will was guilty of contributory negligence as a matter of law, the order granting the motion for a new trial may be sustained although the court did not specify that it was made upon the ground of the insufficiency of the evidence. Biaggi v. Ramont, 189 Cal. 675, 209 P. 892. However, they urge that, upon the record in this case, the issue of contributory negligence was one of fact determinable by the jury. The railroad company contends that the evidence offered by the appellants concerning the happening of the accident compels a determination of the issue as one of law.

The tracks of a steam railroad are a sign of danger, and one intending to cross them must avail himself of every opportunity to look and listen. The degree of care to be exercised is dependent upon the circumstances in the particular case. If there are obstructions to the view, one is required to take a greater amount of care. Herbert v. Southern Pac. Co., 121 Cal. 227, 53 P. 651. However, the same quantum of care is not required of a traveler approaching a railroad crossing at which a bell or signal has been erected to warn him of danger. Vaca v. Southern Pac. Co., 91 Cal.App. 470, 267 P. 346; Gregg v. Western Pac. R. R. Co., 193 Cal. 212, 223 P. 553; Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183. A railroad company will not be permitted to encourage persons to relax their vigil concerning the dangers that lurk in railroad crossings by assuring them, through the erection of safety devices, that the danger has been removed or minimized, and, at the same time, to hold them to the same degree of care as would be required if those devices had not been provided. Gregg v. Western Pac. R. R. Co., supra; Marini v. Southern Pac. Co., 201 Cal. 392, 257 P. 74.

[10] This does not mean that a person approaching a guarded crossing may blindly rely upon the absence of warning by a watchman, or the silence of an automatic signal, and proceed without further regard for his own safety. Knowing that he is approaching a point of danger he must still use reasonable care in looking and listening for any approaching trains. Failure to do so constitutes contributory negligence, as a driver may not cross tracks in reliance upon the safety appliances installed by the railroad with complete disregard for his own

safety and recover damages for injuries sustained by reason of his own failure to use reasonable care. Crawford v. Southern Pac. Co., supra.

The evidence offered by the appellants concerning Will's actions at the time of the accident is as follows: It was about 7:30 in the morning, and although visibility was impaired somewhat by a light rain or mist, a train could be seen clearly from 500 to 800 feet away. As Will approached the crossing, he was driving at a speed of from 15 to 25 miles per hour. He was entirely familiar with this crossing, having driven over it daily for three months. Passing another automobile which was slowing down, he continued to the point of impact at the same rate of speed. Crossing signs were in place, one visible about 500 feet from the tracks. The automatic signal was not working, but at a point 44 feet from the place where the collision occurred, there was unobstructed vision to the north for a distance of from 500 feet to a mile.

[11] The evidence also shows that there were other automobiles moving in the same direction Will was traveling and also coming from the west. His vision to the north was completely obstructed by the buildings on his right until he reached a point about 70 feet from the southbound track. Because of the embankment extending from the building, it was not until he was 44 feet from the southbound track that his view of the track was unimpaired. At a speed of 20 miles per hour, an automobile travels about 30 feet per second, so that he had a period only slightly in excess of two seconds from the time he passed the building within which to look to the north. Under these circumstances, it cannot be said, as a matter of law, that he did not use reasonable care; the question of negligence was one of fact for the jury, and its verdict is fully supported by the evidence.

The railroad company also contends, in support of the order for a new trial, that the following instruction, given at the request of the jury, created a conflict and was prejudicially erroneous: "In order to charge a railroad company with negligence for a defect in a signalling device at a crossing which it is bound to keep in proper condition and repair, it must be shown to you that the railroad company had notice of the defect and that it failed for a reasonable time thereafter to repair such signaling device. * * *" In using the word "bound," it declares, the trial judge told the jury that the railroad is an insurer of the operation of a safety device.

This is too strict a construction of the language used, particularly when the other instructions which were given are read with it as the complete charge to the jury. Nichols v. Nelson, 80 Cal.App. 590, 252 P. 739; Stewart v. Morris, 7 Cir., 96 F. 703. By the challenged instruction, the jury was told that the requirement of "proper condition and repair" is laid upon a railroad company after actual or constructive notice of a failure of the device to operate. In eight other instructions, six of which were offered by the railroad company, its duty was declared to be that of reasonable care, which was carefully defined. Jurors are presumed to be persons of ordinary intelligence, and, considering all the instructions together, could not have understood them to mean that the railroad is an insurer of the perfect operation of its signaling devices. Moreover, in the latter portion of the instruction quoted, it was said that the railroad company might be held guilty of negligence only after "notice of the defect." If it were an insurer, its duty would not depend upon notice; it would be "bound" to keep its equipment in perfect operating condition regardless of notice.

[12] The word "proper," when used in an instruction, has been held to have substantially the same meaning as "reasonable precaution" or "due care," particularly when the obligation of the defendant is stated in other instructions. Cassinelli v. Bennen, 110 Cal.App. 722, 294 P. 748; Nichols v. Nelson, supra; Burk v. Extrafine Bread Bakery, 208 Cal. 105, 280 P. 522. For example, in the Nichols case, the court said that the use of the word "proper" to state the care required of a defendant, "means only the exercise of that degree of care which a prudent man should use under like circumstances, which is the degree of care which the law imposes." [80 Cal.App. 590, 252 P. 742.] Nor does it assume that any defective condition existed at the time of the accident.

Respondent relies upon Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654, 655, in which it was held error to charge the jury that a physician must give "proper instructions" to his patient how to take care of himself. This instruction, the court said, implied that no error could be committed; that a physician is under the duty of obtaining an approximately perfect result, and guarantees his treatment is of that quality. That was a malpractice case in which the jury was also instructed that the physician was "bound to use a degree of diligence, attention, and skill adequate to the performance of his undertaking," and the decision rests upon principles different from those which apply to the controversy now before the court. Cassinelli v. Bennen, supra.

[13] Other points raised by the respondent based upon the instructions have been carefully considered. The answer to them is that the charge to the jury, read as a whole, fully and fairly stated the duties of the respective parties and did not invade the province of the trier of fact by assuming that any particular conditions were present at the time of the accident.

Finally, the respondent seeks to justify the order for a new trial upon the ground that the verdict was arrived at by chance. In support of its motion for a new trial, it presented an affidavit of a juror who stated that, in considering the amount which should be awarded to the plaintiffs, the different amounts voted by his fellow members were added up and divided by twelve at least three times; that the final average computed amounted to $26,000; and that thereafter the sum of $25,000 was fixed by the vote of the majority as the amount of the damages to be awarded the plaintiffs. It does not appear by the affidavit that before these computations were made the jurors had agreed to adopt an average as their verdict. On the contrary, the affidavit shows affirmatively that the jurors voted on the sum of $25,000 as the amount of the damages.

A counter-affidavit is to substantially the same effect except that it shows, in more detail, the consideration of the amount of the award by the jurors after the computations were made. According to this affidavit, after the jurors found that $26,000 was the average amount which was being voted as damages, there was considerable discussion. Some of them thought that it was too much and others that it was too little. Finally nine of the jurors agreed to $25,000, the other three being in favor of a verdict for the railroad company.

[14-16] When jurors agree to vote for a verdict in an amount to be calculated by an averaging of the sums being voted by some or all of them, it constitutes one arrived at by chance which should be set aside. Dixon v. Pluns, 98 Cal. 384, 33 P. 268, 20 L.R.A. 698, 35 Am.St.Rep. 180; McDonnell v. Pescadero Stage Co., 120 Cal. 476, 52 P. 725. But it is not improper for jurors to calculate an average amount as a basis for discussion if there is a later consideration of the amount and a vote upon it, even if they agree upon that amount. Griffith v. Oak Ridge Oil Co., 190 Cal. 389, 212 P. 913; McDonnell v. Pescadero Stage Co., supra; Ham v. County of Los Angeles, 46 Cal.App. 148, 189 P. 462.

The order granting a new trial is reversed.

GIBSON, C. J., and CURTIS, TRAYNOR, JJ., and PULLEN, J. pro tem., concurred.

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18 Cal.2d 490

O'BRYAN v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 17771.

Supreme Court of California.

Aug. 25, 1941.

1. Executors and administrators 🔑22(1)

The object of special administration is to preserve the estate until general letters testamentary or of administration are granted and the executor or administrator empowered to take charge of the estate.

2. Executors and administrators 🔑22(1)

The policy and purpose of the law is to give the court complete and continuous jurisdiction over decedents' estates by special administration as long as there is no person entitled to take charge of the estate under a grant of general letters, whether the delay is occasioned through litigation or from any other cause.

3. Executors and administrators 🔑22(1)

The statute, providing for the appointment of special administrators, vests in the probate court very extensive powers in the matter of the appointment of such administrators. Probate Code, § 461.

4. Executors and administrators 🔑22(3)

Under express statutory provision, the probate court has the power to appoint a special administrator without notice and such order of appointment is not appealable. Probate Code, § 461.

5. Courts ⇨207(4)

Where surviving widow and daughter of testator each offered for probate separate wills, each of which left testator's estate to the respective proponents thereof and daughter filed a contest to probate of will offered by widow, superior court's action in denying widow's application for appointment of herself as special administratrix pending will contest and in appointing a bank as special administrator did not constitute such abuse of discretion as would warrant issuance of writ of mandamus by Supreme Court to compel superior court to set aside order of appointment and appoint widow as special administratrix. Probate Code, § 461.

6. Mandamus ⇨26

Where a court has acted on a matter within its jurisdiction, court's proceedings, however erroneous, may not be reviewed on an application for writ of mandamus.

7. Mandamus ⇨28

Mandamus will not lie to control the discretion of a court or judicial officer or to compel the exercise thereof in a particular manner, except in those rare instances where, under the facts, such discretion can be exercised in but one way.

8. Mandamus ⇨26

A court can be compelled to act, but having acted, its act cannot be reviewed on mandamus.

9. Executors and administrators ⇨22(1)

A designing person, otherwise qualified and entitled ordinarily to preference, should not be permitted to obtain control of an estate, although temporarily, by the exercise of undue influence or by committing forgery, or other species of fraud in connection with the testamentary act, and thus deprive the court of weighing the circumstances appearing prior to the contest, and of exercising its discretion by placing the estate for the time being in the hands of a disinterested person.

10. Executors and administrators ⇨22(1)

There is a distinction between the interest of a representative under a will duly admitted to probate and that of an administrator who is the proponent of an unadmitted will under attack on the ground that such will is the product of fraud and undue influence of such administrator.

CARTER and EDMONDS, JJ., dissenting.

In Bank.

Original proceeding in mandamus by Lillian Mae O'Bryan against the Superior Court of Los Angeles County and others to compel the respondent Superior Court to set aside an order appointing the Citizens National Trust and Savings Bank as special administrator of the estate of William Henry O'Bryan, deceased, and to enter an order appointing petitioner as such special administrator.

Peremptory writ denied and alternative writ discharged.

Eckman & Lindstrom, of Los Angeles, for petitioner.

Cosgrove & O'Neil and John M. Clayton, all of Los Angeles, for special administrator.

J. H. O'Connor, Co. Counsel, Douglas DeCoster, Deputy Co. Counsel, Marshall Stimson, and Noel Edwards, all of Los Angeles, for respondent.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondent Superior Court to set aside an order appointing the Citizens National Trust and Savings Bank as special administrator of the estate of William Henry O'Bryan, deceased, and to enter an order appointing the petitioner as such special administrator.

At the age of seventy-two years, the decedent passed away in Los Angeles county on September 18, 1940, leaving an estate in real and personal property of the approximate value of twenty-five thousand dollars. The petitioner and the decedent were married on or about January 28, 1935, and she is the surviving widow. By a former marriage she has a son, Reginald Hardy, and a daughter, Roberta Birkinshaw. Also surviving the decedent, by a former marriage, are a son, William Cedric O'Bryan, and two daughters, Lyndal O'Bryan Douglas and Elise O'Bryan Gadow.

Under date of July 10, 1939, the decedent and his wife, petitioner herein, executed a joint will in which it was declared that the only children of the decedent were William Cedric O'Bryan and Lyndal O'Bryan Douglas. No mention was made in this will of the daughter Elise O'Bryan Gadow. By this will the property of the decedent was left to the survivor and then, upon the decease of both, should it be simultaneous, to be disposed of in accordance with the terms of the will in which the estate was left to J. Carlton Wetherby in trust for numerous bequests, including $25 each month for life to William Cedric O'Bryan and the sum of $1,000 to Lyndal O'Bryan Douglas, with J. Carlton Wetherby as the residuary legatee. The petitioner herein filed a petition for the probate of said will on September 25, 1940. In said will she was appointed executrix without bond.

On September 27, 1940, Lyndal O'Bryan Douglas, daughter of the decedent, filed a petition for the probate of a will bearing date May 19, 1926. By this will the estate is left to the daughter Lyndal, who is appointed executrix without bond, and with the request that she carry out the "known wishes" of the testator and especially for the benefit of six named persons, including his son William Cedric O'Bryan and his daughter Elise O'Bryan Gadow. This will was confirmed by the decedent by letter to his daughter of date February 3, 1934.

In October, 1940, the daughter of the decedent, Lyndal O'Bryan Douglas, filed a contest before probate of the will of July 10, 1939, alleging as grounds of contest that said will "was procured by the undue influence of Lillian Mae O'Bryan". It is then alleged that for a long time prior to the execution of the second will the decedent was afflicted with disease of body and mind; that by reason of age and diseased physical condition he was weakened in mind and body and reasoning faculties and that he was influenced and dominated by said Lillian Mae O'Bryan; that at the time the will of 1926 was executed the son of the decedent was unable to support himself and received the support of his father; that after their marriage the said Lillian Mae O'Bryan so dominated and exercised control over the decedent that she induced him to assume an unfriendly attitude toward his son, William Cedric O'Bryan, and toward the contestant; that she induced the decedent to cause his son to leave his home and to provide a home for her own daughter; that she influenced and persuaded the decedent to make a will which left all of his property to her, to the exclusion of his son and to the exclusion of the contestant, who had theretofore enjoyed the full confidence of the decedent, and to the exclusion of the other daughter, Elise O'Bryan Gadow; that the said will was not the free and voluntary act of the decedent; and that had he been free from such undue influence he would not have made said will.

On or about November 18, 1940, the daughter Lyndal O'Bryan Douglas filed a petition for the appointment of the Citizens National Trust and Savings Bank as special administrator of said estate, pending the determination of the will contest. About four days later the petitioner herein filed a petition stating that she had theretofore nominated the Security-First National Bank of Los Angeles to serve as special administrator, but that she had withdrawn said nomination. She prayed that she, herself, be appointed special administrator until the determination of said contest.

Written opposition to the petition of the widow was filed by the daughter Lyndal O'Bryan Douglas, alleging the facts relating to the opposing petitions and contest, and further that the appointment of the petitioner Lillian Mae O'Bryan, "who is a defendant and an interested party in the aforementioned contest, would give to her an advantage in said contest and would be prejudicial to the interests of the objector".

The trial court heard the opposing applications for special letters on the respective affidavits and objections and on oral evidence taken at the hearing, and made an order denying the application of Lillian Mae O'Bryan for appointment of herself as special administrator and appointing the Citizens National Trust and Savings Bank as special administrator. The present proceeding was then commenced to compel the respondent to set aside said order. As a return to the alternative writ, the respondent court has filed a general demurrer and an answer.

The answer raises no issues of fact which would require a reference. It denies the allegations of paragraph VII of the petition, wherein it is alleged that the petitioner is entitled under the Probate Code to appointment as special administrator by reason of the fact that she is the surviving widow of the decedent and as such is the only person entitled on the showing made to the respondent court to letters testamentary and that the court abused its discretion in appointing the Citizens National Trust and Savings Bank as special administrator. The answer further alleges that in determining the controversy between the two applicants for special letters the respondent court and judge gave full consideration to all of the evidence, including the provisions of the respective wills, the contest filed by the daughter of the decedent, the petition by the widow for the appointment of the Security-First National Bank as special administrator, and the withdrawal thereof, the petitions for special letters filed by the widow and by the daughter and the opposition thereto, the affidavits filed by or on behalf of the respective parties, the oral evidence introduced at the hearing, and the fact that in the will of July 10, 1939, the decedent had made no mention of his daughter Elise O'Bryan Gadow; and that the court had concluded from the evidence presented that as each petitioner for special letters was claiming title to the property of the estate, it was not a case wherein ordinarily the person first entitled to letters testamentary should receive the same, and that it was for the best interests of all parties to the controversy that "a neutral and disinterested party be appointed special administrator pending the determination of the will contest". The foregoing denials and allegations of the answer raise other issues of law or present facts not in controversy or facts which may be inferred from the showing made by the petitions, the exhibits attached thereto, and the order of court appointing the bank as special administrator.

It is conceded at the outset by the petitioner herein that she "does not contend that the Probate Court is without either jurisdiction or discretion in the appointment of a special administrator". Her position is narrowed to the contention that on the evidence presented the court could act in one way only, that is, by the appointment of herself as special administrator and, therefore, that the court so abused its discretion as to require its action to be controlled in her favor by the writ of mandamus.

[1, 2] The object of special administration is, of course, "to preserve the estate until general letters testamentary or of administration are granted, and the executor or administrator empowered to take charge of it". Estate of Heaton, 142 Cal. 116, 75 P. 662. It should be borne in mind that no one as yet has become entitled to take possession of the estate under general letters. As said in Estate of Heaton, supra, 142 Cal. at page 118, 75 P. at page 662, "The policy and purpose of the law is to give the court complete and continuous jurisdiction over such estate by special administration as long as there is no person entitled to take charge of it under a grant of general letters, whether the delay is occasioned through litigation * * * or from any other cause".

[3, 4] Indeed, the statute vests in the probate court very extensive powers in the matter of the appointment of special administrators. Section 461 of the Probate Code provides: "The appointment [of a special administrator] may be made at any time without notice or upon such notice to such of the persons interested in the estate as the court or judge may deem reasonable. In making the appointment, preference must ordinarily be given to the person entitled to letters testamentary or of administration, but such order is not appealable". This section was enacted in 1931. It was a re-enactment of provisions on the same subject contained in former sections 1412 and 1413 of the Code of Civil Procedure. It has been the law of this state at least since 1872 that the probate court has the power to appoint a special administrator without notice and that the order of appointment is not appealable. It is true that section 1413 as originally enacted and as in force until 1931 provided that in making the appointment of a special administrator the court "must give preference to the person entitled to letters testamentary, or of administration." In the enactment of 1931 the word "ordinarily" was inserted between the words "must" and "be given", so that the provision now reads: "In making the appointment, preference must ordinarily be given to the person entitled to letters testamentary or of administration."

The petitioner concedes that prior to the change in 1931 the court had discretion to appoint a stranger as special administrator and asserts that the addition of the word "ordinarily" was merely a recognition of what was implicit in the law prior thereto. "This discretion is not enlarged by the 1931 amendment", counsel for the petitioner says, "it is merely recognized." But he asserts that at all times the discretion of the court could be exercised in the appointment of a stranger only on a proper showing of "facts in evidence indicating incompetency, fraud, forgery, etc.", and that such showing was not made in this case.

[5] For the purpose of this case, we are willing to proceed in accordance with the petitioner's conception of the law, both past and present. We cannot, however, follow counsel to the conclusion that the order of court now sought to be set aside was lacking in factual support. The foregoing statement of the facts discloses that the court was confronted with rival claimants to the estate under separate wills, one the widow and the other a daughter of the decedent. A rather bitter will contest was pending, in which the widow was charged with overreaching the father of the contestant in the execution of the will in controversy, in which for no apparent reason except as the result of an alleged weakened and diseased mental and physical condition, of which the widow is charged to have taken advantage, he had omitted to mention in the will under contest the daughter Elise O'Bryan Gadow as one of his heirs. This fact is mentioned, not for the purpose of indicating at this time any probative value to its significance, but to show that the court did not arbitrarily and without reason, based on the record, refuse to appoint the widow as special administratrix, but could on all the evidence presented conclude that it would be for the best interests of the estate to have a neutral party in charge of the estate during the temporary period of the will contest.

[6-9] We know of no case, and counsel for petitioner has cited none where, under a similar state of facts, the order of the court appointing a special administrator has been disturbed. In Dahlgren v. Superior Court, 8 Cal.App. 622, 97 P. 681, an order appointing the First Federal Trust Company as special administrator was sought to be annulled in certiorari on the ground that preference should have been but was not accorded to the daughter of the decedent, in all respects qualified, for such appointment. It was held that the failure to grant such preference in accordance with the statutory requirement, however gross an error it might be, was within the jurisdiction of the court to commit and that its action could not be set aside on certiorari. It is to be here observed that the petitioner is seeking to set aside an order of court admittedly made within its jurisdiction. The holding in the Dahlgren case is not only in accordance with the general rule, but it is also the general rule that when the court has acted on a matter within its jurisdiction its proceedings, however erroneous, may not be reviewed on an application for the writ of mandamus. Bauer v. Superior Court, 208 Cal. 193, 198, 281 P. 61; People v. Superior Court of San Francisco, 114 Cal. 466, 46 P. 383; 16 Cal.Jur. p. 822; 7 Cal.Jur. Ten-Year Supp. p. 698, and cases cited. The general rule with its rare exceptions was stated by this court in Hilmer v. Superior Court, 220 Cal. 71, at page 73, 29 P.2d 175, at page 176, as follows: "It is well settled that mandamus will not lie to control the discretion of a court or judicial officer or to compel its exercise in a particular manner, except in those rare instances when under the facts it can be legally exercised in but one way [citing cases]. Stated differently, a court can be compelled to act, but, having acted, its act cannot be reviewed on mandamus." Counsel for petitioner has endeavored to bring this proceeding within the class of "those rare instances" where, because of undisputed facts, no discretion is vested in the court and action thereon only "in * * * one way" may be taken. But the broad terms of the statute as applied to the facts above outlined preclude such a holding. Certainly the petitioner is not a disinterested person. As the proponent of the will under which she would take to the exclusion of the contestant, she is charged with fraud. The verified allegations of undue influence are entitled, prima facie, to some verity. But, say counsel, quoting from In re Erlanger's Estate, 136 Misc. 793, 242 N.Y.S. 249, 252, 253, 254, "If a mere charge of undue influence in the procurement of a will can eliminate the person named as executor from appointment as temporary administrator, a very simple and effective method of disqualification would result. A simple charge of undue influence or fraud in the general form of objections, usually filed to the probate of a will, would be sufficient". In the cited case the court concluded that the special circumstances there presented did not constitute a disqualification of the executor named in the will to act as special administrator pending hearing on objections to the probate of the will. On the other hand, the special circumstances surrounding a contest might well lead to the opposite conclusion. It certainly may not be said that a designing person, otherwise qualified and entitled ordinarily to preference, should be permitted to obtain

control of an estate, although temporarily, by exercising undue influence on a weak or incompetent or credulous person, or by committing forgery or other species of fraud in connection with the testamentary act, and thus deprive the court of weighing the circumstances appearing prior to the contest and of exercising its discretion by placing the estate for the time being in the hands of a disinterested person. It has been recognized by the courts in the state of New York that the appointment of a person to act as special administrator other than the executor named in the will is not an abuse of discretion. In re Pearson's Will, 228 App.Div. 418, 239 N.Y.S. 653, 655. The court in that case said: "Where the executor is not disinterested or is a party to the contest * * *, surrogates have been deemed justified in the exercise of discretion in appointing a stranger." See, also, Estate of Eggsware, 123 Misc. 541, 206 N.Y.S. 18.

[10] In Luckey v. Superior Court, 209 Cal. 360, 287 P. 450, this court recognized that there is a distinction between the interest of a representative under a will duly admitted to probate and that of an administrator who is the proponent of an unadmitted will under attack on the ground that it is the product of the fraud and undue influence of said administrator. In that case the court denied certiorari on the ground that there was no abuse of discretion in the court's action in revoking letters of administration issued to one who subsequently was the proponent of a will under which he received a major share of the estate and which was attacked on the ground of fraud, forgery and undue influence, and in appointing a stranger as special administrator pending the outcome of the contest.

The petitioner herein has not shown either that the respondent court had no discretion to appoint a person other than the petitioner as special administrator, or, deeming the question appropriate in this proceeding, that the exercise of its discretion was unwarranted by the special circumstances presented to it.

The petition for the peremptory writ is denied and the alternative writ is discharged.

GIBSON, C. J., and CURTIS, TRAYNOR, JJ., and PULLEN, J. pro tem., concurred.

CARTER, Justice (dissenting).

I dissent.

The sole issue presented in this case is whether a person entitled to a preference under the Probate Code, may be denied the right to be appointed special administrator of an estate because he is charged with fraud and undue influence in a pending will contest, the will having been offered for probate, and in which he is named executor. The same rules should be applied in solving that problem as are pertinent to a general administrator. That is especially true when it is remembered that the powers and duties of a special administrator are not as great or important as those of a general administrator. The object of special administration is not to bring about a general administration of the estate. He is an emergency officer whose duties are merely to take possession of and preserve the estate until general administration can be had. 11b Cal.Jur. 864. Therefore, in determining who shall have preference in the matter of appointment, there should in fact be required more of a showing to constitute disqualification in the case of special administration than in general administration. Turning to the rules pertaining to the appointment of general administrators we find that the preferences set forth in section 422 of the Probate Code, are to be applied unless the applicant is disqualified to act. Section 401 describes those persons who are disqualified to act as executors or administrators as follows:

"No person is competent to serve as an executor or executrix who is under the age of majority, convicted of an infamous crime, or adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. Marriage does not disqualify a woman from serving as executrix." No authorities hold that merely because a person is engaged in a will contest he is disqualified to act as an administrator. It is obvious that being charged in a will contest with fraud and undue influence is not specified in the Probate Code as a ground of disqualification. While it may be true that contrary to the formerly existing rule and since the decision of this court in Estate of St. John, 8 Cal.2d 175, 64 P.2d 725, an interest adverse to the estate is grounds for denial of the preference, a respondent in a will contest does not have an interest adverse to the estate. His interest may be adverse to other heirs or claimants to the estate, but he makes no claim that any of the property is his rather than the estate's.

Merely because allegations of fraud and undue influence are alleged against a person is no proof whatsoever of the guilt of that person. If it were, then the petition on the contest would be admissible to prove the matters charged. On the contrary the presumption is that petitioner here is honest, fair and impartial. It is said in 11a Cal.Jur. 266, with respect to matters bearing upon the qualifications of administrators:

"Incompetency or disqualification is not presumed, even from the fact that a prior application of the person for letters was denied. While there is no presumption that a person is a resident of the state or of any particular age, the presumptions are against the existence of any of the other disqualifications. The burden is on the objector to establish them.

"Every person is presumed to be sane and in the full possession of ordinary mental faculties, and to be innocent of crime. Likewise, one is presumed to possess a fair character for truth, honesty and integrity, and to take ordinary care of his own concerns." Further, it is pertinent to observe that the rule is firmly established that great weight is to be given to the testator's choice of the executor and his desire is not to be thwarted except in the strongest case. It is stated in 11a Cal.Jur. 270:

"It has been said that nomination of a person as executor is evidence of the confidence reposed in him by the testator, and the deliberate purpose and desire thus solemnly expressed should not be thwarted unless the plain provisions of the law or the interests of justice demand it".

In the instant case petitioner was named in the will as executrix, and although the issue is the appointment of a special administrator rather than an executor, we still have the choice and desires of the testator before us. Summing up then, we have the bare unsupported allegations charging petitioner with fraud and undue influence in a will contest which is utterly no evidence of the truth of those charges. Opposed to that is the presumption of honesty and integrity and the declared wish of the testator. Only one conclusion can follow therefore, i. e., that there is an absolute failure to show any disqualification on petitioner's part; the only evidence is to the contrary. Such a situation shows an abuse of discretion on the part of the trial court in denying petitioner the preference to which she is entitled. Indeed, it has been squarely held in California that preference in appointment of a special administrator must be given to an executor named in the will, although he was the proponent of the will and it was being contested, and further that he claimed adversely to the estate. Estate of Held, 1 Cof. Prob. Dec. 206.

The wording of section 461 of the Probate Code that in making the appointment of a special administrator "preference must ordinarily be given to the persons entitled to letters * * * of administration," cannot alter the situation. I have hereinabove pointed out the cogent reasons why the same rules should be followed with reference to qualifications and preference whether the administrator be general or special. Obviously, the word "ordinarily" was used to prevent the appointment of those persons who, although having a preference, would be disqualified to act, the grounds for disqualification being the same as for general administrators. "Ordinarily" in its customary usage means normally. If normally the preference must be observed, then under abnormal conditions it must not be. The abnormal conditions which immediately spring in the mind are those in which the applicant for special letters is disqualified. The test of disqualification must be found in the rules applicable to general administrators. Prob.Code, § 401.

The effect of the majority opinion is to confer upon the trial court the power to deny special letters of administration to any person named as an executor or executrix in a will where a will contest is instituted before probate and charges of fraud or undue influence and made against the person so named, whether such person be a husband, wife, child, father or mother of the testator and possesses an exemplary character and an unblemished reputation. I cannot agree that the legislature intended such an interpretation to be placed upon section 461 of the Probate Code.

It is a matter of common knowledge that charges of fraud and undue influence are easy to make and difficult to prove, and a review of the cases involving such charges which are reported in the decisions of this and the appellate courts of this state discloses that substantial evidence must be produced by a contestant in order to invalidate a will on either of these grounds.

In my opinion petitioner is entitled to the writ prayed for.

EDMONDS, J., concurred.

18 Cal.2d 449

PEOPLE v. CLARK et al.

Cr. 4343.

Supreme Court of California.

Aug. 19, 1941.

1. Criminal law 🔑1159(2)

Whether evidence against defendants in murder prosecution was sufficient to justify jury's verdicts finding them guilty was primarily for the jury, and the only question before the Supreme Court reviewing the verdicts of the jury as to the insufficiency of the evidence was whether there was any substantial evidence to support the result reached by the jury.

2. Criminal law 🔑1159(2)

If there is substantial evidence to support result reached by the jury, then the duty of an appellate court ends and there is but one action for the appellate court to take, and that is to sustain the verdict.

3. Homicide 🔑250

Evidence sustained murder convictions.

4. Criminal law 🔑1159(2)

The verdict of a jury must be sustained by a reviewing court if there is any substantial evidence in the record supporting the jury's conclusion.

5. Criminal law 🔑742(1)

In murder prosecution, testimony of third person, who had purportedly confessed to the murders in question, that he only confessed to the murders for the purpose of being taken from prison so that he might escape from officers, and that he knew nothing of the murders, was for the consideration of the jury.

6. Criminal law 🔑393(3)

In murder prosecutions, trial court did not err in ordering defendants during the trial to rise in order to be identified by witnesses testifying as to their identity, and in directing one of the defendants to remove a visor that he was wearing in court, so that witnesses attempting to identify him might have an unobstructed view of his features.

7. Courts 🔑92

Where language of opinion was not necessary for the decision of any question before the court, it was not required to be regarded as binding on the court in any future action wherein the point was directly involved.

8. Courts 🔑107

Where language of opinion was found in a general discussion of a collateral matter, the Supreme Court's use of the language was not intended to overrule its prior decisions in which it directly held to the contrary.

In Bank.

Appeal from Superior Court, San Joaquin County; Andrew R. Shottky, Judge.

Dewey Clark and Henry E. Jones were convicted of murder, and they appeal

Judgments affirmed.

Frank G. Warren and Harold Wyatt, both of Stockton, for appellants.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., Raymond M. Dunne, Dist. Atty., and Donald D. Boscoe, Deputy Dist. Atty., both of Stockton, for respondent.

CURTIS, Justice.

The appellants, Dewey Clark and Henry E. Jones, were found guilty by a jury of the murder of Nathan Chinchiolo and Dorothy Woofter. The verdicts carried no recommendation. Their motion for a new trial was denied. Thereupon the court pronounced its judgment and sentence that each of the defendants suffer the death penalty. They have appealed from the order denying said motion and from the judgments of conviction.

The appeal is based upon two grounds: (1) the insufficiency of the evidence to support the verdicts and judgments, as a matter of law; and (2) errors of law which were highly prejudicial to the appellants.

The appellants are negroes, and each had suffered two prior felony convictions.

and had served terms of imprisonment in the state prisons of this state. The appellant Jones after serving a second term of eight and one-half years, was released on April 23, 1940, just five days before the date of the crime now charged against him. Jones is forty-two years of age, and Clark is thirty. Each is a large-sized man, Clark being six feet in height and Jones some taller. They were described by many of the witnesses as being unusually well dressed. Clark lived at Fresno with his parents and worked at odd jobs about the city. Jones on his release from the prison road camp at Keene near Bakersfield on April 24, 1940, came to Fresno, engaged a room at the Lincoln Hotel in that city and occupied the same up until his arrest, except when he was absent from the city. Jones had something like $130 on his release from prison and upon gaining his freedom, he spent it quite freely, with the result that when he was arrested, the original amount was considerably reduced. Clark and Jones became acquainted with each other while they were in prison. They also became acquainted in prison with Hubbard Turner, another member of their race, who was at that time serving a prison sentence. Turner had been released on parole some time prior to Jones' release and was living at Fresno. He lived in a small shack in Fresno, and his house became a frequent meeting-place of the two appellants and Turner.

The crimes the commission of which the defendants were accused were committed on Sunday night, April 28, 1940, in the outskirts of the city of Stockton, in the county of San Joaquin. At approximately 9 o'clock of that evening Nathan Chinchiolo, twenty-three years of age, and Dorothy Woofter, nineteen years of age, together with another couple, left a cocktail lounge in said city of Stockton, in a 1936 Plymouth sedan belonging to the sister of Nathan Chinchiolo. The other couple left the machine at a hotel at about 9:15 o'clock of the same evening. After telling the other couple that they would meet them at the cocktail room in one-half to three-quarters of an hour, Nathan Chinchiolo and Dorothy Woofter drove off in the Plymouth automobile, and they were never seen alive again. On Friday, May 3, 1940, their dead bodies were accidentally discovered by a farmer living at the nearby city of Manteca. The place where the bodies were found was approximately four miles south of the city of Stockton, about 100 feet from a road known as Sharp's lane in a patch of tall grass and weeds. Tracks evidently made by an automobile led from the road to the spot where the bodies were found. The body of Nathan Chinchiolo was lying face downward, with a double gag over his mouth and eyes. He was fully clothed. His hands were tied behind him and his feet were tied together. All the binding was done with fragments of Dorothy Woofter's clothing. There was a wound approximately two inches in length on the right side of his throat. His jugular vein had been severed. The body of Dorothy Woofter was lying some 20 feet from that of Nathan Chinchiolo. Her hands were tied behind her back. She was lying with one blanket under her and another over her. Both belonged to Nathan Chinchiolo and were kept in the car. Her throat was also cut. Doctor Fry, who performed the post mortem examination, when asked as to the condition of her legs, testified: "Well, her knees were drawn up. She was laying on her back and her knees flexed at the thighs. I suppose so called sex position. * * * they resisted all efforts to straighten them down. * * * It is my opinion that those legs were placed in that position after death."

At about 9:45 o'clock Sunday evening the couple whom Nathan Chinchiolo and Dorothy Woofter had left at the hotel on that night, returned to the cocktail room which they had previously left with Nathan Chinchiolo and Dorothy Woofter, and waited for the latter two until the regular closing time, which was 2 o'clock the next morning. The next morning [Monday] the Fresno police notified the Stockton police that a 1936 Plymouth sedan had been found abandoned in a vacant lot in the city of Fresno at approximately 7 o'clock of that morning; that the car had blood stains on the cushions of both the front and back seats, and that the glass in the right rear door was broken, with some fragments of glass in the frame of the car door.

When the families of the missing young people were informed of the finding of the abandoned Plymouth machine in Fresno, they became alarmed and a search for the missing couple was instituted, and only terminated upon the finding of the bodies, as already narrated. The next day after the bodies were found Walter Guyon, manager of a garage in the city of Tracy, which is some twenty miles from Stockton and on the road from the latter city to the city of Fresno, notified the police of Stockton that on Sunday night or Monday morning, April 29, 1940, between 12:50 and 1 o'clock he serviced a car meeting the description of the Plymouth machine, and he described the occupants of the car. His description of the occupants of the car led to the arrest of the appellants, which took place the next day, Saturday, after he had given this information to the Stockton police. Upon their arrest they were brought to the city of Stockton and there questioned regarding the murder of the two people whose dead bodies were found a few days before. Each of the appellants denied that he was guilty of the murder of either Nathan Chinchiolo or Dorothy Woofter, and each denied that he was in the city of Stockton on Sunday, the day of the murder, or at any other time near that date. The appellant Clark stated to the officers that he and Jones between 5 and 7 Saturday evening left Fresno for Bakersfield, and from there they went to a prison road camp at Keene, some thirty miles distant from Bakersfield, where they hoped to sell some wine to the prisoners at that camp. Failing to do so, they returned to Fresno, arriving there about 1 o'clock Monday morning. Jones, on the other hand, when questioned by the officers, told them that he did not go to Bakersfield, but remained in Fresno all day Saturday, Sunday and Monday. He denied any knowledge of the murder of either of the two people charged in the indictments. Each of the two appellants denied any knowledge of the Plymouth sedan found abandoned the Monday before in a vacant lot in Fresno.

At the trial the prosecution proved by positive and direct evidence that the two appellants did leave Fresno on Saturday, April 27, 1940, and that they arrived in Stockton the next Sunday morning; that they registered at the White Hotel in that city under fictitious names; that Jones purchased a watch and chain while in Stockton. There was evidence tending to show that on Sunday evening just before dark the two appellants were on East Clay street near a spot referred to in the evidence as "lover's lane," where, according to the theory of the prosecution, the appellants first accosted Nathan Chinchiolo and Dorothy Woofter, overpowered them and drove them to the spot where their dead bodies were found. There was also evidence introduced the effect of which was to show that the two appellants were seen near the spot where the bodies were found sometime before 10:00 o'clock on the night of the murder. The prosecution produced most convincing evidence that on the night of the murder the two appellants left Stockton in the Plymouth sedan and arrived at Fresno the next morning in this machine.

We have already mentioned the testimony of Walter Guyon, the manager of the garage at Tracy. He testified most positively as to the identity of the Plymouth sedan and also as to the identity of the appellants as the men who were in possession of the machine. According to his testimony, the appellants, when they stopped at his garage, had the tail light of the car repaired and they purchased eight gallons of gasoline. He also noted the broken glass in the right rear door of the machine and called it to the attention of the appellants. His reference to the broken glass in the door brought forth a remark from appellant Jones that they had a "drunken gal" in the car earlier in the evening and she "kicked it out." The testimony of this witness shows that each of the appellants got out of the car while it was in the garage at Tracy, and that the witness had a good opportunity to observe their appearance, their size and their clothes. He positively identified them as the two persons then on trial before the court.

The next place at which the appellants were purported to have been seen was Newman, some thirty-eight miles south of Tracy and between Tracy and Fresno. Richard C. Kinman, the keeper of a bar at Newman, testified that between midnight and 2 o'clock Monday morning, April 29, a man came into his place of business, whom he identified as the appellant Clark, and bought some cigarettes. He went out and came back and bought a bottle of beer, which he drank. Just as he was leaving another negro came just inside the door and asked how far it was to Los Banos, and the witness told him that it was twenty-three miles. The witness did not identify this second man as Jones, but stated that he was a tall negro and was dressed in dark clothing, and that he particularly remembered the occasion and the time for they were the first negroes who had been in his place of business for over a year. The two men left his place together.

At Los Banos, which is twenty-three miles further south on the way to Fresno, two men came into the restaurant conducted by Mr. and Mrs. Ernest Houser, and one asked for coffee and doughnuts for the two. They sat down at a table, Mrs. Houser served them with the order, and then they left. Both Mr. and Mrs. Houser identified them as the two appellants, and the one who did the talking and placed the order, as Mr. Jones. Mrs. Emily Vierra, a friend of the Housers, was waiting at the restaurant for her husband [a milk truck hauler], and she saw and identified the men entering the restaurant at that time as the appellants. These three witnesses placed the time at which the appellants reached the restaurant as early Monday morning, April 29.

Other important matters were brought out by the prosecution linking the appellants with the commission of the crimes, some of which will be referred to later in the discussion of various questions raised by the parties.

After the prosecution had rested, each of the appellants took the witness stand and testified in behalf of himself and his co-defendant. Each admitted that he had made false statements to the officers as to his whereabouts on Saturday, Sunday and Monday, April 27, 28 and 29. They further admitted that they did leave Fresno on the afternoon of April 27 and arrived in Stockton the next morning [Sunday]; that they were in Stockton' all day Sunday, but returned to Fresno, leaving Stockton on Sunday night on a freight train and arriving in Fresno Monday morning. They denied, however, that they had committed either of the murders charged against them or knew anything about either of said crimes, or knew either Nathan Chinchiolo or Dorothy Woofter. They further denied any knowledge of the 1936 Plymouth sedan in which the two deceased were last seen alive. They denied making the trip back to Fresno by automobile and flatly contradicted the witnesses who testified that they saw and identified them at Tracy, Newman and Los Banos.

The foregoing serves as a brief statement of the evidence in the case. The record before us consists of over 2,500 typewritten pages of evidence, which has been read in its entirety, but a mere skeleton statement thereof would unduly extend this opinion and would serve no useful purpose.

[1-3] Whether the evidence against the appellants was sufficient to justify the verdicts of the jury finding them guilty of the crimes charged was, of course, primarily for the jury. The only question before a court reviewing the verdict of the jury upon a contention as to the insufficiency of the evidence, is whether there is any substantial evidence to support the result reached by the jury. If evidence of that character was before the jury, then the duty of the appellate court ends and there is but one action for it to take, and that is to sustain the verdict. In reviewing the evidence in this case, we are not only of the opinion that the record furnishes sufficient substantial evidence to support the verdicts of the jury, as it affects each of the appellants, but we cannot perceive upon what possible hypothesis any other or different verdicts could have been rendered. Upon positive uncontrovertible evidence, the appellants were found a few hours after the disappearance of the murdered couple, in the possession of the Plymouth sedan in which the latter were last seen alive. Mr. Guyon, the manager of the garage at Tracy, positively identified the machine and also the appellants. Evidently it was the information given by Mr. Guyon which led to the arrest of the appellants. It was his description of them which enabled the officers at Fresno to pick out the appellants from among all the negroes of that city, as the two men who were at his garage on that Monday morning. His evidence was corroborated by the testimony of the witnesses who saw the appellants at Newman and Los Banos the same morning. While the appellants denied that they made the trip from Stockton to Fresno by automobile, as the evidence thus would indicate they did, their denial is uncorroborated, and the many contradictions in their evidence and the many admittedly false statements made by them before the trial when accused of these crimes, furnish ample justification for the rejection of their evidence by the jury. With this record before us we are not only bound by the verdicts of the jury, but we are in entire accord with the conclusion reached by it.

[4] Appellants recognize and concede the applicability and controlling effect of the rule in criminal, as well as in civil, actions that the verdict of the jury must be sustained by a reviewing court if there is any substantial evidence in the record supporting its conclusion. However, they contend that in many instances the evidence produced by the prosecution was so inherently improbable as to be unworthy of

belief, and that the jury's action in rendering verdict of guilty against them based upon such evidence was arbitrary and should not be permitted to stand.

The testimony of the witnesses which the appellants particularly assail as being so inherently improbable as to be unworthy of belief is that of the two railroad men E. B. Lyman and C. I. Green, and Mr. and Mrs. Dimock. The two former testified that they saw the appellants on the evening of the murder sometime before dark, at a place near the foot of Clay street, which, it will be remembered, is near the spot referred to by the witnesses as "lover's lane," and where, under the theory of the prosecution, the appellants first attacked the deceased couple, kidnaped them and drove them to the place where their bodies were found, some 200 feet from Sharp's lane. Mr. and Mrs. Dimock testified that at a little before 10 o'clock of the Sunday evening in question they were driving along Sharp's lane near where the bodies were later found and they met the two appellants. Appellants argue that the slight opportunity these witnesses had to observe them and the brief time they testified that the appellants were in their view rendered it impossible for them to give any reliable testimony as to the identity of the appellants. While we agree with the appellants that the opportunity of these witnesses to observe the appellants was extremely limited, especially that of Mr. and Mrs. Dimock, we cannot agree with them that their testimony given under such limitations was so lacking in evidentiary value as to render it inherently improbable, and that it should have been rejected by the jury. As stated before, each of the appellants is a large man, Clark being six feet in height and Jones slightly taller. They were well dressed and Jones had a peculiarity in his walk, which was quite marked. These characteristics were noticed by the witnesses and were given by them as some of their reasons why they were able to identify appellants.

Appellants claim that these four witnesses are the only ones whose evidence even tended to place the appellants in the vicinity of the place where the crime was committed, and if their evidence is rejected, then the whole case of the prosecution must fail. We do not agree with this statement. Independent of the testimony of these four witnesses, the record in our opinion contains sufficient evidence to support the verdicts of the jury. The fact that appellants were found in possession of the Plymouth sedan in which the two deceased were last seen, only a few hours after the murder, and that no explanation was offered by them as to why or how they came into its possession, taken with the many false statements and contradictions in appellants' testimony, is sufficient to justify the verdicts of the jury finding appellants guilty of the crime charged against them.

There is a link in the evidence not heretofore mentioned which supports the prosecution's theory that the two deceased were first assaulted near the foot of Clay street, overpowered and driven to a point near Sharp's lane, where they were murdered. The broken glass noticed by Mr. Guyon in the right rear door of the Plymouth sedan was badly shattered, but there were a number of fragments still to be found in the door frame. There were also found fragments of broken glass at the end of Clay street near where the appellants were seen by the two railroad men, and fragments of broken glass were also found in the immediate vicinity where the dead bodies were discovered. The pieces of broken glass found at each of these two places were collected and with those remaining in the frame of the rear door of the Plymouth sedan and also some in the car itself, were put together somewhat in the same manner as a jig-saw puzzle is worked, with the result that a large part of the original pane of glass was restored, showing that the pieces of glass found at the foot of Clay street, those found in Sharp's lane in the vicinity where the bodies of the two young people were found, and those left in the frame of the broken rear door of the machine formed at one time one complete pane of glass.

Another link in the evidence which might have appealed strongly to the jury and not heretofore mentioned was that there were spots of blood on the clothing worn by appellants on their trip to Stockton. This evidence was given by experts, who examined the clothing after the arrest of appellants. This evidence is in a way corroborated by the testimony of Hubbard Turner, the negro with whom the appellants associated in Fresno. He testified that early Monday morning, the day the appellants returned to Fresno from Stockton, the two appellants came to his house and asked for cleaning fluid, which he gave them, and it was used by them in cleaning their clothing. Clark endeavored to explain his use of the cleaning fluid by stating that he had some black substance resembling tar on his pantaloons and was using the cleaning fluid to remove it. He also attempted to account for any blood on his clothing by the fact that he bought and killed a chicken, and possibly some blood from it got on to his clothing. Jones stated that he was troubled with piles, and that the blood on his clothing was due to their presence. However, he was examined by a doctor after his arrest, who testified that he was not so afflicted and there was no indication that he ever had been troubled with that affliction.

There was also some evidence that the appellants and Turner were planning a robbery of a lady in San Luis Obispo and needed a machine to carry out their plan; that they had tried to steal one but failed in their purpose. The same witness Turner who testified to the last-mentioned incidents, further testified that Monday afternoon, the day of the appellants' return from Stockton, the two appellants took Turner out where the Plymouth sedan had been left on the vacant lot and told him that that was the machine they had secured. Taylor McMurray, a disinterested witness, also testified to seeing the appellant Clark and two other negroes, one quite large, walking along the road in the same vicinity. The witness Turner also testified that Jones gave him a flashlight sometime Monday. It was proven that this flashlight was in the Chinchiolo machine on Sunday evening, the night of the murders.

Two other matters should be briefly referred to as having some bearing upon the case, one of which is of but slight importance, but the other, according to the evidence, appeared for a short time at least, to be of considerable materiality. The first of these is the trip of Jones to Big Creek to visit a white woman residing there, and who was called as a witness by the prosecution. Appellant Jones testified that he was to meet this woman in Stockton, and that he went to Stockton for that purpose on Saturday, April 27. From the evidence brought out, particularly on cross-examination, it was proved that Jones did write her a letter to meet him at the White Hotel at Stockton, and sent her $10, ostensibly for the purpose of paying her expenses. This letter was not dated, but it was postmarked Fresno, April 26, 1940, 8:30 p. m., which was Friday. Big Creek is sixty-nine miles from Fresno. As the letter was evidently mailed Friday evening, it is evident that it might have been received by the woman in time for her to meet Jones in Stockton on Sunday. On receipt of this letter, however, the witness wrote Jones to come up and see her Monday. Jones evidently received this letter on Monday or Tuesday, after his return from Stockton. In response thereto Jones went to Big Creek Tuesday and spent two days with her, returning to Fresno on Thursday. This witness testified that Jones remained in her house the entire time he was at Big Creek and requested that the window shades be kept down. The testimony of this witness is of but slight materiality, except that it might show that one purpose Jones had in going to Stockton was to meet this woman.

[5] The other matter just referred to is the purported confession of Ernest Striplin. At the date Nathan Chinchiolo and Dorothy Woofter were alleged to have been murdered, one Ernest Striplin was residing in Stockton, but shortly thereafter he was convicted of a felony and sent to Folsom State Prison. While in prison and in July, 1940, Striplin made a purported confession in which he stated that he killed Nathan Chinchiolo and Dorothy Woofter. He was brought back to Stockton by the officers for the purpose of testing his story. He took the officers, or he was taken by them, to the scene of the crime and to other places in Stockton mentioned by the witnesses for the prosecution. The officers were apparently impressed with the truth of his story. However, after his return to Folsom, he repudiated the whole of his purported confession and stated that he only told the story for the purpose of being brought back to Stockton, in the hope that he might be able to escape from the officers on the way to or from prison. He was a witness at the trial, produced by the appellants, and he denied any connection with, or knowledge of, the murder of either Nathan Chinchiolo or Dorothy Woofter. He told where he was on the night the murders were committed, and his testimony was corroborated by his friends, acquaintances and members of his family. In fact he proved a complete alibi. His evidence was for the consideration of the jury, and they evidently believed his purported confession was false in its entirety.

Reviewing the evidence against the appellants as we have in the foregoing pages of this opinion, we find ourselves unable to agree with their contention that it is either insufficient to support the verdicts or that any material parts thereof are so inherently improbable as to be legally insufficient for the consideration of the jury in determining the guilt of the appellants. Therefore, the contention of the appellants as to the insufficiency of the evidence is without merit.

[6-8] The sole error of law assigned by appellants as occurring during their trial was the action of the court in ordering them to rise in order to be identified by witnesses testifying as to their identity, and in directing appellant Jones to remove the visor he was wearing in court, so that the witnesses attempting to identify him might have an unobstructed view of his features. Practically the same state of facts was before this court in the case of People v. Goldenson, 76 Cal. 328, 347, 19 P. 161, and People v. Oliveria, 127 Cal. 376, 380, 59 P. 772, and before the district court of appeal in the case of People v. Ferns, 27 Cal.App. 285, 287, 149 P. 802, in which it was held that such an order of the court was not error nor a violation of the constitutional rights of a defendant not to be a witness against himself. In People v. Cornell, 203 Cal. 144, 147, 263 P. 216, 217, in commenting upon the case of People v. Goldenson, supra, we find it stated: "* * * this court aptly observing that the defendant was not thereby 'compelled to exhibit any part of his person which the jurors could not see as he walked in and out every day.' * * *" Nor was it error for the trial court to order Jones to stand and remove a visor he was wearing in court. It has been held that an order of the trial court directed to a defendant to stand up and remove his glasses was not error. 22 C.J.S., Criminal Law, § 652, p. 999; Rutherford v. State, 135 Tex.Cr.R. 530, 121 S.W.2d 342. Appellants rely upon language contained in the opinion of People v. Mayen, 188 Cal. 237, 253, 205 P. 435, 442, 24 A.L.R. 1383, stating that one accused of crime has the right at all stages "to stand silent and *inert* before his accusers." (Emphasis ours.) The question involved in that case was whether property of the accused, unlawfully seized by the officers, could be introduced in evidence against the owner. The above language upon which appellants rely was not necessary for the decision of any question before the court in that case, and for that reason may not be regarded as binding upon the court in any future action where the point is directly involved. Furthermore, this language relied upon is found in a general discussion of a collateral matter, and we are convinced that by its use the court did not intend to overrule its prior decisions, where it directly held to the contrary.

Our conclusion, therefore, is that the order denying the appellants' motion for a new trial and the judgments against them should be affirmed, and it is so ordered.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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18 Cal.2d 439

WALSH v. WALSH.

L. A. 17863.

Supreme Court of California.

Aug. 18, 1941.

Rehearing Denied Sept. 15, 1941.

1. Judgment 🔑186

In passing on a motion for summary judgment, the trial court's primary duty is to decide whether there is an issue of fact to be tried, and if it finds one, it is then powerless to proceed further, but must allow a jury trial, unless a jury trial is waived. Code Civ.Proc. § 437c.

2. Judgment 🔑186

Issue finding rather than issue determination is the pivot on which the summary judgment law turns. Code Civ.Proc. § 437c.

3. Judgment 🔑183

A "motion for summary judgment" is not a trial on the merits but is merely to determine whether there is an issue to be tried. Code Civ.Proc. § 437c.

See Words and Phrases, Permanent Edition, for all other definitions of "Motion for Summary Judgment".

4. Judgment 🔑181

If an issue of fact is raised, then a summary judgment is improper and the case must proceed to trial. Code Civ.Proc. § 437c.

5. Judgment 🔑181

A motion for summary judgment is proper only where it is perfectly plain that there is no substantial issue to be tried. Code Civ. Proc. § 437c.

6. Judgment ⚷186

A court is not authorized on motion for summary judgment to try an issue, but is to determine whether there is an issue to be tried, and if there is, the issue must be tried by a jury.

7. Contracts ⚷176(1)

When a contract is, in any of its terms or provisions, ambiguous or uncertain, it is primarily the duty of the trial court to construe the contract after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances, and conditions surrounding its execution, and the conduct of the parties relative thereto.

8. Evidence ⚷450(5), 461(1)

Where language employed in a contract is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import, an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and for that purpose conversations between and declarations of the parties during the negotiations at and before the execution of the contract may be shown.

9. Contracts ⚷176(3)

Where the meaning of the language of a contract is uncertain, or doubtful, and parol evidence is introduced in aid of its interpretation, the question of its meaning is one of fact.

10. Judgment ⚷181

Where contracts comprising agreement to support and maintain adopted son used word child or children in some places as denoting a minor or minors and at other times as denoting relationship irrespective of age, trial court erred in granting defendant a summary judgment in action on contract by adopted son after he had passed the age of 21 to recover a money judgment under the agreement. Code Civ.Proc. § 437c.

11. Judgment ⚷178

The summary judgment statute is drastic, and its purpose is not to provide a substitute for existing methods in the trial of issues of fact. Code Civ.Proc. § 437c.

◆

In Bank.

Appeal from the Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by John R. Walsh against Miriam C. Walsh to recover a money judgment under an alleged property settlement agreement. From a judgment of dismissal predicated on the granting of defendant's motion for a summary judgment, the plaintiff appeals.

Judgment reversed, and cause remanded.

For prior opinion see 108 P.2d 763.

Roland Rich Woolley and Joseph F. Rank, both of Los Angeles, for appellant.

Robert W. Kenny, Morris E. Cohn and Max Sisenwein, all of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal from a judgment of dismissal predicated upon the granting of defendant's motion for a summary judgment pursuant to the provisions of section 437c of the Code of Civil Procedure.

The complaint alleged that plaintiff is the adopted son of Raoul A. Walsh and defendant Miriam C. Walsh, who were husband and wife; that defendant and her husband on February 21, 1927, entered into a property settlement agreement (hereinafter designated as the "first agreement"), which contract was modified by a subsequent agreement between the parties dated October 17, 1934 (hereinafter designated as the "second agreement"); and that defendant has failed, neglected and refused to provide for the support and maintenance of plaintiff pursuant to the terms of the contracts aforesaid. The prayer was for a money judgment. By her answer defendant admitted the execution of the instruments as averred in the complaint, but she denied that she owed plaintiffs any sum whatsoever under the provisions of these agreements, copies of which were attached as exhibits in support of her plea. Concurrently with the filing of her answer, defendant moved for a summary judgment based upon the pleadings and her affidavit, wherein she claimed that plaintiff's complaint should be dismissed upon the merits and she emphasized in particular as determinative of the validity of her defense, the fact that plaintiff had attained his majority some four and one-half years prior to the commencement of this suit and that he no longer was in her custody and control. In opposition to the defendant's motion, plaintiff in his affidavit verifying his cause of action, submitted his version of these property settlement agreements, which interpretation, if true, would tend to show that his rights and interests as a third party beneficiary under the contracts were not qualified by or limited to the period constituting his minority. After hearing of the motion and consideration of these divergent views of the litigants as to the meaning attributable to the language employed in these agreements, the court resolved the conflict in favor of the defendant and entered summary judgment dismissing the plaintiff's complaint.

[1-6] The controlling question to be determined upon this appeal is whether or not the trial court abused its discretion by entry of the summary judgment in response to defendant's motion therefor. This remedy, available since 1933 to plaintiffs in actions commenced in the superior court, was extended in like terms of limitation to defendants in 1939 by amendment of the summary judgment statute. The relevant provision is section 437c of the Code of Civil Procedure (as amended by Stats.1939, ch. 331, § 1), which so far as here material reads as follows: "In superior courts * * * when an answer is filed in an action to recover upon a debt * * * if it is claimed that * * * the action has no merit, on motion * * * supported by affidavit * * * the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." Thus, in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived. By an unbroken line of decision in this state since the date of the original enactment of section 437c, the principle has become well established that issue finding rather than issue determination is the pivot upon which the summary judgment law turns. Security-First National Bank v. Cryer, 39 Cal.App.2d 757, 104 P.2d 66; McComsey v. Leaf, 36 Cal.App.2d 132, 97 P.2d 242; Kelly v. Liddicoat, 35 Cal.App.2d 559, 96 P.2d 186; Shea v. Leonis, 29 Cal.App.2d 184, 84 P.2d 277; Bank of America v. Casady, 15 Cal.App.2d 163, 59 P.2d 444. As was said in Shea v. Leonis, supra, 29 Cal.App.2d at page 187, 84 P.2d at page 279: "A motion for summary judgment is not a trial upon the merits. It is merely to determine whether there is an issue to be tried." The same thought was expressed in Bank of America v. Casady, supra, 15 Cal.App.2d at page 168, 59 P.2d at page 446: "If an issue of fact is raised, then a summary judgment is improper, and the case must proceed to trial. Krieger v. Dennie, 123 Cal.App.(Supp.) 777, 780, 10 P.2d 820." In McComsey v. Leaf, supra, the court by an extensive review of leading authorities from other states wherein provision had been made for the award of summary relief, gives striking demonstration of the universal practice to permit this expedited procedure only where it is perfectly plain that there is no substantial issue to be tried. Illustrative of this view is the following quotation from Dwan v. Massarene, 199 App.Div. 872, 192 N.Y.S. 577, 582, a well-considered and widely cited New York case which limits itself strictly to a discussion of the summary judgment rules: "The court is not authorized to try the issue, but is to determine whether there is an issue to be tried. If there is, it must be tried by a jury."

Determinative of whether or not a genuine and substantial issue of fact was presented by the aforementioned affidavits tendered upon the hearing of the motion for summary judgment is the following specific language of paragraph VIII of the first agreement referable to the undertaking of defendant to furnish support and maintenance to plaintiff:

"The wife shall have the custody and control of the said children, John R. Walsh and Robert R. Walsh, and of their education, until they shall respectively attain to the age of twenty-one years, without any interference whatsoever on the part of the husband. The wife shall at all times consistent with school attendance by said children, afford reasonable opportunity to the husband to visit the children and take them, or either of them, on recreational or other trips, and like opportunity to the children to visit the husband. The wife agrees that she will, so long as she receives the payments provided for in this agreement, properly care for, maintain and educate the said child or children in respect of whom said payments shall have been so made; but, subject only to this agreement, she may expend the said payments in accordance with her uncontrolled discretion."

The aforesaid modification by the second agreement in 1934 related only to particulars nonessential to the instant discussion and therefore need not be considered here.

It is plaintiff's position that the words "child or children" as used in the above-quoted paragraph are purely descriptive so far as concerns the duration of the benefits to be received by them from defendant. In this connection he places special emphasis upon the fact that when the subject of custody and control is considered in the first sentence, a special limitation is provided depending upon minority; but in the third sentence when the extent of time during which the "child or children" shall receive benefit is established, the duration is limited by the single clause "so long as she receives the payments provided for in this agreement." On the other hand, the defendant insists that the thought pervading the paragraph as a whole is the care of the children during minority, so that the defendant's undertaking to support the plaintiff, like her right to his custody, terminated upon his attaining his majority. Thus, whether these pertinent words were intended as terms of description or of limitation becomes the crux of the controversy.

[7-9] We are of the opinion from a reading of paragraph VIII that the words "child or children" as there used are ambiguous and indefinite. The words, flexible in character, are of varying meanings, sometime defined as synonymous with minor, at other times employed to denote relationship with regard to parentage irrespective of age. On its face the phraseology of this paragraph considered in its entirety is reasonably consistent with either of the interpretations advanced here by the litigants. When a contract is in any of its terms or provisions ambiguous or uncertain, "it is primarily the duty of the trial court to construe it *after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances, and conditions surrounding its execution and the conduct of the parties relative thereto.*" Barlow v. Frink, 171 Cal. 165, 173, 152 P. 290, 292. (Italics added.) The governing principle as to when parol testimony may be introduced to explain the language of a contract or to ascertain the intention of the parties is clearly set forth in Kenney v. Los Feliz Investment Co., Ltd., 121 Cal.App. 378, 386, 387, 9 P.2d 225, 229, as follows: "It is a settled rule that, when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import, an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and declarations of the parties during the negotiations at and before the execution of the contract may be shown. Balfour v. Fresno C. & I. Co., 109 Cal. 221, 41 P. 876." And in Scott v. Sun-Maid Raisin Growers Ass'n, 13 Cal.App.2d 353, at page 359, 57 P.2d 148, at page 151, the court stated: "When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact* * * *. Thomson v. Leak, 135 Cal.App. 544, 548, 27 P.(2d) 795; Gallatin v. Markowitz, 139 Cal.App. 10, 13, 33 P.(2d) 424; Coats v. General Motors Corp., 3 Cal.App.(2d) 340, 356, 39 P.(2d) 838." (Italics added.)

[10, 11] Applying the rules of law above stated, it is clear that the trial court should have denied defendant's motion for a summary judgment so that the issue raised between the parties hereto as to the duration of defendant's undertaking to furnish support and maintenance to the plaintiff might be tried upon its merits. The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact. The use made of the statute in this case was a perversion and an abuse of it.

For the reason indicated the judgment of the superior court is hereby reversed and the cause remanded.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.

18 Cal.2d 502

BRAINARD v. DE LA MONTANYA et al.

Sac. 5389.

Supreme Court of California.

Aug. 25, 1941.

1. Bankruptcy 🔑303(3)

In action by corporation's bankruptcy trustee against majority stockholder and director to establish trust and recover alleged secret profits on theory that defendant dealt personally with or through corporation to his own advantage, without other directors' and stockholders' knowledge or consent, evidence *held* sufficient to sustain trial court's material findings in defendants' favor.

2. Corporations 🔑186, 316(1)

Any of corporation's directors and stockholders may deal with corporation in his individual capacity on full disclosure of such fact to, and with full knowledge and consent of, other directors and stockholders.

3. Bankruptcy 🔑278

In bankruptcy trustee's action against majority stockholder and director of bankrupt corporation to establish trust and recover secret profits on theory that defendant dealt personally with or through corporation to his own advantage, without other directors' and stockholders' knowledge and consent, in transactions respecting which no directors' meetings were held, plaintiff cannot recover under statute stating generally duty of corporation directors and officers to act in good faith with view to corporation's interests and providing that no transaction between corporation and director shall be void or voidable under certain circumstances merely because such director was present at board meeting which approved transaction and voted for such approval. Civ.Code, § 311.

4. Corporations 🔑316(1)

A corporation director is not precluded from dealing directly with corporation, though any transaction between them is subject to rigid scrutiny and voidable for any violation of his duty as trustee, but not absolutely void.

5. Corporations 🔑316(1)

Where corporation directors, consenting to sale of their own property to corporation at their own price, are only stockholders of corporation and sole beneficiaries of trust, such sale is neither void nor voidable at corporation's instance.

6. Corporations 🔑383

While a corporation ordinarily acts by resolutions, adopted at formal meetings of its board of directors and entered in its minutes, decisions reached by all directors and stockholders of closed corporation at informal conferences are binding on corporation when corporate formalities have been dispensed with and corporate affairs carried on through such conferences by custom with consent of all concerned.

7. Bankruptcy 🔑145(1)
Corporations 🔑316(1)

Transactions carried on by a corporation stockholder and director personally with or through corporation after full disclosure of facts to, and with full knowledge and consent of, other stockholders and directors were valid as against attack by corporation or its bankruptcy trustee, in absence of fraud on any creditors of corporation, though no formal directors' meetings were held.

In Bank.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by G. W. Brainard, as trustee in bankruptcy of the Bennett Distilling Company, against Pierre De La Montanya and wife to establish a trust and recover alleged secret profits. Judgment for defendants, and plaintiff appeals.

Affirmed.

Grant H. Wren, Clarence A. Shuey, and Arthur L. Shannon, all of San Francisco, for appellant.

John Ralph Wilson and Bertrand F. Lurie, both of San Francisco, and Nathan F. Coombs, of Napa, for respondents.

SPENCE, Justice pro tem.

Plaintiff, as trustee in bankruptcy of Bennett Distilling Company, a corporation, brought this action against defendants Pierre De La Montanya and his wife, seeking to establish an alleged trust and to recover alleged secret profits. The cause was tried by the court sitting without a jury and judgment was entered in favor of the defendants. Plaintiff appeals from said judgment.

The controversy arose out of the business dealings over a period of years of defendant Pierre De La Montanya. In 1920 said defendant, together with E. J. O'Brien and E. A. Groezinger, entered into a copartnership for the purpose of manufacturing and selling non-alcoholic beverages and syrups under the Cresta Blanca label. The parties handled their affairs informally and no articles of copartnership were ever drawn. Each of the parties continued thereafter to engage in independent activities, said defendant dealing as an alcohol broker, Groezinger dealing in whiskey and O'Brien receiving royalties from Rathjen-Eggers. In 1923 said parties organized a corporation known as Cresta Blanca Liquid Sunshine Company for the purpose of carrying on the business formerly conducted by the copartnership. They received stock for their interests in the copartnership. Stock to the amount of $7,500 was sold for cash but this stock was subsequently purchased by said defendant. Thereafter the outstanding stock was held in approximately the following proportions: De La Montanya 73 per cent, O'Brien 23 per cent and Groezinger 4 per cent. In 1928 the Cresta Blanca Company was organized for the purpose of taking over the Cresta Blanca Liquid Sunshine Company and continuing the business of manufacturing and selling non-alcoholic beverages and syrups under the Cresta Blanca label. The newly-formed corporation had the same directors and officers as the old corporation, with the exception of Groezinger. De La Montanya acted as president and O'Brien acted as vice president. The stockholders and their proportionate stock interests remained the same, except that the stock of Groezinger was transferred to and was carried in the name of De La Montanya, with the consent of all concerned. Thereafter there were but two stockholders of record, but Groezinger admittedly owned 4 per cent of the stock and he continued to take an active part in the business. The business affairs of all said corporations were handled very informally, there being practically no formal directors' meetings held and practically no minutes kept at any time. The parties apparently continued to act in much the same manner as partners. All actively participated in the conduct of the business and their decisions were made through informal discussions. The parties also continued to engage in separate activities. The proportionate stock interests remained the same until October, 1935, when De La Montanya sold all of his stock to Edmond F. Maher for $40,000. In 1935 the name of the corporation was changed to Bennett Distilling Company and it continued its business under that name until the corporation was adjudicated a bankrupt in September, 1936. This action was brought against De La Montanya and his wife in July, 1938.

The complaint was in three counts. The first count involved what has been termed the real estate matter; the second count involved the brandy matter; and the third count involved the alcohol matter. Each of said counts was based upon the theory that defendant had dealt personally with or through the corporation to his own advantage without the knowledge or consent of the other directors and stockholders and in violation of the fiduciary relationship existing between defendant and the corporation. The only allegations of the complaint involving the wife of defendant Pierre De La Montanya are found in the first count. It appears that the real property was purchased in the name of the two defendants and that defendant Pierre De La Montanya thereafter conveyed his interest therein to his wife. We shall hereinafter refer to defendant Pierre De La Montanya as the defendant.

The Real Estate Matter.

As above indicated, the Cresta Blanca Company was organized during the prohibition era and, for some time, the company dealt solely in non-alcoholic beverages. In April, 1933, Congress legalized the manufacture and sale of wines of 3.2 per cent alcoholic content. In anticipation of this legislation the company had sent its representative, Edmond F. Maher, to Washington to apply for a permit to deal in such wines. Maher wired from Washington that it would be necessary to obtain premises separate from those used for dealing in non-alcoholic beverages in order to obtain a permit to deal in such wines. Defendant sought suitable premises in the vicinity, and on Saturday, April 15, 1933, he signed a contract on behalf of the company to purchase a building at 704 Sansome Street, said building being located directly across the street from the office of the company.

On Monday, April 17, 1933, the real estate agent called at the office of the company, and defendant then told O'Brien and Groezinger that he had arranged for the purchase of said building by the company. O'Brien protested the purchase of any real property by the company and, as a result of the conversation, defendant stated that he would purchase the property himself and rent it to the company for $200 per month. Groezinger said in the presence of O'Brien, "It is all right with me." Thereafter defendant purchased the premises, taking a deed in the name of himself and his wife and executing a note and deed of trust to secure the balance of the purchase price. Thereafter he paid all interest on the note together with the taxes and insurance on the premises. The occupation by the company of the premises at 704 Sansome Street began on April 15, 1933, and continued until late in 1935 or the early part of 1936, and the company paid to defendant the rental of $200 per month during that entire period with the knowledge and consent of O'Brien and Groezinger.

With respect to said transaction, the trial court found that defendant fully informed the other members of the board of directors of the purchase of said real property on behalf of the corporation; that O'Brien and Groezinger disapproved of any purchase of any real property by the corporation; that it was thereupon agreed by the corporation, acting through its board of directors and with the consent and knowledge of all its stockholders that defendant should personally purchase the property and rent the same to the corporation for a monthly rental of $200; that defendant thereupon assumed the obligation of purchasing said property and the corporation was released from said obligation; that the corporation, acting through its board of directors and with the consent and approval of all the stockholders, took possession of said premises and paid the agreed rental; and that no act of defendant was done secretly or in violation of any fiduciary relationship which may have existed between defendant and the corporation.

The Brandy Matter.

The brandy referred to in the second count consisted of a large quantity thereof distilled in the early twenties by Sun Maid Raisin Growers Association. In 1928, and again in 1930, defendant personally endeavored to arrange for the sale of said brandy but he was unable to procure the necessary permits for the preparation of the brandy for sale. In the summer of 1932, however, the Sun Maid Raisin Growers Association entered into a contract with defendant for the disposal of said brandy. Twenty-five barrels thereof were donated to the Cresta Blanca Company to be bottled and sold. The purpose of this donation by Sun Maid was to stimulate the interest of the trade with a view to the possible sale of said brandy to some of the large dealers in distilled liquor. This purpose was known to O'Brien and Groezinger. The brandy was accepted by the corporation and was bottled under the Cresta Blanca label. Only a small quantity of said twenty-five barrels was sold by the corporation under the original plan, due to threatened litigation by the owners of the Cresta Blanca trade name.

In December, 1932, defendant met in Los Angeles with a representative of Joseph Finch & Company and a representative of Sun Maid. A sale was negotiated for all of the Sun Maid brandy together with the remainder of the twenty-five barrels belonging to the Cresta Blanca Company. Defendant and one Roy Payne received a commission from Sun Maid upon said sale. At that time defendant procured from Joseph Finch & Company an option on two hundred barrels of said brandy, which option he later exercised in July, 1933. He also acquired nineteen barrels of brandy directly from Sun Maid. He sold one hundred barrels of the last-mentioned brandy to a dealer in San Francisco and the remainder was marketed by him under his own label. A portion of this brandy was thereafter purchased from defendant by the Cresta Blanca Company.

In this connection, the trial court found that at all times during his affiliation with the Cresta Blanca Company defendant personally and on his own behalf was engaged as a broker in the selling of alcoholic beverages for personal profit, which fact was fully known and approved by all the directors and stockholders of the corporation; that in 1932 the corporation was engaged solely in the manufacture and sale of nonalcoholic beverages and was not authorized or empowered to engage in the manufacture or sale of alcoholic beverages; that said brokerage business of defendant was disconnected from the business of the corporation and was not in competition therewith and did not conflict with his duties as a director of the corporation; that all of the directors and stockholders knew of the donation of the twenty-five barrels of brandy to the corporation and knew and consented to the arrangement of defendant with Sun Maid whereby defendant was to receive a commission on the sale of said brandy; that defendant, acting in his own individual capacity and in conjunction with Roy Payne, negotiated the sale of said brandy to Joseph Finch & Company for a commission, which was shared equally by defendant and Payne; that said transaction was fully disclosed at said time to all of the directors and stockholders of the corporation who consented and approved of defendant's dealing in said transaction; that defendant, in pursuance of his own business of dealing in alcoholic beverages, obtained for his own individual purposes and with his own funds approximately 200 barrels of brandy, and, after having fully disclosed to all the directors and stockholders his personal interest in said brandy, sold certain amounts thereof at various times to said corporation with the consent and approval of all of said directors and stockholders, which brandy so purchased was disposed of by the corporation at a profit to itself; that said transactions involving sales of defendant's brandy to the corporation appeared on the books of the corporation and payment therefor by the corporation was made by the corporation acting through its officers and directors, other than defendant.

The Alcohol Matter.

From 1920 until 1936, and at all times during the dealings between the parties, defendant acted independently and in his individual capacity as a broker dealing in alcohol. Defendant's connection with certain alcohol companies and his receipt of brokerage commissions from said companies was known to O'Brien and Groezinger throughout their association with defendant. The corporations with which the parties were connected used alcohol in the manufacture of their products and, on numerous occasions, alcohol was ordered by the employees when needed from the alcohol companies represented by defendant without consulting defendant. Defendant received brokerage commissions from the alcohol companies in said transactions.

In this connection, the trial court found that defendant received said brokerage commissions in pursuance of his individual business as an alcohol broker; that the price paid for said alcohol was the market price and was not enhanced by the payment of said commissions; that defendant fully disclosed to all the directors and stockholders of said corporations his relationship with the alcohol companies and the fact that he was receiving brokerage commissions on all of said alcohol purchased from said companies and that all of the directors and stockholders approved and consented to said transactions; and that said transactions and the receipt of said commissions by defendant were not in conflict with his duties as an officer and director of said corporations.

Plaintiff's Contentions.

Plaintiff contends on this appeal that the evidence is insufficient to sustain the findings and that the decision is against law, but in our opinion neither of said contentions may be sustained.

[1] Our review of the record leads us to the conclusion that there was ample evidence to sustain all of the material findings. Groezinger had died prior to the trial and the main witnesses were defendant and O'Brien. The evidence given by O'Brien was in conflict in certain particulars with the evidence given by defendant but the trial court resolved those conflicts in favor of defendants. It would serve no useful purpose to review the conflicts in detail. Suffice it to state that O'Brien denied the occurrence of several discussions relating to the transactions involved and his testimony tended to show a lack of full disclosure on the part of defendant and a lack of full knowledge and consent on the part of himself. On the other hand, the conflicting testimony given by defendant, which was corroborated in many important details by the direct testimony of disinterested witnesses and by the surrounding circumstances, showed full disclosure on the part of defendant and full knowledge and consent on the part of all the directors and stockholders, which included only O'Brien and Groezinger in addition to defendant himself. As above indicated, we are of the view that defendant's testimony and other testimony in the record clearly sustain the material findings.

[2] While the briefs are devoted largely to a discussion of the question of the sufficiency of the evidence to sustain the findings, plaintiff apparently takes the position that the decision is against law even assuming the sufficiency of the evidence to sustain said findings including those relating to full disclosure and full knowledge and consent. We cannot agree with plaintiff in the position thus taken. The

corporations involved were essentially closed corporations which were merely used as the mediums through which the three men transacted a portion of their business. It appears that the corporations were originally organized solely for the purpose of manufacturing and selling non-alcoholic beverages and syrups and that each of the three men continued to conduct an independent business, dealing in alcohol and alcoholic beverages under the limitations provided by law during the prohibition era. There were no directors or stockholders other than said three men during any of the times in question and we know of no rule which would prevent any one of the three men from dealing with said corporations in his individual capacity upon full disclosure and with the full knowledge and consent of the other two men.

[3] Plaintiff cites and relies upon section 311 of the Civil Code but that section does not appear to be helpful to plaintiff under the circumstances. In the first sentence of said section there is set forth in general terms the duty of the directors and officers to act in good faith and with a view to the interests of the corporation. The section then provides that no transaction between a corporation and a director "shall be either void or voidable" under certain circumstances merely by reason of the fact that such director is present at the meeting of the board which approves such transaction or by reason of the fact that his vote is counted for such purpose. This last-mentioned portion of said section can have no application here as no directors' meetings were held with respect to the above-mentioned transactions. It may be further noted that said section does not purport to set forth all of the various circumstances which may render valid a transaction between a corporation and one of its directors. As is said in Ballantine's California Corporation Laws, 1938 Edition, section 92, at page 99, "This section does not undertake to codify all of the rules of law and equity with reference to dealings between directors or officers and the corporation."

[4, 5] Numerous authorities are cited in 6a California Jurisprudence at page 1112 in support of the proposition that "In accord with the general fiduciary duties and relationship which a director bears, an officer is not precluded from dealing directly with the corporation of which he is a director, although any transaction between them is subject to rigid scrutiny and is voidable for any violation of his duty as trustee, but is not absolutely void." And it has been further held that where the consenting directors are the only stockholders and the only beneficiaries of the trust, a sale to the corporation by its directors of their own property at their own price is neither void nor voidable at the instance of the corporation. See Sargent v. Palace Cafe Co., 175 Cal. 737, 739, 167 P. 146, and authorities cited; 6a Cal.Juris. 1121. It thus appears that there are circumstances under which a director may deal with the corporation and that there are circumstances under which such a transaction will be neither void nor voidable at the instance of the corporation. In passing, we may state that there is neither allegation nor proof in the present case that at the time that the transactions in question took place, there were any creditors or that any act was done by the corporation or any individual in fraud of creditors. We must therefore treat the stockholders in the present case as the "only beneficiaries of the trust" and, under the findings, all that was done by defendant was done after full disclosure and with the full knowledge and consent of all said beneficiaries.

[6] It is immaterial that no formal directors' meetings were held. While it is true that a corporation ordinarily acts by resolutions which are adopted at formal meetings of its board of directors and are entered in its minutes, it is also true that decisions reached by all the directors and stockholders of a closed corporation at informal conferences will be binding upon the corporation when, by custom and with the consent of all concerned, corporate formalities have been dispensed with and the corporate affairs have been carried on through such informal conferences. First National Bank v. Frazier, 143 Or. 662, 19 P.2d 1091, 22 P.2d 325; Nat. Bank v. Puget Sound Biscuit Co., 61 Wash. 192, 112 P. 265; Longmont Supply Ditch Co. v. Coffman, 11 Colo. 551, 19 P. 508; Miller v. South Hills Lumber & Supply Co., 334 Pa. 293, 6 A.2d 92; Baker v. Smith, 41 R.I. 17, 102 A. 721; Fletcher's Cyclopedia of Law of Private Corporations, vol. 2, § 394; Thompsons on Corporations, 3d Ed., vol. 2, § 1171. Such was the case here.

[7] For the foregoing reasons, we conclude that under the facts as found by the trial court the transactions complained of

were valid against attack by the corporation or the trustee in bankruptcy of said corporation.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

18 Cal.2d 478

MARTIN et al. v. CALIFORNIA MUT. BLDG. & LOAN ASS'N et al.

S. F. 16004.

Supreme Court of California.

Aug. 25, 1941.

1. Building and loan associations 🔑**2, 42(18)**

The statute which became effective on August 29, 1933, respecting distribution and payment of dividends in liquidation by building and loan commissioner to shareholders of building and loan associations, was applicable to a case wherein an association, which was taken over by commissioner for liquidation on January 23, 1933, had changed from a mutual to a capital stock company in 1924 and exchanged outstanding mutual shares for investment certificates without notifying plaintiffs, who held mutual shares, of their rights to exchange shares for certificates, and under statute plaintiffs were entitled to share in proceeds of liquidation as creditors, ratably with holders of investment certificates. St.1931, pp. 483 and 541, § 1.01 et seq., and § 13.16, as amended by St. 1933, p. 2721; St.1933, p. 2723, § 3.

2. Statutes 🔑**147**

While an intention to change the law, as expressed in a statute, by an amendment is usually inferred from a material change in language of statute, a consideration of surrounding circumstances may indicate that amendment was merely result of a legislative attempt to clarify meaning of statute.

3. Building and loan associations 🔑**42(18)**

Where building and loan association, which was taken over for liquidation in 1933, had changed from a mutual to a capital stock company in 1924, and exchanged outstanding mutual shares for investment certificates without notifying plaintiffs, who held mutual shares, of their rights to exchange shares for certificates, and association, by its policy, accorded shares equal rank with certificates, even under Building and Loan Association Act as it read in 1931, the Supreme Court would not, in equitable proceedings by plaintiffs to establish their right to share equally with other creditors in assets of association, disregard policy of association and treat plaintiffs as "shareholders" subordinate in liquidation to certificate holders, but plaintiffs were to be treated as persons similarly situated to holders of certificates and entitled to share equally with them in proceeds of liquidation. St.1931, pp. 483 and 541, § 1.01 et seq., and § 13.16, as amended by St.1933, p. 2721; St. 1933, p. 2723, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Shareholder".

4. Building and loan associations 🔑**1**

The complicated relationships arising from affairs of a building and loan association should normally be determined only by an examination of organization, structure and operations of the particular association in light of governing statutes, articles of incorporation and by-laws, and not merely by reference to labels attached to various interests.

5. Building and loan associations 🔑**42(18)**

Where thrift accounts issued by a building and loan association, after it changed from a mutual to a capital stock company in 1924 under plan whereby outstanding mutual shares were exchanged for investment certificates, were treated by association as being equal to certificates before its liquidation in 1933, the accounts, in substance, were investment "certificates" and not "shares", and holders thereof could not be treated as "shareholders" but were entitled to share in proceeds of liquidation as creditors, ratably with holders of investment certificates. St. 1931, pp. 483 and 541, § 1.01 et seq., and § 13.16, as amended by St.1933, p. 2721; St.1933, p. 2723, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Certificate" and "Share".

In Bank.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Consolidated actions by Lenala A. Martin and others against the California Mutual Building and Loan Association and others, wherein plaintiffs sought to establish their right to share equally with other creditors in assets of defendant California Mutual Building and Loan Association, an insolvent corporation, in process of liquidation by defendant Building and Loan Commissioner. From a judgment decreeing that plaintiffs were to share in proceeds of liquidation as creditors, ratably with holders of investment certificates, the Building and Loan Commissioner appeals.

Affirmed.

Walter Carrington, of Oakland, D. T. Jenkins, of San Jose, Patrick J. Kearns, of San Francisco, and James C. Engebretson, of San Jose, for appellants.

Herbert C. Jones, Lloyd A. Mason, and Kenneth R. Malovos, all of San Jose, for respondents Martin et al.

J. M. Atkinson, of Mountain View, for respondent Burrell.

Kenneth R. McDougall, of Palo Alto, for respondent McDougall.

GIBSON, Chief Justice.

In these consolidated actions plaintiffs seek to establish their right to share equally with other creditors in the assets of the defendant California Mutual Building and Loan Association, an insolvent corporation now in process of liquidation by the defendant Building and Loan Commissioner. The commissioner appeals from an order of the superior court decreeing that plaintiffs are to share in the proceeds of liquidation as creditors, ratably with the holders of investment certificates.

Prior to 1924, the California Mutual Building and Loan Association was a mutual association in which the great bulk of the investments were represented by withdrawable, mutual membership shares having a right to full participation in the net profits of the corporation. These withdrawable shares, some of which were installment shares and some of which were fully paid shares, constituted the only type of proprietary or capital stock. Accumulated profits set aside as a reserve fund, and a small amount of investment certificates issued on the security of that fund, were its only nonwithdrawable capital. On February 12, 1924, however, a change in the capital structure of the corporation was authorized by the shareholders, and the by-laws were amended to permit the issuance of 2,500 shares of guarantee capital stock which was nonwithdrawable and which was designed to be the proprietary stock of the corporation. Provision was also made for a pro rata distribution of the previously accumulated reserve fund among the mutual shareholders, and a majority of the directors was thereafter to be selected from the holders of the guarantee stock.

On March 11, 1924, the Board of Directors, in order to complete the conversion of the association from a mutual to a capital stock company, terminated the right of the mutual shares to full participation in future profits and restricted them to a dividend or interest rate of 6 per cent. By a second resolution the board instructed the secretary to take up all installment stock shares and to transfer them to fully paid shares or investment certificates at the option of the holders. The issuance of investment certificates, also bearing interest at 6 per cent, was authorized by a third resolution. A fourth resolution provided for the establishment of "thrift accounts", hereinafter discussed.

Subsequent to the issuance of the guarantee stock, and the adoption of these several resolutions, the directors instructed officers and employees of the association to urge the exchange of all outstanding mutual shares, both installment and fully paid, for the non-stock form of investment certificate. No particular time was fixed for the consummation of the exchange. Accordingly, the association continuously pursued the policy of effecting the exchange of mutual shares for investment certificates. This was not done by written communication or public notice to investors or in any other regular manner, but by personal interviews with the mutual shareholders from time to time as they came into the company office. As a result of this policy, investors who in 1924, held mutual shares aggregating some $4,400,000 exchanged enough of them for non-stock investment certificates so that by the year 1932 only about $200,000 of the old mutual shares were still outstanding. Meanwhile $420,000 of thrift accounts had been issued, investment certificates outstanding had increased to approximately $12,000,000, and guarantee stock in the amount of $500,000 had been issued. There is evidence that failure to transform the remaining mutual shares to investment certificates was due largely, if not wholly, to the fact that holders thereof had not been informed of the right to make the exchange or had been assured that it was not necessary to make the transfer for the reason that the reorganization already had changed their status from proprietary owners to creditors on a parity with the holders of investment certificates. The trial court found that neither the association nor its officers had notified or informed plaintiffs of the plan, policy or course of action of the association, or had notified or informed plaintiffs that they had the "right, privilege, option or opportunity" to convert their mutual shares into investment certificates. It was further found that after the capital structure change of 1924, the association represented that upon the issuance of the guarantee capital stock, it became the proprietary stock and the mutual shares "became in effect, in reality, in substance and in truth merely borrowings or interest bearing indebtednesses of said association, and no longer true proprietary stock". Mutual shares were grouped with the investment certificates in the financial statements of the association, and officials of the association testified to the consistent practice of dealing with the mutual shareholders as depositors or creditors after 1924 and until the association encountered financial difficulties. Large dividends were paid to the holders of guarantee stock while mutual shareholders were restricted to a 6 per cent return and the trial court found that although the mutual shares had voting power, the guarantee stockholders in fact controlled the corporation.

Some of the plaintiffs hold mutual shares issued prior to 1924. Others, however, hold shares issued as "thrift accounts" after 1924. These were mutual shares on which compulsory monthly payments over a long period of time were required. In soliciting these accounts the association drew no distinction between them and other accounts for the purchase of investment certificates, but represented that they offered a new plan for regular savings in which the investor would be rewarded upon completion of the long saving plan by receiving a higher yield of 8 per cent. Though labeled "installment shares" these thrift accounts were neither understood nor intended to be shares. While they were being issued the association was engaged in its campaign to exchange the old mutual shares for investment certificates in order to avoid a tax liability which was thought to be consequent upon the existence of mutual shares. And when in 1927 the association was assessed a federal tax on the theory that its depositors were mutual shareholders receiving dividends out of earnings, the association indicated its attitude toward the thrift accounts by its successful contention in a controversy with the federal taxing authorities that these "shares" as well as the old mutual shares were in reality borrowed capital, and the profits disbursed thereon merely interest, deductible from gross income in the same manner as interest on investment certificates. Holders of thrift accounts were allowed over the years, as were holders of the old mutual shares, to convert them into the investment certificate form whenever they desired, and for all practical purposes they were treated as interchangeable with investment certificates. Moreover, the thrift accounts were not accorded "full participation in the profits" as then required of "installment shares" by section 634(a) of the Civil Code, but, instead, were limited to a fixed maximum return of 8 per cent.

The association encountered financial difficulty in 1931 and on January 23, 1933, the Building and Loan Commissioner took over the association for the purpose of liquidation under the Building and Loan Association Act. Stats.1931, p. 483; Deering's Gen.Laws, Act 986. Thereafter the plaintiffs filed their claims with the commissioner asserting the right to share equally in the proceeds of liquidation with the investment certificate holders. Their claims having been rejected by the commissioner, plaintiffs instituted this action. The trial court found for the plaintiffs concluding that since they were on an equal basis with the investment certificate holders prior to liquidation, they should share ratably with them in the proceeds of such liquidation.

[1] When the association went into liquidation in January, 1933, the Building and Loan Association Act provided that the commissioner should first pay all claims "other than to shareholders and stockholders without distinction or preference as between the claims of certificate holders and other creditors". Act, § 13.16. By a statute which became effective August 29, 1933, the act was amended to provide that "notwithstanding anything to the contrary herein contained, in the case of any association in which shareholders shall have heretofore been granted the right and option by

the association to exchange their shares for investment certificates of equal value he shall distribute and pay dividends in liquidation to such shareholders without distinction or preference as between the claims of such shareholders and the claims of certificate holders and other creditors". Stats. 1933, p. 2721; Deering's Gen.Laws [1937], Act 986, § 13.16. An urgency clause was also enacted which provided: "There are numerous building and loan associations now, at the present time, in the process of liquidation and in order that shareholders in such associations shall be assured of full and complete protection by allowing them under the conditions set forth in this act to participate ratably with investment certificates * * * it is absolutely essential that this act take effect immediately and its provisions made immediately applicable to associations now in the process of liquidation." Stats.1933, p. 2723. This statute was clearly intended by the legislature to apply to cases such as the present one, and under it the plaintiffs are entitled to share ratably with holders of investment certificates since they hold shares which were exchangeable for such certificates. The commissioner contends, however, that to accord a retroactive effect to the 1933 amendment and make it applicable to an association then in process of liquidation would constitute an impairment of the obligation of contract and an interference with vested rights in violation of both the state and federal constitutions.

[2] We do not find it necessary to determine the correctness of this contention, for it is the opinion of this court that even under the statute as it read prior to 1933, the plaintiffs would not have been treated as "shareholders" but as persons similarly situated to holders of investment certificates and entitled to share equally with them on liquidation. While an intention to change the law is usually inferred from a material change in the language of the statute (People v. Weitzel, 201 Cal. 116, 118, 255 P. 792, 52 A.L.R. 811; Meyerfeld v. South San Joaquin Irr. Dist., 3 Cal.2d 409, 417, 45 P.2d 321, 325; Loew's, Inc. v. Byram, 11 Cal.2d 746, 82 P.2d 1), a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute. See Union League Club v. Johnson, 18 Cal.2d 275, 115 P.2d 425; 59 C.J. 1098; 2 Sutherland, Statutory Construction, p. 777. It is true that in Gallichotte v. California Mut. B. & L. Ass'n, 23 Cal. App.2d 570, 579, 74 P.2d 73, 77, 535, another amendment of the same section was held not to be a mere clarifying amendment. In that case the plaintiff had instituted an action for damages against the association prior to the time of taking possession of its assets by the commissioner, at which time the statute required "all claims of creditors" to be presented to the commissioner within a fixed time or to be "forever barred". The commissioner did not mail a copy of the notice to file claims to the plaintiff. He was served with a memorandum to set the cause for trial and did in fact carry on the defense of the action at the first trial in the name of the association. Meanwhile the statute was amended to require the filing of claims even where a suit was pending prior to liquidation, and on the second trial the commissioner pleaded that the plaintiff's failure to file a claim had barred his recovery. The court correctly held, particularly in view of the practical construction given the statute by the commissioner himself, that the plaintiff was not required to file a claim under the statute as it read prior to the amendment.

[3, 4] The instant case arises under entirely different circumstances. Prior to 1924, the old mutual shares were clearly proprietary in nature. Then the association was reorganized as a guarantee stock association. Practical voting control passed to the holders of the guarantee stock. Prior reserves were distributed to the old shareholders. A fixed rate of return equal to that on investment certificates was provided. A policy of exchanging the shares for investment certificates was instituted and, in fact, approximately 95 per cent of the shares were so exchanged. Association officers and shareholders alike understood the shares to be on an equal basis with investment certificates and they were so treated in the association balance sheet. By its settled policy, the association accorded these shares equal rank with investment certificates, and it is clear that even under the statute as it read in 1931, this court would not in equitable proceedings of this nature have disregarded that policy and treated the plaintiffs as "shareholders" subordinate in liquidation to investment certificate holders. In such a situation no particular significance should attach to

the label given plaintiffs' investments and the court should be guided by the substance rather than the form of the investment. Cf. Intermountain B. & L. Ass'n v. Gallegos, 9 Cir., 78 F.2d 972, 981; Savannah, etc., L. & B. Co. v. Silverberg, 108 Ga. 281, 33 S.E. 908, 911; Helvering v. Richmond F. & P. R. Co., 4 Cir., 90 F.2d 971; In re National B., L. & Prov. Ass'n, 12 Del.Ch. 93, 107 A. 453, 456; 11 Fletcher, Corporations, p. 719, § 5294. Our recent opinion, In re Pacific Coast Building-Loan Ass'n, 15 Cal.2d 134, 99 P.2d 251, sets forth the guiding principle that the complicated relationships arising from the affairs of a building and loan association should normally be determined only by an examination of the organization, structure and operations of the particular association in the light of the governing statutes, articles of incorporation and by-laws, and not merely by reference to the labels attached to the various interests. The holders of membership shares in that case were in a much less favorable position than the plaintiffs herein, but they were nevertheless, held to be creditors and entitled to payment of the principal of their claims before payment of interest accruing after liquidation to holders of investment certificates.

[5] The thrift accounts also were accorded such an equality of treatment with investment certificates before liquidation that it could not have been the legislative intention to defer one to the other during liquidation. Although these shares were issued after the reorganization of the association, they were not sold with the intention of creating a class of membership shareholders such as those involved in the Pacific Coast case. Instead, they were offered by the association as identical with other accounts for the purchase of investment certificates. As in the case of the old mutual shares, they were regarded by the association officers and the investors as of equal rank with the investment certificates, were so treated on the balance sheet and in tax negotiations, and were exchangeable for such certificates. In substance, if not in name, they are investment certificates and not shares, and would have been so treated under the prior statute.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

CURTIS, J., concurred in the judgment.

18 Cal.2d 487

ADAMS et al. v. CALIFORNIA MUT. BUILDING & LOAN ASS'N et al.

BYL et al. v. SAME.

S. F. 16417.

Supreme Court of California.

Aug. 25, 1941.

1. Estoppel 🔑87
Limitation of actions 🔑13

Where delay in commencement of action was caused by plaintiffs' reliance upon defendant's representation that decision in a similar previously commenced action would be determinative of plaintiffs' rights, defendant was "estopped" from pleading laches or the statute of limitations as a defense to plaintiffs' action.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Estoppel 🔑63
Limitation of actions 🔑13

A person, by his conduct, may be "estopped" from relying upon the defenses of laches and limitations.

3. Action 🔑63

Where delay in commencing action is induced by defendant's conduct, the delay cannot be availed of by defendant as a defense.

4. Action 🔑63
Limitation of actions 🔑13

Where delay in commencement of actions was caused by plaintiffs' reliance upon defendant's representation that decision in a similar previously commenced action would be determinative of plaintiffs' rights, and plaintiffs' actions were seasonably instituted upon discovery of defendant's change of attitude respecting effect of the previous action upon plaintiffs' rights, plaintiffs' actions were not barred by "laches" or limitations.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

5. Appeal and error 🔑1207(3)
Attorney and client 🔑155

Where representative actions were brought on behalf of named plaintiffs and others similarly situated but not represented in corresponding litigation, any award of counsel fees was to be paid out of that portion of fund recovered by those for whose benefit actions were brought, and reasonable-

ness of any award of counsel fees was for determination of trial court when causes were remanded for further proceedings.

◆

Appeal from Superior Court, Santa Clara County; Warren V. Tryon, Judge.

Consolidated actions by A. W. Adams and others against the California Mutual Building and Loan Association and others, and by John J. Byl and others against the California Mutual Building and Loan Association and others, wherein the question was whether plaintiffs, as holders of mutual shares and thrift accounts in defendant California Mutual Building and Loan Association, were entitled to share in liquidation as creditors on a parity with holders of investment certificates. From an adverse judgment, plaintiffs in each case appeal.

Reversed, with directions.

L. H. Schellbach, of San Jose, and Harold C. Holmes, Jr., and Breed, Burpee & Robinson, all of Oakland, for appellants.

D. T. Jenkins, of San Jose, Walter Carrington, of Oakland, and Patrick J. Kearns, of San Francisco, for respondents.

GIBSON, Chief Justice.

These consolidated actions, like the Martin case, Martin v. California Mutual Building & Loan Ass'n, Cal.Sup., 116 P.2d 71, this day decided, present the question whether the plaintiffs, as holders of mutual shares and thrift accounts in the defendant California Mutual Building and Loan Association, are entitled to share in liquidation as creditors on a parity with the holders of investment certificates. The history of the association and the other facts necessary to a decision of this appeal have been stated in the Martin case, and the decision in that case is determinative of the principal issues presented here. However, inasmuch as the trial court here found, contrary to our conclusion in that case, that mutual shares and thrift accounts are subordinate to investment certificates in liquidation, we must, for the reasons stated in the Martin case, reverse the judgment from which this appeal is taken.

[1-4] The actions here involved are not barred by laches or the running of the statute of limitations. There is uncontradicted evidence in the record that the office of the defendant Building and Loan Commissioner continuously indicated and represented, verbally and in writing, that the decision in the Martin case, which was first instituted and in which pursuant to agreement with him the issues were so framed as to cover the several types of investment here involved, should be determinative of the rights of all persons or groups similarly situated; and that it was in reliance on such representations that these suits were not earlier instituted. Throughout that litigation, as the commissioner paid liquidating dividends to investment certificate holders, he would set aside a proportionate amount to be paid to all "shareholders" should they be classed in that litigation as creditors entitled to parity with investment certificate holders. Under all of the circumstances, the commissioner is estopped to plead laches or the statute of limitations. It is well settled that a person by his conduct may be estopped to rely upon these defenses. Rapp v. Rapp, 218 Cal. 505, 509, 24 P.2d 161; Calistoga Nat. Bank v. Calistoga Vineyard Co., 7 Cal.App.2d 65, 72, 46 P.2d 246; 16 Cal.Jur. 575; 130 A.L.R. 8. Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense. Rapp v. Rapp, supra; Miles v. Bank of America N. T. & S. Ass'n, 17 Cal.App.2d 389, 398, 62 P.2d 177. These principles have been applied to hold a defendant estopped to plead that statute where he represented that he would be bound by the outcome of a pending suit. Missouri, K. & T. Ry. Co. v. Pratt, 73 Kan. 210, 85 P. 141, 9 Ann.Cas. 751; Daniel v. Edgecombe County, 74 N.C. 494; 130 A.L.R. 8, 60. Plaintiffs' actions here were seasonably instituted upon discovery of the commissioner's change of attitude as regards the effect of the Martin litigation upon the rights of other investors in the association.

[5] Inasmuch as these are representative actions, brought on behalf of named plaintiffs and others similarly situated but not represented in corresponding litigation, any award of counsel fees should be paid out of that portion of the fund recovered by those for whose benefit these actions were brought. In re Pacific Coast Bldg.-Loan Ass'n, 15 Cal.2d 155, 157, 99 P.2d 261. The reasonableness of any such award of counsel fees is for the determination of the trial court when the causes are remanded, as they must be, for further proceedings

in conformity with the views and conclusions expressed in the Martin decision.

The judgment is reversed with directions to the trial court to proceed as herein indicated.

SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

CURTIS, J., concurred in the judgment.

46 Cal.App.2d 504

STOUGH v. HANSON.

Civ. 2782.

District Court of Appeal, Fourth District, California.

Aug. 14, 1941.

1. Vendor and purchaser 🔑18(3)

Where vendor gave prospective purchaser option to buy land and before expiration of option period vendor was notified of prospective purchaser's acceptance and of his desire to exercise the option with a demand for a deed and an offer to pay price, and the acceptance was written at bottom of option but vendor's attention was not called to it, the vendor could not defeat purchaser's right to specific performance on ground that there was no communication of acceptance by purchaser to vendor.

2. Vendor and purchaser 🔑44

Evidence warranted finding that $2,500 was a fair, adequate, and reasonable price for land at time option to purchase was signed by purchaser, notwithstanding that, a day or two after execution of the option, oil was discovered on land a few miles away.

3. Vendor and purchaser 🔑18(4)

Where prospective purchaser was given option to buy land in consideration of one dollar, and a day or two after execution of the option vendor informed purchaser that he wished to cancel the option but did not offer to return the amount paid, vendor's notice of rescission given to the purchaser was not sufficient to revoke the option to purchase.

4. Vendor and purchaser 🔑18(4)

An option given for a consideration, however small, is irrevocable and cannot be terminated without the consent of the other party during the time named in the option.

5. Specific performance 🔑28(2)

Where vendor gave a written option agreeing to sell land subject to a lease to a named oil company at any time within 60 days from date, for a stipulated consideration, and the purchaser accepted the option and had it recorded, the vendor could not escape specific performance of the contract on ground that it was so uncertain in its terms that specific performance could not be decreed, since the time was definitely fixed and the sort of conveyance required was designated.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action for specific performance of a contract for the sale of land by J. W. Stough against B. Hanson. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Owen D. Richardson, of San Jose, for appellant.

Wm. R. Biaggi, of San Jose, and Iener W. Nielsen, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for specific performance and to compel the conveyance of certain real property upon the payment of the purchase price in accordance with the terms of an option agreement.

On July 13, 1938, the defendant gave the plaintiff a written option agreeing to sell this land, subject to a lease to a named oil company, at any time within sixty days from date for $2,500, payable in cash. The plaintiff wrote his "acceptance" on the option and recorded it on July 16, 1938. A day or two after the execution and delivery of the option the defendant informed the plaintiff he wished to cancel the option as his family did not want him to sell the land. The plaintiff refused to cancel the option and so informed the defendant. Shortly thereafter the defendant served upon the plaintiff a written notice of rescission, upon the grounds that the consideration had failed and that the consent of the defendant to the option had been given by mistake. Before the expiration of the sixty days the plaintiff notified the defendant of his desire to exercise the option, offered to pay him the purchase price in cash, and demanded a deed subject to the lease described in the option. In this action, which followed, the court found in all respects in favor of the plaintiff and entered judgment in his favor, and the defendant has appealed therefrom.

[1] The appellant's first point is that there was no communication of the acceptance by the respondent to the appellant. This is based upon the fact that the acceptance written at the bottom of the option by the respondent was not called to the attention of the appellant. Apparently this was done in order to enable the respondent to record the instrument and whether this was then called to the attention of the appellant is not material here. Before the expiration of the option period the appellant was notified of the respondent's acceptance and of his desire to exercise the option, with a demand for a deed and an offer to pay the money.

[2] It is next contended that the contract was not just or reasonable and that the consideration to be paid for the land was inadequate. The purchase price named in the option was $2,500. The present contention is based upon the fact that in a second cause of action for damages, which was dismissed, the respondent alleged that at that time he considered the land worth $102,500. This pleading was filed about seven months after the date of the option and the respondent testified that he then believed the land was worth that amount. Several witnesses testified that at the time the option was signed $2,500 was a fair and reasonable price for the property. There is also evidence that it was worth no more at the time of the trial. It does appear that about the time the option was signed oil was discovered a few miles away, and the appellant testified that when he heard about this oil excitement he concluded that he had made a bad bargain. It further appears that two oil wells had been brought in, one of which was nine miles from the property in question and the other 3½ miles away. The court's finding that $2,500 was a fair, adequate and reasonable price for the land at the time the option was signed is fully sustained by the evidence.

[3, 4] It is next urged that the notice of rescission given by the appellant to the respondent was sufficient. It appears, and the court found, that $1 had been paid by the respondent for the option and neither by the notice of rescission nor otherwise did the appellant return or offer to return the amount so paid to the respondent. Moreover, it is well settled that an option given for a consideration, however small, is irrevocable and cannot be terminated, without the consent of the other party, during the time named in the option. Marsh v. Lott, 8 Cal.App. 384, 97 P. 163; Chrisman v. Southern California Edison Co., 83 Cal. App. 249, 256 P. 618.

[5] The last point raised is that the contract sued upon is so uncertain in its terms that specific performance should not have been decreed. It is argued that it cannot be told from the instrument what sort of a conveyance the appellant is obligated to execute and deliver or when such a conveyance is to be given. It is also argued that it cannot be told from the face of the instrument what are the terms of the outstanding lease to which the conveyance was to be subject. The option clearly provides that the appellant is to "sell and convey" the land in question to the respondent or his assigns "at any time within 60 days from date hereof." This, with the subsequent exercise of the option, clearly and definitely fixes the time of performance, and the agreement to convey land sufficiently indicates what sort of a conveyance is required. The option provided that the land was to be conveyed subject to a lease to a named oil company and the respondent demanded a conveyance subject to that lease. We are not here concerned with what were the terms of that lease, and no uncertainty in the agreement appears which is in any way material to anything now before us.

The judgment is affirmed.

We concur: GRIFFIN, J.; MUNDO, Justice pro tem.

46 Cal.App.2d 439

STATE DEPARTMENT OF INSTITUTIONS v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13112.

District Court of Appeal, Second District, Division 1, California.

Aug. 9, 1941.

1. Workmen's compensation 🔑51

The doctrine of strict construction of compensation statutes is not applicable in California.

2. Workmen's compensation 🔑652

Such acts as are necessary to the life, comfort, and convenience of a servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in their performance "arises out of employment." St. 1937, p. 269, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Arises Out of Employment".

3. Workmen's compensation 🔑606

In determining whether a particular act is reasonably contemplated by employment so that an injury received while performing such act may be compensable, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and other factors should be considered, and any reasonable doubt as to whether the act is contemplated by the employment, in view of the policy of liberal construction in favor of employee, should be resolved in favor of the employee. St.1937, p. 269, § 3600.

4. Workmen's compensation 🔑649

Where attendant at state hospital, after having completed her work for day, left hospital building and entered her automobile which was parked in a parking lot provided on premises, and then drove automobile to front entrance of building where she waited for a co-employee who paid her 25 cents a day to ride to and from work with her, and, after a 10-minute wait, attendant went up main steps of building to ascertain why co-employee had not appeared, and she fell and broke her arm on steps, injury did not "arise out of and in course of employment," so as to be compensable. St.1937, p. 269, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out Of And In Course Of Employment".

◆

Proceeding under the Workmen's Compensation Law by the State Department of Institutions to review an award of the Industrial Accident Commission in favor of Gwen Conner, employee of petitioner as an attendant at the State Hospital at Camarillo.

Award annulled.

Donald Gallagher, of San Francisco, W. C. Flynn, of Los Angeles, and Edmund J. Thomas, Jr., of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondent Commission.

WHITE Justice.

By this proceeding petitioner seeks to have annulled an award of the Industrial Accident Commission granting to respondent Gwen Conner compensation for injuries sustained by her while she was in the employ of petitioner as an attendant at the State Hospital at Camarillo.

The facts are not in dispute. Respondent Mrs. Conner lived twenty miles away from the hospital where she was employed. She drove to and from work in her automobile, in which she also transported a co-employee, who paid her 25 cents a day for this accommodation. On the day of the injury Mrs. Conner, having completed her work for the day at 11 p. m., left the building in which she was employed, entered her car which was parked in a parking lot provided on the premises, and drove to the front entrance of the hospital building, where she waited for her passenger. After a ten-minute wait, Mrs. Conner left her car and went up the main steps of the building to ascertain why her passenger had not appeared. On the steps she fell and broke her arm.

[1-3] It is urged that the undisputed facts show that the injury did not arise out of and in the course of the employment, and therefore is not compensable under section 3600 of the Labor Code, St.1937, p. 269. This contention is sound. At the time of her injury, respondent Mrs. Conner not only was off duty, but was engaged upon a purely personal errand, of no direct or indirect benefit to her employer. Re-

spondents rely in part upon authorities which hold that while an act may be in part personal to the employee, the personal element does not necessarily make it entirely foreign to the employment. An examination of such authorities discloses, however, that they lend little, if any, support to respondents' view of the present case. The conclusion to be derived from the decisions of this and other jurisdictions is well expressed in the opinion in Employers', etc., Corp. v. Industrial Acc. Comm., 37 Cal.App.2d 567, 573, 99 P.2d 1089, 1092, as follows: "Some of the cases denying liability for injuries received while performing personal acts are based on the doctrine of strict construction of compensation acts. That doctrine has never been adopted in this state. Many of the apparently conflicting decisions are not in fact conflicting when analyzed. *Each case must necessarily turn on its own facts.*" (Emphasis added.) Continuing, the court quoted from Whiting-Mead Co. v. Industrial Acc. Comm., 178 Cal. 505, 507, 173 P. 1105, 5 A.L.R. 1518, as follows: "'Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. * * * That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incidental dangers. At the same time injuries occasioned by them are accidents resulting from the employment.'"

The court then concluded: "If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable. In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors, should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee. * * *"

[4] Viewing the present case most liberally, it must be held, nevertheless, that it does not fall within the category of those cases in which the personal activity of the employee was a natural or usual incident of the work or a mere momentary interruption thereof; but rather that it involves the assumption by the employee of a new status distinct from that of employee. Illustrative cases are contained in annotations in 59 A.L.R. 370; 66 A.L.R. 756. It may be conceded that communicating with or searching for a co-employee on the premises, for personal, social or business reasons, during working hours, might reasonably be held in some instances (depending upon the particular facts as to nature and custom of employment) properly incidental to or contemplated by the employment; but the fact in the case at bar is that the employment had ceased for the day; that respondent Conner was then and there under no duty to her employer; that she had had sufficient time to leave the building, and in fact had done so. Had she chosen to remain in the building after her day's work was done, it could not be argued that she would remain indefinitely under the protection of the act; she could not, as stated in 27 Cal.Jur. 389, "unnecessarily loiter". Nor, had she driven away from the hospital and then returned on a personal errand, could it be said that her employee status was restored while she was again on the premises.

We fail to see that the act of the employee when she was injured while returning to the building wherein she was employed for the purpose of ascertaining the cause of her co-employee's delay in leaving the building to accompany Mrs. Conner home in the latter's automobile, amounted to an act which Mrs. Conner might reasonably have been expected to do while in the performance of the duties of her employment. Manifestly, the employee was not injured while performing a duty or in connection with a duty she was employed to perform, nor was her injury sustained while she was performing an act which was naturally or reasonably an incident of her work. At the time of her injury the employee was exercising a personal privilege, for her own personal benefit, in returning to the building to ascertain what was delaying a fellow employee who was to be transported home by the injured employee for a consideration. Under the facts here present, we must hold that the injuries sustained by the employee neither arose out of nor occurred in the course of her employment.

For the foregoing reasons, the award is annulled.

We concur: YORK, P. J.; DORAN, J.

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46 Cal.App.2d 385

PEOPLE v. ROSS et al.

Cr. 1765.

District Court of Appeal, Third District, California.

Aug. 6, 1941.

Hearing Denied Sept. 4, 1941.

1. Conspiracy 🔑47
Criminal law 🔑511(1)

In prosecution for conspiracy to commit grand theft by stealing an account book and money in excess of the sum of $200 from a trade union for which defendants were business agents, evidence adequately corroborated testimony of accomplice as to guilt of defendants and sufficiently connected them with commission of offense to warrant conviction, independently of testimony of accomplice. Pen.Code, § 1111.

2. Criminal law 🔑742(2)

In prosecution for conspiracy to commit grand theft by stealing an account book and money in excess of the sum of $200 from trade union for which defendants were business agents, whether secretary of union was an accomplice was for the jury. Pen.Code, § 1111.

3. Criminal law 🔑1159(4)

In the absence of clear and undisputed evidence that a witness is an accomplice in the perpetration of a crime for which another person is being tried, the District Court of Appeal may not assume for the first time on appeal that he was an accomplice and arbitrarily exclude his testimony from consideration. Pen.Code, § 1111.

4. Criminal law 🔑510

One who is charged with conspiracy to commit a crime may be convicted on testimony of an accomplice only when corroborating facts or circumstances are shown, independently and without aid of the testimony of the accomplice, tending substantially to connect defendant with commission of the offense. Pen.Code, § 1111.

5. Criminal law 🔑511(2)

The evidence corroborating the testimony of an accomplice is not sufficient when it merely raises a suspicion of the defendant's guilt, but it may consist of either direct or circumstantial evidence tending to connect accused with offense charged.

6. Criminal law 🔑511(4)

The relationship of the parties and their acts and conduct may be considered in determining whether evidence corroborating testimony of an accomplice is sufficient to sustain conviction. Pen.Code, § 1111.

7. Criminal law 🔑741(1), 742(1)

In conspiracy prosecution, the credibility of witnesses and weight and sufficiency of the evidence are matters for the jury.

8. Criminal law 🔑423(9)

In prosecution for conspiracy to commit grand theft by stealing an account book and money in excess of the sum of $200 from trade union for which defendants were business agents, where the conspiracy included not only stealing of the money and cashbook, but also a division of money between the conspirators and payment of a specified sum to one of them for perpetrating the offense, acts of the defendants occurring after the money and property had been stolen could be relied on as proof that defendants were implicated in the conspiracy.

9. Conspiracy 🔑48

In prosecution for conspiracy to commit grand theft by stealing an account book and money in excess of the sum of $200 from trade union for which defendants were business agents, acts of the conspirators subsequent to the actual theft, involving division of the money and payment of specified amount to one of conspirators as his reward for executing the crime, were for consideration of jury in determining whether the business agents were implicated.

10. Criminal law 🔑423(9)

Where a conspiracy discloses an agreement and intention to divide the stolen property, evidence of the acts, conduct, and declarations of the conspirators subsequent to actual theft may be admitted on theory that conspiracy is not completed until spoils are divided.

11. Criminal law ⇨423(9)

Acts performed subsequent to a theft, which is the object of a conspiracy, in compliance with a promise to pay an accessory a specified sum for his participation in the crime, are competent as tending to prove the conspiracy.

12. Criminal law ⇨780(2), 785(2)

In prosecution for conspiracy to commit grand theft, where jury was informed that coconspirator was an accessory to the crime and that he had pleaded guilty and jury knew that coconspirator had been impeached by evidence that he had been previously convicted of a felony, instructions, regarding the evidence of an accomplice and that the jury must view his testimony with caution on that account and that jury could disregard the testimony of any witness who had been impeached, were properly given. Code Civ.Proc. § 2051.

13. Criminal law ⇨553, 741(1), 742(3)

The testimony of impeached accomplice was subject to careful examination and his credibility was subject to grave suspicion, but his credibility and the weight of his testimony were questions solely for jury.

14. Criminal law ⇨508(9), 553

The jury may disregard the testimony of an accomplice or a witness who has been impeached, but they need not do so unless it is wholly disbelieved, and the testimony is competent and entitled to such weight as the jury believes it should be accorded.

15. Criminal law ⇨741(1), 742(1)

Generally, the credibility of a witness who is charged with a crime jointly with other defendants and who has either been separately tried and convicted of the crime or who pleads guilty thereto, and the weight to be accorded his testimony, are matters for the jury.

◆

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

E. H. McAfee and Willis McAfee were convicted of conspiracy to commit grand theft, under an indictment charging them jointly with one Lyle Ross with commission of conspiracy to commit grand theft and conspiracy to commit robbery, and they appeal.

Affirmed.

Hearing denied; Carter, J., dissenting.

Glenn D. Newton and Daniel S. Carlton, both of Redding, for appellants.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and L. W. Carr, Dist. Atty., and John A. Spann, Deputy Dist. Atty., both of Redding, for respondent.

PER CURIAM.

The appellants were jointly indicted with one Lyle Ross by the grand jury of Shasta county in two counts for the crimes of conspiracy to commit grand theft and conspiracy to commit robbery. The charge of grand theft consisted of the stealing of an account book, checks and cash in excess of the sum of $200, belonging to International Hod Carriers and General Laborers Union of America, Local 961. Lyle Ross pleaded guilty to both counts of the indictment and became a witness at the trial against the appellants. The appellants were convicted of conspiracy to commit grand theft. They were acquitted of the charge of conspiracy to commit robbery.

[1] It is contended the judgment is not supported by the evidence, chiefly because there is a lack of evidence sufficient to corroborate the testimony of the coconspirator, Lyle Ross, as to the guilt of the defendants, as required by section 1111 of the Penal Code.

The International Hod Carriers Union, Local 961, maintained headquarters in the Empire Hotel building on California street in Redding. Harold Generes was the financial secretary and treasurer. Richard C. Brennan was recording secretary. The appellant, E. H. McAfee, commonly called "Mike", was business agent. The other appellant, Willis McAfee, usually called "Bud", assisted his brother as business agent. A large number of laborers who worked in that vicinity were under the jurisdiction of that local organization. They paid their dues in cash or by means of checks, to either secretary Generes or to Mr. Brennan at the union office at Redding. The money and checks were temporarily placed in a cash box. The receipts and disbursements were entered in a cash book. The receipts which were paid on Wednesdays and Fridays of each week usually exceeded a thousand dollars. The money was deposited by either secretary every two or three days, depending upon the amount accumulated. When a considerable sum was received, without the opportunity to deposit it in the bank, Mr. Brennan often carried it home with him in an envelope to keep over night. Just prior to the date of the commission of the theft in question, it was also his custom to carry the cash book home with him at night. This was done because Mike McAfee, the business agent, had told him to "keep that book with him at all times", or at least to safely keep the book. Mike McAfee, whose duty it was to pay expenses to laborers during strikes, was often handed cash for that purpose from the daily receipts, which items were presumed to be entered in the cash book. The prosecution contended that the motive of Mike McAfee in directing the secretary to take the book with him, was to obtain possession of it by means of the planned theft, so as to prevent the directors of the union from discovering previous misappropriations of money. But the evidence fails to show a substantial shortage of cash prior to the theft in question. It seems fair to assume the record does not adequately support that theory regarding the book.

On the day of the theft, October 23, 1940, cash was paid into the office in the aggregate sum of $1,060. During that day secretary Generes either deposited a large part of the receipts or took with him, at 7 o'clock, when he went home, about $800. When Mr. Brennan went home that night about 8 o'clock he had only a balance of $214 in cash and checks, which he took with him in an envelope, together with the cash book. The theory of the prosecution was that Mike McAfee did not anticipate that Mr. Generes would take with him or deposit a large portion of the receipts of the day, but on the contrary, that Mr. Brennan was likely to carry with him the entire day's receipts.

The codefendant, Lyle Ross, went to Redding the latter part of July, 1940, in search of a job. He was an ex-convict, on parole. He applied for work at the hall of Union Local No. 961. He there met Bud McAfee who was serving as business agent for the union during the temporary absence of his brother Mike. A local strike was then in progress. He had a conversation with Bud McAfee in front of the hall, in which Mr. Ross told him that he had been in trouble and that he was then on parole. Bud knew he had been convicted of several crimes. Ross had a very bad criminal record. Bud, however, told him there was no position available just then, but encouraged him to believe he might secure one later. Mr. Ross secured a job a few days later from a contractor by the name of J. P. Brennan, at Weed, about eighty miles from Redding. October 21st, he returned to Redding, and hunted up Bud McAfee, at the office of the union, and made an application to join the union. Bud told him he would talk with his brother Mike and get him "straightened out" with the union. Bud went with Ross and had a drink in an adjacent saloon. They then had a long conversation while they sat in Bud's automobile in front of the hall. Bud asked him about the nature of the trouble he had previously referred to. Ross told him it was with the Federal Government. After learning of Mr. Ross' criminal record, Bud finally asked him if he "could use some easy money". Ross testified at the trial that Bud told him that if he would carry out a plan they had in mind "there would be approximately two hundred dollars in it for me". He said Bud explained to him the manner and approximate amount of dues which were paid to the secretaries each week and recorded in the cash book, together with the habit of the recording secretary, Richard C. Brennan, to leave the office about 7 or 8 o'clock in the evening, taking with him the cash book and the receipts of the day. He said they usually deposited the money in the bank Thursdays and Saturdays, and that they would usually have on hand about a thousand dollars. Bud told him they had been spending a lot of money on account of the strikes, a part of which they were not able to account for, and that they were afraid of letting the officers of the union get possession of the cash book. Bud told him they planned to carry out a "fake holdup" and get possession of the book and cash from the secretary when he carried them out with him the following Wednesday night. He told Ross that Brennan would leave the office between 7 and 8 o'clock with his brief case containing the book and money, as it was his custom to do, and after getting a lunch in Caso's restaurant near by, he would cross the street and enter his automobile. He told Ross that all necessary arrangements "would be fixed", and that he was to wait in front of the hall, and when Brennan got into his machine he "was to get into the car and ride out the Iron Mountain highway with him and bring the car and the satchel back". Bud then told him, "There will be possibly a thousand dollars in it, and that would have to be split four or five or possibly six ways". He again told Ross there would be about two hundred dollars as his share of the plunder. Ross was told that Mike McAfee, Richard Brennan and Harold Generes were involved in the conspiracy. After obtaining possession of the book and money, Ross was to leave Brennan in the country, park the car on a side street in Redding and deliver the brief case and its contents to Bud, who would be waiting for him at the liquor store near the old post office building.

Mr. Ross told Bud he would carry out the plan. After the conversation just related, by agreement Ross met Mike McAfee at the hall at 1:30 o'clock in the afternoon, and he arranged affairs so that Ross was duly admitted to membership in the union. He returned to work the following day.

Wednesday afternoon, October 23d, according to their previous plan, Ross did not return to work, but took his station near the front entrance to the hall about 7 o'clock in the evening. He had armed himself with a monkey wrench. It was then raining and dark. It appears that Bud's estimate of the amount of dues which would be collected that day was very accurate. The total sum of $1,060 was actually collected. At 7:30 o'clock Harold Generes came out and drove away in his car. Generes took with him an envelope containing about $800 of the receipts of that day's payments, but Ross was unaware of that fact. Half an hour later, Brennan came out with his brief case in his hand. He went to Caso's restaurant near by where he spent about fifteen minutes eating lunch, after which he emerged, and, crossing the street to where his car was parked, he opened the door and threw his brief case in on the front seat. There were then no pedestrians in sight.

From this point in the story the testimony of Ross and of Brennan differ quite radically. Ross said that he was standing on the left-hand side of the car, and that Brennan got in his car on the right-hand side. Ross then opened the door and got in the rear seat. Brennan looked around at him without saying a word. Ross said "O. K., Dick, let's go". Brennan drove out of town on the Iron Mountain road a distance of four or five miles and, turning into a side road, stopped on the margin of the highway. Ross asked him if everything was all right. Brennan answered, "Yes, everything is in that satchel". He then got out of the machine and Ross drove the car back to town and parked it on a side street. He then opened the brief case and counted the money, discovering that there was only $81 in cash and about $130 in checks. He returned them to the case and, taking the portfolio, walked to the old post office building where he found Bud sitting in front of the liquor store. Ross delivered the brief case to him with the remark that there had been a mix-up somewhere. Bud then counted the contents of the envelope and said: "Well, there has been a mix-up some place. I will admit that but I don't know where it is at. * * * You take the money." Ross did so, and dropped it in his side pocket. Bud then added, "I will try to get this arranged around and see where the mix-up was so that you can get the rest of your money". Bud told Ross he would see that he got the rest of his money. Bud took the brief case, with the cash book and checks, and they parted. Ross then told Bud he would go back to Weed where he had been previously working. He did so.

The story of Mr. Brennan regarding the actual holdup is quite different from that of Lyle Ross. He testified that prior to October 23d, Mike McAfee advised him to keep the cash book in his personal possession and that he thereafter usually carried it home with him at night; that about 7:30 p. m. on October 23d, Mr. Generes left the office and took with him a large portion of the receipts of the day; that he left the office that night at 8 o'clock, taking the balance of the cash and checks received that day, together with "this general cash book *that I carry*", which he placed in his brief case, and that after eating a light lunch in Caso's restaurant, he crossed the street to his Plymouth sedan automobile, which was parked near Davis' garage, and started to get in on the left-hand side when "someone poked a gun in my back and told me to get in and act natural and nothing would happen". He said that it was raining and dark and he did not see the individual. He was facing forward when the incident occurred. He did not see the gun, but assumed that the object which was shoved in his back was a revolver. He said he promptly obeyed the command and got into the front seat, and that the other man entered the back seat. He tried to turn around and look at the man but was told "not to turn around" or he would "get plugged". He followed a peremptory order to drive out of town along the Iron Mountain road for a few miles and thence on to a side road for a short distance. He was then told to stop the car and to turn it around, heading in the direction from which they had come. He did so. The man told him "You don't have to get nervous or get afraid; nothing will happen to you if you don't try anything". He was then told to get out and "march up in front of the car", which he did, after having been searched for a gun. He left his brief case on the front seat. When he attempted to look around, the man said, "Turn back around there if you don't want to get slugged". Ross then took the wheel and passing Brennan he disappeared toward Redding. Brennan said he did not know the man who robbed him. From a glimpse of him in the dark he could not accurately describe his appearance, but thought he was young man of medium height and weight. He, however, said he believed he could recognize his voice if he heard it again. Mike McAfee admitted that he knew Mr. Brennan had said he could recognize the voice of the man who robbed him.

After the car was out of sight Mr. Brennan ran rapidly down the road and knocked at the door of the first farm house he saw, which was owned by Mr. and Mrs. Apperson. It was then about 8:30 p. m. Both of them testified he was greatly excited; that he was wearing no hat, and that he was in "an awful hurry to get to town". He told them he had been "stuck up and robbed". It was then raining and dark. Mr. Apperson immediately got his car and took Brennan to Redding. At his request Mr. Brennan was taken directly to the state highway office opposite the city hall, where Brennan told them he had been held up and robbed. He told Mr. Meeker, the sheriff, he thought he could recognize the voice of the robber.

An investigation of the crime resulted in the arrest and joint indictment of Mike and Bud McAfee and Lyle Ross for conspiracy to commit grand theft and robbery. Mr. Brennan testified he never saw Lyle Ross from the night of the robbery until after his arrest on December 12th. At the request of the sheriff he went to the jail to see and talk with Ross, and he said "I recognized his voice". Mr. Ross pleaded guilty, and became a witness at the trial against the other defendants. They were convicted of conspiracy to commit grand theft, and they were acquitted of the other charge of conspiracy to commit robbery.

We are of the opinion the record contains sufficient evidence to connect the appellants with the commission of the offense of conspiracy to commit grand theft. It adequately corroborates the testimony of the accomplice, Lyle Ross, as required by section 1111 of the Penal Code. Numerous circumstances leave little doubt that the appellants were implicated in the crime. These corroborating circumstances consist of the following facts:

The appellants were business agents of Local Union 961; they met Lyle Ross in July prior to the larceny, and were informed he had been convicted of crimes and that he was then on probation; they knew of his criminal record; they had knowledge of and informed Ross of the approximate amount of dues which were collected from members of the union each Wednesday and Friday; they told Ross there would be about $1,000 collected on Wednesday, October 23d. Ross had no other means of learning that fact; the sum of $1,060 was actually collected that day; they told Ross it was the custom of Brennan to take the receipts of the day and the cash book home with him at night. He had no other way of learning that fact. Neither the cash book nor the stolen checks were recovered. The appellants knew Ross personally, having met and conversed with him several times; they knew his name, the hotel where he stopped in Redding; his description and the place and nature of his employment. Mike McAfee admitted they were suspicious he was the man who committed the theft, yet they failed to disclose his identity to the officers. They also knew that Mr. Brennan had said he thought he could recognize the voice of the man who robbed him, yet they made no effort to bring him in contact with the man they believed committed the crime. In spite of their knowledge of the criminal record of Mr. Ross, they arranged to restore his membership in the union. After the commission of the crime, Mike McAfee procured the issuance to Ross, on October 31st, of a union card appointing him as "shop steward". After the investigation of the crime had proceeded several weeks, just prior to the arrest, Bud, at the request of Mike, wrote a note to Ross, leaving it at his hotel for delivery, in which he said, "Meet me out at Mike's house at 11 o'clock". A postscript added the statement, "It's important so be sure and be there". The note was received in evidence. Its authorship is not disputed. December 11th, the day before the arrest, Mike McAfee telephoned to Ross at Weed, asking him for a conference, and immediately drove up to see him. Mike claimed to have gone to Weed to interview Ross about organizing a local labor union at that place. He said he did not then think of his participation in the robbery, although he admitted that he was always suspicious of his guilt. He brought Ross back to Redding with him. On the way back he told Ross he expected to go into a bonding business with a man by the name of Needham. He told Ross that Needham carried on his person $3,000 in cash and a certified check for $4,000. Ross claimed Mike tried to persuade him to rob Needham. Ross did not know Needham, yet he did actually have knowledge that he carried the money and check on his person. That information must have been conveyed to Ross by Mike, for Needham testified that he carried the money and check on his person, and that no one knew of that fact except Mike and his wife to whom he previously showed the money in a hotel at San Francisco a few days prior to December 11th.

The foregoing circumstances adequately furnish corroboration of the connection of the appellants with the crime, independently of the testimony of the accomplice, Ross.

The discrepancy between the testimony of Lyle Ross and Mr. Brennan does not necessarily mean that the latter was implicated in the crime. It is immaterial, so far as the guilt of the appellants is concerned, whether he was or not. There are sufficient circumstances to connect the appellants with the crime independently of the testimony of either Lyle Ross or Mr. Brennan.

[2, 3] It is contended the record conclusively shows that Mr. Brennan was an accomplice in the conspiracy, and that his evidence must therefore be disregarded. We think not. In the absence of evidence clearly showing that a witness is an accomplice in the perpetration of a crime for which another person is being tried, we may not so assume for the first time on appeal and arbitrarily exclude his testimony. In the present case we find no indication that, during the trial, the appellants regarded Mr. Brennan as an accomplice. There was no objection to his testimony on that ground. The appellants offered no instruction to the jury advising them they should consider his testimony with caution if they believed him to be an accomplice. The jury was fully instructed upon that general principle of law with an evident application to the testimony of Lyle Ross alone. It was a question for the jury to determine whether Mr. Brennan was an accomplice. In the absence of clear and undisputed evidence to that effect, we may not assume for the first time on appeal that he was an accomplice and therefore exclude his testimony from consideration under the provisions of section 1111 of the Penal Code.

In the case of People v. Coffey, 161 Cal. 433, 119 P. 901, 902, 39 L.R.A.,N.S., 704, it is said, regarding the duty of a jury to determine whether a witness is or is not an accomplice, that: "When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact. People v. Kraker, 72 Cal. 459, 14 P. 196, 1 Am.St.Rep. 65."

See, also, People v. King, 30 Cal.App.2d 185, at page 197, 85 P.2d 928, for a statement of the same principle.

[4-6] It is true that one who is charged with conspiracy to commit a crime may be convicted upon the testimony of an accomplice under section 1111 of the Penal Code, only when corroborating facts or circumstances are shown, independently and without the aid of the testimony of the accomplice, tending substantially to connect the defendant with the commission of the offense. Sec. 1111, Pen.Code; People v. Compton, 123 Cal. 403, 411, 56 P. 44; 5 Cal.Jur. 515, sec. 19; 15 C.J.S., Conspiracy, p. 1156, § 93, b. The corroborating evidence is not sufficient when it merely raises a suspicion of the guilt of the defendant. The corroborating testimony may consist of either direct or circumstantial evidence which tends to connect the accused person with the offense charged. The relationship of the parties and their acts and conduct are competent evidence to be considered. Johnstone v. Morris, 210 Cal. 580, 590, 292 P. 970; People v. Wiley, 33 Cal.App.2d 424, 91 P.2d 907; People v. Nikolich, 93 Cal. App. 356, 269 P. 721; 5 Cal.Jur. 521, sec. 24; 15 C.J.S., Conspiracy, p. 1146, § 93, a. In the text last cited it is said in that re-

gard: "To establish sufficiently the existence of the conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties."

[7] In proof of an alleged conspiracy to commit a crime, the credibility of witnesses and the weight and sufficiency of the evidence, are matters for the determination of the jury. 5 Cal.Jur. 519, sec. 23.

[8-10] It is true that some of the acts of the appellants relied upon as proof that they were implicated in the alleged conspiracy occurred after the money and property had been stolen. That evidence was, however, competent for the reason that the conspiracy in the present case included not only the stealing of the money and the cash book from Mr. Brennan, but also a division of the money between the conspirators and the payment of a specified sum of about $200 to Lyle Ross for perpetrating the crime. Bud McAfee told Ross they would have to divide the stolen money between five persons. He told Ross his share would be about $200. After the larceny had been committed and they secured only $81 in cash and about $130 in checks, Ross was given the cash with a promise that they would see that he got the remainder of the amount which he was promised. That promised balance was never paid to Ross. It is the theory of the prosecution that the appellants subsequently procured his appointment as steward of the local union to conciliate him until they could pay him the balance of his reward for executing the crime. It is also suggested the subsequent effort to procure Ross to rob Carl Needham was to carry out their promise to see that Ross got $200 for the first theft, and that the note which was written to Ross to meet Bud at the home of Mike, and Mike's trip to Weed were all a part of the same transaction to steal and divide the money taken from Mr. Brennan. Those acts were all matters for the determination of the jury. It has been held that when a conspiracy discloses an agreement and intention to divide the stolen property, as it does in the present case, evidence of the acts, conduct and declarations of the conspirators subsequent to the actual theft, may be admitted in evidence on the theory that the conspiracy is not completed until the spoils are divided. People v. Dean, 66 Cal.App. 602, 608, 226 P. 943; People v. Fay, 82 Cal.App. 62, 255 P. 239; 8 Cal.Jur. 124, sec. 212. In the Fay case evidence of the subsequent effort to sell certain bonds was held to be competent in a criminal charge of conspiracy to steal the bonds. In the authority last above cited it is said in that regard: "When a conspiracy discloses an intention to divide property stolen, evidence of acts and declarations at any time before the division are admitted upon the theory the conspiracy does not end until that time."

[11] Likewise, acts performed subsequent to a theft, which is the object of a conspiracy, in compliance with a promise to pay an accessory a specified sum for his participation in the crime, are also competent as tending to prove the conspiracy.

[12, 13] It does not appear that Lyle Ross was promised immunity or leniency as a reward for testifying against the appellants. The record merely shows that he pleaded guilty to the offenses jointly charged against him and the defendants, and that he became a witness for the prosecution. The jury was informed that Ross was an accessory to the crime and that he had pleaded guilty. They were properly instructed regarding the evidence of an accomplice and that they must view his testimony with caution on that account. They were also properly instructed that they could disregard the testimony of any witness who had been impeached. The jury knew that Ross had been impeached under the provisions of section 2051 of the Code of Civil Procedure by evidence that he had been previously convicted of a felony. The jury therefore knew they had a right to reject his testimony entirely. They were duly cautioned in that regard. It is true that his testimony under such circumstances should be examined with great care and that the question of his credibility was subject to grave suspicion. 22 C.J.S., Criminal Law, p. 1381, § 805. But the questions of his credibility and of the weight to be given to his testimony were to be determined solely by the jury. In 22 C.J.S. at page 1381, Criminal Law, § 805, it is said in that regard: "An accomplice is not rendered incompetent as a witness by the mere fact that he has been promised immunity from prosecution, or mitigation of his punishment * * *. The fact that a witness hopes or expects that he will secure a mitigation of his own punishment by testifying on behalf of the prosecution does not disqualify him."

At page 1383, § 808, of the same text it is further said:

"The fact that a person is an accomplice in the commission of a crime goes to his credibility as a witness, and to the weight of his testimony. * * *

"In considering the effect of the testimony of an accomplice and the weight to which it is entitled, the courts have made numerous statements indicating the questionable character of such testimony, as, for examples, that it is not regarded with favor, that it is discredited by the law, that it should be received and viewed or acted on with caution, that it should be weighed with care in the light of the circumstances, that it should be scrutinized closely, carefully, or cautiously."

[14] While the jury may disregard the testimony of an accomplice or a witness who has been impeached, they are not necessarily required to do so, unless it is wholly disbelieved. The witness is nevertheless competent and his evidence is entitled to such weight as the jury believes it should be accorded. In the case of People v. Negra, 208 Cal. 64, 280 P. 354, 356, the court said: "While the jury may consider the circumstance that a witness is an accomplice, in passing upon his credibility as a witness (People v. Clough, 73 Cal. 348, 354, 15 P. 5, his testimony is not to be rejected merely because he is an accomplice, and if there is other evidence which measures up to the requirement of the Code (supra), tending to connect the defendant with the commission of the crime charged, then such testimony of the accomplice is to be considered by the jury, as is any other testimony, and must be given the weight to which the jurors may conclude that it is entitled. People v. Hoosier, 24 Cal.App. 746, 142 P. 514."

[15] In 16 Corpus Juris 695, section 1422, it is said: "As a general rule the credibility of an accomplice and the weight to be accorded to his testimony are questions for the jury as in the case of other witnesses." See also 22 C.J.S., Criminal Law, § 808.

The same rule applies to a witness who is charged with a crime jointly with other defendants, and who has either been separately tried and convicted of the crime, or who pleads guilty thereto.

We may not say that the testimony of Lyle Ross, in the present case, is inherently improbable.

For the foregoing reasons we are of the opinion we may not interfere with the verdict of the jury.

The judgment and the order are affirmed.

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46 Cal.App.2d 426

FAWELL v. LOOP BUILDING CO. et al.

Civ. 2768.

District Court of Appeal, Fourth District, California.

Aug. 7, 1941.

Hearing Denied Oct. 2, 1941.

1. Fraudulent conveyances 🔑57(4), 168

Where property was conveyed in payment of a debt and certain other valuable consideration before creditors of grantor had acquired any lien, and at that time grantor's insolvency was not indicated and grantee was without knowledge that grantor was indebted to others, the grantor himself could not have set the conveyance aside and creditors were in no better position.

2. Records 🔑9(13¼)

Where lots had been registered under the Torrens Land Title Law but subsequent conveyance was not registered though it was recorded, and grantor in an attempt to remedy the situation, and before judgment was entered in creditor's favor against grantor, conveyed the property to his nephew in trust for grantee, and had latter conveyance registered under land title law, the judgment and other creditors were in no better position than grantor and at least as between the parties, the original conveyance was valid. St.1915, p. 1932.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Margaret Fawell against the Loop Building Company and others to quiet title to certain real property. From a judgment for plaintiff, the Loop Building Company and another appeal.

Affirmed.

Ray Howard and Chas. M. Easton, both of Los Angeles, for appellants.

John F. Poole and Robert E. Abbott, both of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment quieting the plaintiff's title to certain parcels of real property.

Prior to 1929 the lots in question were owned by C. A. DeCoo and had been registered under the Land Title Law, commonly known as the Torrens Land Title Law, St. 1915, p. 1932, in the name of DeCoo. On March 25, 1929, DeCoo conveyed the property to his sister, the plaintiff and respondent here, who lived in Chicago. The deeds were recorded and later sent to Mrs. Fawell, who still retained them at the time of the trial. However, these conveyances were not registered under the Land Title Law and no new certificate was issued showing title in Mrs. Fawell. On June 12, 1930, DeCoo conveyed the same property to his nephew Franz Fredenhagen, with an oral agreement that this grantee would hold the property in trust for Mrs. Fawell. This conveyance was registered under the Land Title Act.

On June 20, 1930, the Loop Building Company secured a judgment for about $1,700 in an action it had filed against DeCoo. In an ex parte proceeding in that action the court restrained the further transfer of the property and gave permission for the Loop Building Company to file an action for the purpose of determining whether DeCoo still had any interest in the property. On December 11, 1930, the Loop Building Company filed an action against Fredenhagen, DeCoo and the registrar of titles in Los Angeles county, seeking to have it declared that this real property was the property of DeCoo and subject to its judgment, and to have the registrar's records and certificates corrected to so show. A judgment for the defendants in that action was later reversed on the ground that certain evidence should have been received. Loop Building Co. v. Fredenhagen, 3 Cal.App.2d 151, 39 P.2d 222.

On January 27, 1931, Fredenhagen filed another action against the Loop Building Company alleging, among other things, that he held title to this property as trustee for Mrs. Fawell and seeking to quiet title in himself as such trustee. On February 27, 1935, Mrs. Fawell brought this action to quiet her title to the property. By stipulation, all three actions were tried together, this being a retrial of the first of these actions and the first trial of the other two. The court found in all respects in favor of Mrs. Fawell and entered a judgment in her favor in the last of these actions quieting her title to the property. From that judgment, the Loop Building Company and the special administrator of the estate of C. A. DeCoo have appealed. It is said that the special administrator is interested in protecting two other creditors of the deceased.

The appellants first contend that some fourteen of the findings are not sustained by the evidence. Most of these objections are based upon mere conflicts in the evidence. In a few instances the court, in finding that the allegations of particular paragraphs in the pleadings were or were not true, inadvertently found that some paper had not been filed or that something had not been done when the admitted facts are to the contrary. These were all as to immaterial matters. Only one or two of the points raised under this head require any consideration. It is argued that a finding that the conveyance to Mrs. Fawell was not made in lieu of testamentary disposition is not supported by any evidence. Mrs. Fawell testified that DeCoo was indebted to her in the sum of $1,250, for which amount he had given her a note, and for services which she had subsequently rendered to him; that some months before March 25, 1929, DeCoo agreed to pay this debt by conveying to her property which he owned in California; and that, subsequently, he conveyed this property to her and she surrendered the note and canceled the debt. Her evidence sufficiently supports the finding here in question, as well as other findings which are attacked. It is further argued that the court's finding to the effect that no evidence had been produced showing insolvency or contemplated insolvency on the part of DeCoo is without support in the evidence. Aside from a general failure of proof in this regard there is direct evidence which indicates that the conveyance of this property by DeCoo to Mrs. Fawell did not result in his insolvency. The nephew, Fredenhagen, testified that about May, 1930, which was some fourteen months after the property was conveyed to Mrs. Fawell, DeCoo transferred to that witness "some of his stock" in a lumber company and "several parcels of real estate" which had nothing to do with the property here in question.

There is no evidence in the record as to the value of the property thus transferred to the nephew, and for all that appears DeCoo may have had ample means to pay all of his debts at the time this property was conveyed to Mrs. Fawell.

Among other things, the court found that this property had been conveyed to the respondent by a deed executed by DeCoo on March 25, 1929; that the conveyance was made for a good and adequate consideration and that ever since that date she has been the owner in fee simple of said property and in possession and entitled to possession thereof; that after March 25, 1929, DeCoo made no claim to said property; that the property was conveyed to the respondent in payment of a debt of $1,250 and certain other valuable obligations and considerations; that said conveyance was made pursuant to an agreement between the parties thereto which was made in the early part of December, 1928; that the deed was given to cancel the indebtedness; and that Mrs. Fawell did not, at the time of accepting said deed nor for a long time thereafter, have any knowledge that DeCoo was indebted to any person or company. These findings are sufficiently sustained by the evidence.

[1] It appears, therefore, that DeCoo conveyed this property to respondent for a good consideration before the appellants acquired any lien on this property, at a time when his insolvency was not indicated, and without knowledge on the part of the respondent that he was indebted to others. DeCoo himself could not have set the conveyance to the respondent aside and the appellants are in no better position. It is well settled that an attaching creditor can take only whatever interest the debtor has. Bank of Ukiah v. Petaluma S. Bank, 100 Cal. 590, 591, 35 P. 170. The appellant corporation was not even an attaching creditor.

[2] The only remaining question which requires consideration is whether the failure of the parties to register the conveyance to the respondent under the Land Title Law renders that conveyance void as against a subsequent judgment creditor. It appears that DeCoo attempted to remedy that situation by later, and before the Loop Building Company's judgment was entered, again conveying the property to his nephew but in trust for the respondent, which conveyance was registered under the Land Title Law. Whether or not this attempted remedy was sufficient, in itself, the fact remains that DeCoo had previously conveyed the property to the respondent, and recorded the conveyance. The appellants can be in no better position than was DeCoo, and at least as between the parties the original conveyance was valid whether or not it was registered under the Land Title Law. Carlson v. Carlson, 124 Cal.App. 207, 12 P.2d 165; Congdon v. G. M. H. Wagner & Sons, 207 Cal. 373, 278 P. 863. It follows that the trial court was correct in finding and holding that the corporate appellants' judgment was not a lien on the property and that the respondent was entitled to judgment quieting her title thereto.

The judgment is affirmed.

We concur: GRIFFIN, J.; MUNDO, Justice pro tem.

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46 Cal.App.2d 456

BURDICK et al. v. WITTICH et al.

Civ. 11702.

District Court of Appeal, First District, Division 1, California.

Aug. 11, 1941.

1. Appeal and error ⊂⇒1010(1)

When there was evidence and inferences from that evidence to support a finding by trial court that no gift had been made, appellate court was without power to disturb the judgment.

2. Gifts ⊂⇒47(1)

Where the parties stipulated that a confidential relationship "as understood in law" existed between a purchaser and the vendor, burden of proving an alleged gift by vendor to purchaser of the note for the unpaid balance, and the requisite intent to make such a gift rested upon the purchaser.

3. Gifts ⊂⇒33(2)

Where a confidential relationship existed between vendor and purchaser, a delivery of the note for the unpaid balance of the purchase price by the vendor to the purchaser was constructively fraudulent.

4. Gifts 🔑**47(3)**

Although the usual rule is that possession is presumptive evidence of an operative delivery, where parties stand in confidential relationship to each other and the one in superior position gains an advantage, such person in superior position has the burden of showing that the transaction was not constructively fraudulent if the transaction is attacked.

5. Gifts 🔑**47(1)**

Where confidential relationship existed between vendor and purchaser, allegation that delivery of note for unpaid balance by vendor to purchaser was for safekeeping, only, is sufficient to place burden of showing that delivery was made with intent to renounce the obligation upon the purchaser.

6. Stipulations 🔑**14(1)**

Where purchaser stipulated that a confidential relationship as understood in law existed between purchaser and vendor, for purpose of showing that it was the natural thing for the vendor to give note for unpaid balance of purchase price to purchaser, purchaser would not be permitted to evade the legal effect of such stipulation by urging, when alleged gift be challenged, that the status of the parties was not such as to place on purchaser the burden of proof applying between parties in a confidential relation.

7. Appeal and error 🔑**994(3)**

While a trial court may not arbitrarily disregard the uncontradicted and unimpeached testimony of a witness, the trial court is the sole judge of the credibility of witnesses.

8. Evidence 🔑**594**

Testimony of a witness may be impeached other than by direct contradiction, and the manner in which the witness testifies, the character of his testimony, motives, and the inherent probabilities of the situation, all may be sufficient to entitle the trial court to disregard otherwise uncontradicted testimony.

9. Gifts 🔑**49(1)**

In action to quiet title to real property and to obtain decree that delivery of the note for the unpaid balance of the purchase price by vendor to purchaser was a gift, evidence justified judgment for defendants on ground that delivery was not operative as a gift.

10. Appeal and error 🔑**1008(1)**

Where direct testimony of purchaser that deceased vendor had made a gift of note for unpaid balance to vendee is impeached by other evidence, and where burden of proving the alleged gift is on the purchaser, the question of whether or not the delivery was operative as a gift was within province of trial court and its determination cannot be disturbed by the appellate court.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Howard L. Burdick and wife against Bertha A. Wittich and others, to quiet title to real property and to obtain a decree that a note secured by a deed of trust on the property had been discharged. Judgment that title be quieted subject to the deed of trust, and plaintiffs appeal. Affirmed.

Crozier C. Culp, of Oakland, for appellants.

Elliott Johnson and Albert M. Hardie, both of Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiffs, husband and wife, brought this action to quiet their title to certain real property in Oakland, and to obtain a decree that a note secured by a deed of trust on the property had been discharged. From a judgment for defendants, the trustee under the deed of trust and the administrator of the estate of Mary E. Davis, payee of the note, quieting plaintiffs' title subject to the deed of trust, plaintiffs prosecute this appeal. Their sole contention is that the evidence, as a matter of law, compels a judgment in their favor.

[1] There is no doubt that the payee of the note in 1933, some four years before her death, delivered the note and the deed of trust to the plaintiffs. The basic question presented is whether such delivery was made with the intent to absolutely or conditionally cancel the note, or whether, as found by the trial court, such delivery was made "for the sole purpose of safekeeping" and "for the sole purpose of making the plaintiffs depositories of said promissory note for the purpose of safekeeping". An examination of the record discloses that, from the evidence introduced, diametrically opposed inferences are possible. There can be no doubt that, had the trial court found in favor of plaintiffs,

such finding would be amply supported by the record. But, the trial court did not so find. There is evidence, and inferences from that evidence, to support the findings. Under such circumstances, this court is without power to disturb the judgment.

The real property in question consists of two flats, two separate houses, and two garages. It yielded a monthly income of $102.50. Mrs. Davis and her husband, prior to his death in 1925, had resided on the property for many years. In 1915 the plaintiffs became tenants of Mrs. Davis, living in one of the flats. After her husband's death, Mrs. Davis lived in the other flat. Mrs. Davis and the plaintiffs became very friendly. Plaintiff Howard Burdick advised Mrs. Davis in reference to most of her investments. Plaintiff Gertrude Burdick performed many services for Mrs. Davis, visiting with her very frequently and caring for her when she was ill. This friendly attitude was reciprocated by Mrs. Davis.

In 1928 the plaintiffs purchased the property from Mrs. Davis. According to the testimony of plaintiffs, they were reluctant to undertake such a large obligation, but finally agreed to purchase the property upon the urgent solicitation of Mrs. Davis, and upon her promise, as a special inducement, that she would so fix it that if she should die before the note was paid, the plaintiffs would not have to pay another cent on the property. After considerable discussion, the plaintiffs agreed to purchase the property for $16,500, $2,000 down, and the balance evidenced by a promissory note calling for 6 per cent interest payable monthly, and $1 or more per month on principal, the unpaid principal falling due on April 1, 1943. The note was secured by a deed of trust on the property. Following the purchase by plaintiffs, Mrs. Davis continued to live upon the premises as a tenant of the plaintiffs. They continued to be the closest of friends. In fact, the uncontradicted evidence shows that the plaintiffs treated Mrs. Davis with almost the same degree of affection and consideration as if she had been their mother, and she treated the plaintiffs as if they were her son and daughter. Mrs. Davis, in 1928, was a childless widow about sixty-three years of age. Between 1928 and the time of her death in 1937 she remained very friendly with the plaintiffs. During the same period she also remained friendly with her brothers and sisters and nieces and nephews. She continued to consult plaintiff Howard Burdick concerning her investments, and at the time of her death she possessed a substantial estate. All of her stocks and bonds she kept in the safe deposit box of the plaintiffs. She had no right of access to that box except through the Burdicks. Upon her death, the Burdicks turned these stocks and bonds over to the administrator.

Plaintiffs were very careful to make their monthly interest payments promptly. Never once between March 1, 1928, the date of the note, and July 12, 1933, the date the note is alleged to have been canceled, did they fail to pay the interest on or before the first day of each month. During this period various substantial amounts were also paid on the principal. On July 10, 1933, the plaintiffs had paid $6,330 on the principal, leaving a balance owing on that date of $8,170. During this period the note and deed of trust remained in the possession of Mrs. Davis.

According to the plaintiffs, the note and deed of trust were delivered to them entirely without their solicitation or suggestion. According to their testimony, on July 12, 1933, Mrs. Davis visited them and handed Howard Burdick the note and deed of trust, and stated: "Howard, here are your note and deed of trust. I am giving them to you and Gertie." She thereupon handed the documents to Howard Burdick. After Mr. Burdick had expressed his appreciation, Mrs. Davis stated: "But I wish you would pay me the same as you have done, so long as I live." At the time of the delivery of the note there was endorsed on the back thereof the following somewhat ambiguous endorsement: "Paid to date, July 10, 1933. Paid $8170. Mary Davis." It was stipulated that this endorsement was in the handwriting of Mrs. Davis.

After the delivery of the note and deed of trust, plaintiffs placed the documents in their safe deposit box, together with many documents belonging to Mrs. Davis. The note and deed of trust were in that box together with other documents belonging to Mrs. Davis at the time of her death. Both plaintiffs admitted that they did not know that the above-quoted endorsement was on the note, until after the death of Mrs. Davis. As already pointed out, the sum of $8,170 was not the sum paid on the principal on July 12, 1933, but was the balance due on the note on that date.

After July 12, 1933, plaintiffs continued to make regular monthly interest payments on the note. These interest payments were accurately computed and were entered in both the record book kept by Mrs. Davis and the one kept by plaintiffs. No different method of keeping the record of payments was adopted after the alleged gift than had been employed before. Mrs. Davis signed the plaintiffs' book indicating receipt of each payment. Moreover, in addition to interest payments, between July of 1933 and the death of Mrs. Davis in March of 1937, plaintiffs made substantial payments on the principal of the note. These payments totaled $1,204, and were entered in the books of the parties. Plaintiffs testified that these payments on principal were gratuitous on their part, but gladly made by them whenever Mrs. Davis needed money. Admittedly, however, plaintiffs never told Mrs. Davis that any of the subsequent payments were gratuitous.

Mrs. Burdick corroborated her husband's story concerning the alleged gift in all of its essentials. She also testified that, although the gift was made in July of 1933, between that date and March of 1937, she and her husband never discussed or mentioned the gift one to the other. Both she and her husband admitted that after the death of Mrs. Davis, and prior to the the trial, they had frequently discussed the matter, and, as a result of their joint recollections, had reconstructed the story of the gift as told on the witness stand. Mr. Burdick admittedly never requested that Mrs. Davis execute a reconveyance of the property so as to complete the gift. He testified that: "I never gave it a thought. I was just too dumb, that's all."

Four intimate friends of Mrs. Davis testified that between July of 1933 and March of 1937 Mrs. Davis had told them that she had fixed it so that on her death the plaintiffs would have the property clear. The trial judge was of the view that this testimony was weakened by the fact that these witnesses had failed to tell a former attorney of plaintiff's, in their conferences with this prior attorney, that such statements had been made to them.

Mrs. Bertha Hardie, niece of Mrs. Davis, testified that several days after the death of Mrs. Davis she had a conversation with Mrs. Burdick in the course of which Mrs. Burdick discussed the note and asked the witness to whom the payments thereon should now be made. This conversation was denied by Mrs. Burdick.

Reference should also be made to another fact. This case went to trial on a second amended complaint. In the original and first amended complaint, as well as in a claim filed by plaintiffs against the estate, the theory upon which plaintiffs proceeded was that they were entitled to a cancellation of the note and a reconveyance of the property, by reason of an alleged contract, made for a good consideration, that the indebtedness should be cancelled. The alleged consideration was the services rendered by Mr. Burdick to the deceased. Incidentally, both the first two complaints prayed that the note and deed of trust be declared void as of March 13, 1937—not July 12, 1933, the date that it is now claimed the note was cancelled. It was not until February of 1938, when the second amended complaint was filed, that the theory of a gift was first advanced in the pleadings of plaintiffs.

During the cross-examination of Howard Burdick, counsel for defendants endeavored to develop the close and intimate relationship that existed between the Burdicks and Mrs. Davis, when counsel for plaintiffs objected, and the judge stated that he was going to permit such questions which counsel for defendants stated were for the purpose of showing "a confidential relationship between each other." Counsel for plaintiffs then stated: "Do not dispute it. We admit it." Counsel for defendants then stated: "We will take that admission. It is admitted that there was a confidential relationship as understood in law that existed between the Burdicks and Mrs. Davis." Counsel for plaintiffs replied: "No issue on that at all."

On this evidence the trial court found that Mary Davis made the endorsement on the back of the note, but that "it was not the intention of the said Mary Davis in so writing upon the back of said note to extinguish the obligation of said note"; that Mary Davis delivered the endorsed note on July 12, 1933, to Howard Burdick "for the sole purpose of safekeeping, and that said delivery was not made with any intent upon the part of said Mary Davis of extinguishing said obligation, and was not made with the intent upon the part of said Mary Davis of vesting exclusive possession of said note in the plaintiffs, or either of them, but was made for the sole purpose of making the plaintiffs depositories of said promissory note for the purpose of safekeeping, * * * and subject to the direction and right of repossession by Mary Davis from the time of their delivery to plaintiffs up until the time of the death of the said Mary Davis." The court, therefore, held that plaintiffs were the owners of the property in question subject to the note and deed of trust.

Appellants urge, as they must, that these findings are unsupported, and that the evidence compels a finding that the note was cancelled. There can be no doubt that the endorsement of the note, plus its delivery to its makers, could effect a cancellation thereof under sections 3200 and 3203 of the Civil Code. But this is not the question presented. The question is whether the contrary finding of the trial court is supported by the evidence.

Appellants devote a large portion of their opening brief to establishing that a discharge could have been effected by the endorsement and delivery, with or without consideration. It is also urged that there could be a conditional renunciation, that is, a renunciation of the principal of the note conditioned upon the appellants keeping up interest payments during the lifetime of the payee. These contentions are undoubtedly sound, and are not challenged by respondents. They do not, however, present the real question on this appeal. The real question is, what was the intent with which the note was endorsed and delivered? Stated another way, does the evidence compel the conclusion that there was an intent to discharge the obligation of appellants by the endorsement and delivery, or is the finding of the trial court, that such delivery and endorsement were for the sole purpose of safekeeping supported by the evidence?

[2-5] The trial court held that there was a confidential relationship between the parties, and that therefore the burden of proof rested with appellants to show the requisite intent with which the alleged gift was made. In view of the stipulation of the parties that a confidential relationship "as understood in law" existed between the parties, there can be no doubt that the burden of proof to show the existence of the alleged gift, including the requisite intent, rested upon appellants, and, further, that the transaction here involved, in view of such confidential relationship, was constructively fraudulent. Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189; Brown v. Canadian Indus. Alcohol Co., 209 Cal. 596, 289 P. 613; Cox v. Schnerr, 172 Cal. 371, 156 P. 509; Payne v. Payne, 12 Cal. App. 251, 107 P. 148; Bohn v. Gruver, 111 Cal.App. 386, 295 P. 891. This rule is of some importance because the usual rule is that possession is presumptive evidence of an operative delivery. But where the parties stand in a confidential relationship to each other the inference that a transaction wherein the person in the superior position gains an advantage is constructively fraudulent is broad enough to include an inference against an effective delivery where the delivery is attacked. In this connection, it should be mentioned that in their closing brief appellants urge that respondents did not plead fraud. But they did plead want of an effective delivery, averring that the manual delivery was only for safekeeping. This allegation is sufficient, in view of the relationship of the parties, to place upon appellants the burden of showing that the delivery was made with the intent to renounce the obligation.

[6] As already pointed out, at the trial counsel for appellants expressly stipulated that "there was a confidential relationship as understood in law that existed between the Burdicks and Mrs. Davis." This confidential relationship was emphasized in their opening brief for the purpose of indicating that it was the natural thing for Mrs. Davis to make a gift of the note to them, even though they were not related to her. In their closing brief, however, after finding where the stipulation at the trial and the admission in their opening brief have led them, it is urged that, although there was a confidential relationship to a certain extent and as to certain matters, the status was not such as to place on them the burden of proof applying as between parties in a confidential relationship. Appellants cannot thus be permitted to play fast and loose with the trial court. They cannot be permitted at this late date to thus evade the legal effect of the stipulation. Moreover, independently of the stipulation, the uncontradicted evidence shows that Howard Burdick was the gratuitous agent, the confidential adviser and confidant of Mrs. Davis. The uncontradicted evidence demonstrates that there existed a confidential relationship within the meaning of the rule under discussion.

[7-9] Appellants urge that, regardless of the above rule of law, the uncontradict-

ed evidence of the Burdicks shows that the note was delivered with the intent to make a gift of the balance due thereon, and that this uncontradicted testimony is corroborated by the endorsement on the back of the note, and by the testimony of the four old friends of Mrs. Davis, to which reference has been made. They urge that the trial court had no legal right to disregard this uncontradicted and corroborated testimony. While it is true that a trial court may not arbitrarily disregard the uncontradicted and unimpeached testimony of a witness (Hynes v. White, 47 Cal.App. 549, 190 P. 836), it is equally true that the trial court is the sole judge of the credibility of the witnesses, and that the testimony of a witness may be impeached other than by direct contradiction. Biurrun v. Elizalde, 75 Cal.App. 44, 242 P. 109; Whitaker v. Whitaker, 137 Cal.App. 396, 30 P.2d 538. Thus, the manner in which the witness testifies, the character of his testimony, his motives, and the inherent probabilities of the situation, all may be sufficient to entitle the trial court to disregard so-called "uncontradicted" testimony. Bohn v. Gruver, 111 Cal.App. 386, 295 P. 891. Applying these rules to the present case, what is the state of the record? We have the testimony of the Burdicks as to what was said when the alleged gift was made. There is also the endorsement of the note by the deceased and her delivery of it to appellants. In addition, we have the testimony of the four witnesses as to the decedent's declarations as to her intent. Had the trial court found, on this evidence, that the decedent intended an operative delivery, undoubtedly such finding would have found support in the record, and this is so even though interest and some principal payments were thereafter made. Gould v. Van Horne, 43 Cal.App. 145, 187 P. 35. But the trial court did not so find. It found there was no intent to make an operative delivery. It, apparently, felt that the above testimony had been impeached. This conclusion is supported by the following evidence:

1. It is an admitted fact that interest and principal payments were made subsequent to the alleged gift. Although appellants sought to explain such payments the sufficiency of such explanation was for the trial court.

2. There was testimony that after the death of Mrs. Davis appellant Mrs. Burdick asked one of the relatives of Mrs. Davis where and to whom future payments on the note should be made.

3. After the death of Mrs. Davis appellants did not immediately claim that a gift of the note had been consummated, but filed a claim against the estate, and several pleadings in this action, claiming a contract based on consideration to cancel the note.

4. Important as the gift was to appellants, Mrs. Burdick testified that she and her husband did not discuss the alleged gift between themselves until after the death of Mrs. Davis. Both appellants admitted they never looked at the note to see if it was endorsed until after the death of Mrs. Davis. They took no steps to protect themselves in the transaction.

5. The story appellants told on the witness stand was admittedly the result of discussions between themselves subsequent to the death of Mrs. Davis, in which discussions they finally agreed as to the exact language used by Mrs. Davis.

6. The Burdicks had in their safe deposit box, where the note was kept, many important papers and documents admittedly belonging to Mrs. Davis.

[10] None of these facts is conclusive. They are matters, however, that could properly be considered by the trial court in weighing the testimony of appellants. When considered with the fact that the burden was on appellants, the above evidence is sufficient to sustain the findings of the trial court and to impeach the testimony of appellants. While it is true that it is hard to explain the form of the endorsement used by Mrs. Davis except on the theory of a gift, it is equally hard to understand the conduct of the appellants. While the four friends of Mrs. Davis corroborated the appellants to a certain extent, their testimony was impeached by the testimony of a former attorney for appellants that these witnesses had not told him the story they told him on the witness stand. Under these circumstances, the problem presented was peculiarly and entirely within the province of the trial court. Its determination cannot be disturbed by this court.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

JUDSON et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 13172.

District Court of Appeal, Second District, Division 1, California.

Aug. 13, 1941.

Hearing Granted Oct. 10, 1941.

1. **Appearance** ⚿9(1)

Whether an appearance is "general" or "special" is determined by character of relief sought, not by intention of party that it shall or shall not operate as a general or special appearance.

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance" and "Special Appearance".

2. **Appearance** ⚿9(1)

Statement of a party that he is making a special appearance is not conclusive as to whether appearance is special or general.

3. **Appearance** ⚿9(1, 2)

If defendant by his appearance insists only upon the objection that he is not in court for want of jurisdiction and confines his appearance for that purpose only, then he has made a "special appearance", but if he raises any other question or asks any relief which can be granted only upon the hypothesis that court has jurisdiction then he has made a "general appearance".

4. **Appearance** ⚿9(5)

Where petitioner for writ of prohibition to restrain court from rendering judgment against petitioner sought dismissal of case against petitioner, under code provision providing for dismissal of action for want of prosecution for five years, petition invoked affirmative action of the court to terminate the litigation and thus petitioner had put in a "general appearance". Code Civ.Proc. § 583.

5. **Dismissal and nonsuit** ⚿60(6)

Provision of Code of Civil Procedure for dismissal of action for want of prosecution for five years does not apply when it has been impossible to bring the case to trial because of conduct of the defendant in either secreting himself within the state to prevent service of summons, or in residing outside the state. Code Civ.Proc. § 583.

6. **Dismissal and nonsuit** ⚿60(1)

Purpose of provision of Code of Civil Procedure for dismissal of action for want of prosecution for five years is to prevent delays for too long a period and the provision does not arbitrarily close proceedings at all events in five years. Code Civ.Proc. § 583.

7. **Dismissal and nonsuit** ⚿60(6)

Where court was unable to proceed to trial by reason of inability of plaintiff to serve complaint and summons because of conduct of defendants, the power of the court was temporarily suspended and the period of limitations fixed by the Code of Civil Procedure for dismissal of action for want of prosecution for five years, was tolled. Code Civ.Proc. § 583.

8. **Appearance** ⚿9(1)

Denial of petitioners' motion for writ of prohibition to restrain court from rendering judgment on default against petitioners on an action brought in that court was of no consequence in determining the nature of petitioners' appearance.

9. **Judgment** ⚿106(1)

Where petitioners made a general appearance and thereafter failed to plead in the action, the court committed no error in directing entry of default of petitioners.

◆

Petition by Mrs. R. W. Judson, Sr., and others against the Superior Court of Los Angeles County for writ of prohibition to restrain respondent court from rendering judgment against petitioners following entry of their default in an action brought against them in that court.

Ordered that alternative writ be discharged. Peremptory writ denied.

Macfarlane, Schaefer, Haun & Mulford, of Los Angeles, for petitioners.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Deputy Co. Counsel, and Victor Mindlin, all of Los Angeles, for respondent.

WHITE, Justice.

In this proceeding, the petitioners claim that they are entitled to a writ of prohibition restraining respondent court from rendering judgment against petitioners, following the entry of their default in an action brought against them in said court. On April 18, 1935, an action was commenced in respondent Superior Court against petitioners by one Charles R. Bertrand, and upon the same date summons was issued. On April 21, 1941, petitioners herein as defendants in the action served and filed a notice of motion to dismiss the action for want of prosecution, by reason of the fact that five years had elapsed since the filing thereof. § 583, Code Civ.Proc. In the aforesaid notice of motion it was stated specifically that the moving parties "will make a special appearance for the purpose of moving this Court for an order dismissing the above entitled action". Without narrating in detail each and all of the acts done by plaintiff in the action to effect service of complaint and summons upon petitioners, as defendants therein, suffice it to say that at the hearing of the aforesaid motion in respondent court, there were introduced various affidavits from which it appeared that plaintiff had made constant, diligent and unceasing, but unavailing, efforts to serve petitioners with process throughout the years intervening between the filing of the action and the hearing on the motion to dismiss same. Based upon such affidavits, the filing of which is alleged in respondent court's answer to the petition herein, and which filing is undenied, the court denied the motion of petitioners on the ground that they had either secreted themselves within the state of California to prevent service of summons, or had resided outside the state of California, by reason of which respondent court determined that at no time did it have the power to proceed to trial in said action.

Petitioners' contentions herein are twofold: A. That the motion to dismiss under section 583 of the Code of Civil Procedure is not a general appearance, and that, therefore, the court had no right to order the default of the defendants entered. B. That after five years had elapsed from the time an action is filed, and said cause has not been brought to trial the trial court loses jurisdiction over said action for all purposes, except to dismiss the same.

[1-3] Whether an appearance is general or special is determined by the character of the relief sought and not by the intention of the party that it shall or shall not operate as a general or special appearance. The statement of a defendant or party that he is making a special appearance is not necessarily conclusive. The test is—Did the party appear and object only to the consideration of the case or any procedure in it because the court had not acquired jurisdiction of the person of the defendant or party? If so, then the appearance is special. If, however, he appears and asks for any relief which could be given only to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance regardless of how adroitly, carefully or directly the appearance may be denominated or characterized as special. In re Clarke, 125 Cal. 388, 58 P. 22. The rule in this regard may be epitomized by saying that if a defendant by his appearance insists only upon the objection that he is not in court for want of jurisdiction over his person and confines his appearance for that purpose only, then he has made a special appearance, but if he raises any other question, or asks any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, then he has made a general appearance. Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Zobel v. Zobel, 151 Cal. 98, 90 P. 191.

[4] In the instant case we are impressed that petitioners in seeking a dismissal of the case, pursuant to the provisions of section 583 of the Code of Civil Procedure, were invoking the affirmative action of the court in their behalf to terminate the litigation. How they could apply for the relief asked on any other theory than that they were submitting themselves to the general jurisdiction of the court in the action is not apparent to us, because the relief they sought was such as could be given only to a party in a pending case. Zobel v. Zobel, supra.

Petitioners' claim that when an action is not brought to trial within five years after the filing thereof, the court loses jurisdiction thereof for all purposes, save only to dismiss it, and that the duty of the court to dismiss such action is obligatory and mandatory, cannot be sustained.

[5, 6] While, generally speaking, it is mandatory upon the court pursuant to section 583 of the Code of Civil Procedure to dismiss an action when the requirements of the section are not met, nevertheless, there is a well-recognized implied exception to this rule. Such exception applies when, as a result of the conduct or action of the defendant, it is not possible to bring the case to trial. When such a situation exists, the court is not bound to dismiss the action. The plain purpose of the statute is to prevent avoidable delays for too long a period, and that it is not designed to arbitrarily close a proceeding at all events in five years is evidenced by the fact that by its provisions the parties are permitted to extend the period without limitation by

written stipulation. Examples of instances in which the time element provided for in section 583 of the Code of Civil Procedure may be disregarded, if during such time the jurisdiction or right of the court to set the cause for trial was suspended, are furnished by the cases of Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102; and Kinard v. Jordan, 175 Cal. 13, 164 P. 894. The theory of these decisions seems to be that where, for all practicable purposes, going to trial would be impossible, the provisions of section 583 of the Code of Civil Procedure are tolled, thereby, as said in Estate of Morrison, supra, 125 Cal.App. at page 512, 14 P.2d at page 106, "setting reality above artificiality".

[7] To our minds no logical distinction can be made between a temporary suspension of proceedings in the trial court because of a dismissal induced by fraud or mistake (Estate of Morrison, supra); or a suspension of the power of the court to proceed by reason of the pendency of an appeal (Kinard v. Jordan, supra); and a suspension of the power of the court to proceed to trial in the cause by reason of the inability of the plaintiff to serve the complaint and summons upon the defendants, as the court found in the case before us upon competent and sufficient affidavits, because of the artifice, evasive and surreptitious conduct of such defendants in avoiding service of such process. To hold otherwise would be to put a premium upon conduct which, to say the least, impedes, if not obstructs, justice and the orderly conduct of judicial tribunals. This the courts cannot do.

[8, 9] In the light of the decisions, it seems clear to us that the only hypothesis upon which petitioners could base their motion to dismiss under section 583 of the Code of Civil Procedure was that respondent court had the power to proceed to trial of said cause, and this hypothesis necessarily presupposes and includes that respondent court was clothed with jurisdiction of the persons of petitioners. Such appearance on the part of petitioners was therefore a general appearance by them, and the fact that the court denied petitioners' motion is of no consequence in determining the nature of their appearance, any more than was the designation of the same by petitioners as a special appearance. Having made a general appearance and thereafter failing to plead in the action, and the court having correctly ruled upon such motion under the facts here present, no error was committed by respondent court in directing the entry of the default of said petitioners, and respondent court should not be restrained from entering a judgment against them.

It is ordered that the alternative writ issued herein be discharged sixty days from and after the date of filing of this decision. The peremptory writ prayed for is denied.

We concur: YORK, P. J.; DORAN, J.

46 Cal.App.2d 449

HILTON v. REED.

Civ. 6581.

District Court of Appeal, Third District, California.

Aug. 9, 1941.

Hearing Denied Oct. 6, 1941.

1. Appeal and error 🔑837(4)

On appeal from judgment for plaintiff entered after overruling of defendant's demurrer to complaint, District Court of Appeal is limited to precise allegations of complaint.

2. Appeal and error 🔑909(3)

On appeal from judgment for plaintiff entered after overruling of defendant's demurrer to complaint in action to quiet title and to enjoin defendant from prosecuting prior action in which defendant asserted a mechanic's lien against the property, District Court of Appeal was not justified in assuming that defendant's lien claim was based upon a written instrument, and therefore the rules as to so-called quia timet actions were not applicable, where complaint alleged merely that defendant claimed a right to a lien in the prior action and did not allege that mechanic's lien claim was filed. Code Civ. Proc. § 738; Civ.Code, §§ 3412, 3413.

3. Mechanics' liens 🔑251
Quieting title 🔑34(5)

In action to quiet title and to enjoin defendant from prosecuting prior collateral action in which defendant asserted a mechanic's lien against the property, complaint was not defective for failure to allege whether plaintiff acquired property before or after defendant's lien claim in prior collateral action was filed, or sought to be enforced by foreclosure proceedings, where complaint alleged merely that defendant claimed a right to a lien in the prior action and did not allege that mechanic's lien claim was filed or that foreclosure proceedings were begun.

4. Quieting title 🔑34(5)

In action to quiet title, allegations in complaint that defendant had commenced prior action in which defendant claimed a right to a mechanic's lien and that such action was still pending were not "surplusage", and therefore complaint was subject to demurrer for failure to allege whether plaintiff acquired title to property subsequent to commencement of prior action, where cloud which plaintiff was seeking to remove was the prior action and the prayer specifically sought to restrain defendant from prosecuting the prior action.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

5. Pleading 🔑49

The prayer of a complaint can be consulted in determining character of action.

6. Mechanics' liens 🔑197

A person acquiring property subsequent to filing of action asserting a claim to a mechanic's lien against property would be bound by decree in such action unless such person acquired property without notice or knowledge of such claim.

7. Pleading 🔑367(2)

Where plaintiff instituted quiet title action and alleged pendency of prior action in which defendant asserted a claim to a mechanic's lien against the property and sought to enjoin defendant from prosecuting prior action, defendant was entitled to have the complaint made more certain and definite as to how the claim of defendant in the prior action was without right.

8. Injunction 🔑118(1)

To justify restraining of prosecution of an action pending in a court, the pleading seeking such relief should be clear and certain.

9. Abatement and revival 🔑4, 17

The pendency of prior action, based on the same cause, contested by the same parties, and commenced in the same jurisdiction, is ground for the abatement of second action at the common law, and is a ground for demurrer under Code of Civil Procedure. Code Civ.Proc. § 430.

10. Abatement and revival 🔑4

The rule that the pendency of a prior action based on the same cause, contested by the same parties, and commenced in the same jurisdiction, abates a second action, is based partly upon the practical supposition that the first suit is effective and affords an ample remedy to the party and that therefore the second action is unnecessary and vexatious. Code Civ.Proc. § 430.

11. Abatement and revival 🔑17

The plea of another action pending is in the nature of a "dilatory plea", and is not favored, and the court will not sustain a demurrer on such ground unless it clearly appears from the complaint that the prior action is based on the same cause and is pending between the same parties. Code Civ. Proc. § 430.

See Words and Phrases, Permanent Edition, for all other definitions of "Dilatory Plea".

12. Abatement and revival 🔑9

A plaintiff acquiring property prior to filing of action in which defendant asserted claim to mechanic's lien against the property would not be bound by such action if plaintiff was not made a party thereto, and hence such action would not be "pending" as to plaintiff and therefore would not prevent plaintiff from instituting action to quiet title and to enjoin defendant from prosecuting the prior action. Code Civ.Proc. § 430.

See Words and Phrases, Permanent Edition, for all other definitions of "Pending".

13. Lis pendens 🔑24(2)

A person acquiring property after filing of action asserting claim to mechanic's lien against the property and having knowledge or notice of such action would in effect be a "party" to such action and would be bound by any judgment rendered therein. Code Civ.Proc. § 385; § 1908, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Party".

14. Abatement and revival 🔑17

A complaint in quiet title action, alleging pendency of prior action in which defendant asserted a claim to a mechanic's lien against the property and seeking to enjoin defendant from prosecuting prior action, was not subject to demurrer on ground that a prior action was pending between the same parties for the same cause of action, where complaint did not disclose with certainty whether prior action was between the same parties as the instant case. Code Civ.Proc. § 430.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Quiet title action by C. N. Hilton against William G. Reed. From a judgment in favor of the plaintiff, entered after the defendant's demurrer was overruled and the defendant declined to plead further and defendant's default was entered, the defendant appeals.

Reversed, with directions to sustain the demurrer and grant the defendant permission to amend his complaint.

William C. Ring, of Los Angeles, for appellant.

Merritt D. Jergins and Simon Miller, both of Long Beach, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff, entered in a quiet title action after appellant's demurrer was overruled and he declined to plead further, his default being entered. The only issue involved on this appeal is the ruling of the trial court on the demurrer.

The complaint alleged in substance that respondent was the owner of certain real property; that appellant on April 13, 1938, commenced an action in the same superior court against a number of defendants, including a number of fictitious defendants, but not naming respondent, "whereby defendant claimed, among other things, the right to a mechanic's lien against said property; that said action is still pending in said court"; that defendant claimed an interest in said property adverse to plaintiff, which claim was without right. The prayer of the complaint, in addition to seeking the usual relief in a quiet title action specifically prayed that defendant be enjoined from prosecuting the action referred to in the complaint.

The demurrer was both general and special, the special grounds being (1) that the complaint is uncertain in that it cannot be ascertained therefrom whether or not plaintiff acquired title subsequent to the filing of the action referred to in the complaint and the recording of a lis pendens in said action; and (2) that it appears from the face of the complaint there is another action pending between the same parties hereto wherein plaintiff could intervene and in which all claims affected by said lien claim could be adjudicated in one action.

Appellant's first contention is that: "A complaint in quia timet against a claim and proceeding to enforce a mechanic's lien is fatally defective against general demurrer where facts avoiding such lien proceeding and justifying plaintiff's non-intervention therein are not alleged."

Appellant argues that this action is not one to quiet title under section 738 of the Code of Civil Procedure, but is a quia timet action "directed at said lien claim and suit, as contemplated by Civil Code, sections 3412 and 3413", which sections read as follows:

(3412) "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

(3413) "An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury, within the provisions of the last section."

[1, 2] Appellant's entire argument upon this point is predicated upon the assumption that the complaint affirmatively shows that the claim of defendant is based upon a recorded or written claim of lien. We are, of course, limited to the precise allegations of the complaint which in this respect are that Reed "in said case claimed, among other things, the right to a mechanic's lien against said property". Actions brought under sections 3412 and 3413 of the Civil Code relate to situations where there is an outstanding instrument which it is sought to annul. An appellate tribunal is not justified in assuming, as appellant has assumed, that the adverse claim of defendant is based upon a written instrument, and therefore the rules as to so-called quia timet actions are not applicable here.

[3] Appellant next contends that "the complaint is defective for uncertainty in failing to allege whether or not plaintiff

acquired the property in issue before or after defendant's lien claim in the prior collateral action was filed, or sought to be enforced by foreclosure proceedings; since, if previously acquired, it might not be subject to said lien, while if acquired pendente lite, or thereafter, said property is subject thereto, but in any event, any defense against the same must be interposed in said action".

We must point out, however, that there is no allegation in the complaint which justifies appellant in assuming, for the purposes of the demurrer or this appeal, that a mechanic's lien claim was filed or that foreclosure proceedings were begun. At most, it appears from the complaint that defendant filed a suit in which he claims, among other things, *a right to a lien.*

[4-8] However, we believe that there is great merit in appellant's second ground of demurrer that the complaint is uncertain because it cannot be ascertained therefrom whether or not plaintiff acquired title to the property subsequent to the commencement of the action referred to in the complaint. Respondent, apparently realizing the force of this contention, asserts that "the allegations of the complaint referring to the pendency of the prior suit, being in addition to the usual allegations to quiet title, are unnecessary to the statement of a cause of action, and any uncertainty in connection therewith is therefore immaterial and not ground for a demurrer".

We do not believe that the reference in plaintiff's complaint to the prior action can be regarded as surplusage. It is apparent from the complaint that the cloud which plaintiff was seeking to remove was such prior action, and the prayer, which may be consulted in determining the character of the action, specifically seeks to restrain defendant from prosecuting said action. Plaintiff, of course, might have filed a complaint to quiet title which did not mention the prior action, or seek to enjoin its prosecution, and such complaint would not have been subject to that ground of demurrer, but plaintiff did not do so. As was said in Powell v. Lampton, 30 Cal.App.2d 43, at page 46, 85 P.2d 495, at page 497:

"Even though a good cause of action to quiet title to the fund in question might have been pleaded without alleging the facts which show on the face of the pleading that another case involving title to the same fund had either been decided or was pending at the time this complaint was filed, having defectively pleaded the facts upon which the plaintiff relied to identify the fund, he is bound by the issue thus tendered, and may be required to more definitely and specifically allege the facts to avoid the apparent uncertainty with relation to the parties bound thereby. Under similar circumstances it was contended in the case of Burki v. Pleasanton School District, etc., 18 Cal.App. 493, at page 498, 123 P. 546, at page 548, that the unnecessary matter relating to the giving of a statutory bond, was an issue which 'should be pleaded as a defense' to the action. The court said in that regard:

" 'The plaintiff undertook to plead all of the circumstances of the transaction, apparently in anticipation of any defense which might be available to the defendant. He is bound by the facts pleaded in his complaint; and, as it is apparent upon the face of the complaint that those facts do not and cannot be made to state a cause of action upon a completed and valid contract, the demurrer was correctly sustained, without leave to amend.' "

The complaint which was filed on November 29, 1938, alleges that the prior action was filed on April 13, 1938, and asserts that defendant has no interest in said property and seeks to enjoin defendant from prosecuting said action. Under such circumstances, defendant is entitled to have the complaint show whether or not the title upon which plaintiff relies was acquired before the filing of such prior action, or subsequently thereto, because such fact would certainly have a bearing upon the effect of the prior action and the question as to whether the present action should be abated. If the property in controversy was acquired by plaintiff subsequent to the filing of the prior action he would be bound by any decree therein unless he acquired it without any notice or knowledge of defendant's claim. In any event, if plaintiff seeks to enjoin defendant from prosecuting the prior action and sets forth in his complaint the pendency of said prior action, we believe that, under such circumstances defendant is entitled to have the complaint more certain and definite as to how the claim of defendant in the prior action is without right. To justify the restraining of the prosecution of an action pending in a court, the pleading seeking such relief should be clear and certain.

We are, therefore, of the opinion appellant's second ground of demurrer was well taken.

The final contention of appellant is that his third ground of demurrer should have been sustained "because it affirmatively appears from the face of the complaint that the relief sought is the obstruction of defendant's impending mechanic's lien action, as to plaintiff's alleged property wherein he may intervene and tender every defense thereto which is available to him in this action".

Section 430 of the Code of Civil Procedure authorizes a demurrer when it appears upon the face of the complaint "That there is another action pending between the same parties for the same cause".

[9, 10] The general rule is well settled in California that the pendency of a prior action, based on the same cause, contested by the same parties, and commenced in the same jurisdiction, is ground for the abatement of the second action. The pendency of a prior suit between the same parties for the same cause of action was good ground for the abatement suit at common law, and it is recognized as a ground for demurrer by our Code of Civil Procedure. The rule that the pendency of one action abates another is based in part upon the practical supposition that the first suit is effective and affords an ample remedy to the party and hence that the second action is unnecessary and vexatious. 1 Cal.Jur., p. 23.

[11] It must also be borne in mind that the plea of another action pending is in its nature a dilatory plea, and is not favored. Before a court is justified in sustaining a demurrer on that ground it must clearly appear from the complaint that the prior action is based on the same cause and is pending between the same parties. Because of the uncertainty in the complaint hereinbefore discussed we cannot say whether or not the prior action is between the same parties.

Appellant indulges in an extended argument to show that the causes and objects of the actions in the two suits involve the same subject-matter and that the plaintiff and defendant in the case at bar are actors respecting the validity and enforceability of the lien. Respondent in reply contends that the pendency of an action in which appellant is plaintiff does not affect the right of respondent herein to bring the present suit because a demurrer interposed for the purpose of abating an action will lie only where both actions involve the same parties and the same cause, and that a plea in abatement, no matter how raised, is proper only when the same plaintiff is prosecuting both suits.

There can be no doubt that the purpose of this action is to remove any cloud on plaintiff's title created by the former action filed by appellant. It is true that there were the usual allegations of a simple quiet title action in addition to the allegations concerning the former action, but the complaint sets forth that in the former action appellant claimed "the right to a mechanic's lien against said property", and it is hardly possible that a party would seek to enforce a lien against property if he asserted any interest in it beyond his right to such lien.

[12-14] Before a court is justified in sustaining a demurrer on the ground of another action pending it must clearly appear from the complaint that the prior action is based on the same cause and between the same parties. Because of the uncertainty in the complaint hereinbefore discussed, we cannot say whether or not the prior action is between the same parties as the case at bar. If the plaintiff in this action acquired the property in question prior to the filing of the prior action, and was not joined therein, said plaintiff would not be bound by said action and said action could not be said to be pending as to plaintiff. But if, on the other hand, plaintiff acquired said property from defendants therein subsequent to the filing of said action, and with knowledge or notice of said action, plaintiff would in effect be a party to said action and would be bound by any judgment rendered therein. Code Civ.Proc. §§ 385, 1908, subd. 2. We are, therefore, not prepared to hold that appellant's third ground of demurrer was well taken.

In view of our conclusion that the court below erred in overruling appellant's demurrer as to uncertainty, we find it unnecessary to discuss the other points discussed in the briefs. We believe that the judgment should be reversed with directions to the trial court to sustain the demurrer and grant respondent permission to file an amended complaint. It is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

46 Cal.App.2d 494

In re McCOY'S GUARDIANSHIP.
McCOY v. TAYLOR.

Civ. 13128.

District Court of Appeal, Second District, Division 1, California.

Aug. 13, 1941.

1. Guardian and ward ⚿13(1)

The appointment of a guardian for a minor is a matter lying within the trial court's sound discretion.

2. Guardian and ward ⚿13(8)

The conclusion reached by a trial court on the question of the appointment of a guardian for a minor will not be set aside on appeal, unless it is shown to have been reached as the result of an abuse of discretion.

3. Guardian and ward ⚿10, 13(4)

Though the failure of a parent to provide for a child may be shown as one of the items of evidence bearing on the question of the parent's competency to be a guardian of the child, it is not the same thing as "incompetency" nor does it require a conclusion that the parent is "incompetent", since the past failure of a parent to provide for his child may well coexist with a present duty to discharge fully all the duties of guardianship.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompetency" and "Incompetent".

4. Guardian and ward ⚿13(7)

In determining whether a parent is a fit guardian for his child, any findings concerning fitness or unfitness in the past are mere surplusage, since the determining factor is the parent's fitness for guardianship at the time of the hearing of the guardianship petition.

5. Guardian and ward ⚿13(8)

The fact that child's mother obtained a divorce from the father for desertion, and that the father was thereafter convicted of failure to provide for the minor and his mother, did not require reversal of court's judgment granting guardianship of the child, after the mother's death, to the father rather than to the child's stepfather, where there was evidence to show that at the time of guardianship proceedings the father was a fit person for the guardianship of the child.

6. Guardian and ward ⚿10

The section of the Probate Code providing that a parent guilty of abandonment for failure to provide for a child forfeits all right to the guardianship, and that the parent who, under certain conditions, knowingly permits his child to remain one year in an orphan asylum abandons and forever forfeits all right to the guardianship of the child, indicates that in the former case the forfeiture is not to be permanent, while in the latter case, the penalty is a permanent bar to all future custody, since, were the penalty intended to be the same in each case, the same language would undoubtedly have been applied to both situations. Probate Code, § 1409.

7. Guardian and ward ⚿10

Presumably, the interest of a child will best be subserved by awarding its care to a parent, unless the parent is unfit to have the care of the child, and unless the parent is found to be unfit, the parent is entitled to the care and custody of the child.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Proceeding in the matter of the guardianship of Edward Gerald McCoy, a minor. From a judgment and order appointing Evie T. McCoy, the father of the minor, as guardian, Henry Taylor appeals.

Judgment affirmed.

Thomas L. Griffith, Jr., of Los Angeles, for appellant.

Willedd Andrews, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment and order appointing the father of the minor in question the guardian of the minor's person and estate. Appellant is the second husband of the minor's mother and the stepfather of the minor. The question here involves the right, as between the natural father and the stepfather of the child, to appointment as the child's guardian, under the circumstances presented.

At the time of the father's, respondent's, petition for custody herein the minor, a boy, was seven years of age and his mother was dead. About the time the boy was two years old his mother obtained a decree of divorce from respondent and was awarded custody of the child. The boy's mother subsequently married appellant, and it appears that respondent also subsequently married and at the time of his petition herein was living with his second wife and a child of the second marriage, a six-year-old boy. It appears that ever since his mother's marriage to appellant the minor here in question has lived with appellant.

The court found appellant to be a fit and proper person to have the care and custody of the minor but concluded that respondent, the father, was entitled to be appointed guardian as a person preferred under section 1407 of the Probate Code unless otherwise found to be incompetent and unfit. The court did not find respondent to be incompetent and unfit; and found that respondent had not deserted or abandoned or failed to support the said minor child and that respondent was a competent, fit and proper person to have the care and custody of the said minor.

Appellant contends that the findings that respondent had not deserted or abandoned or failed to support the minor child, and that respondent was a fit and proper person to have custody of the said child, are not supported by the evidence; and that there is no evidence that the special interest of the child will be best served in respect to his temporal and mental and moral welfare in the appointment of respondent as his guardian; and that the uncontradicted evidence conclusively shows that respondent forfeited his right to be appointed guardian in the matter. These contentions are based upon the ground that the minor's mother obtained her divorce from respondent for desertion and that thereafter respondent was convicted of failure to provide for the minor and his mother, and that the evidence presented to the court below revealed these facts. Appellant also argues that where the issue of the best interest of the child is raised by the pleadings, an order appointing a guardian must be based upon findings of facts specifically regarding that interest.

[1, 2] The appointment of a guardian for a minor is a matter lying within the sound discretion of the court and the conclusion reached will not be set aside on appeal unless it is shown to have been reached as a result of an abuse of discretion. Matter of Allen's Estate, 162 Cal. 625, 629, 124 P. 237. In the instant case, after a hearing, the trial court found the minor's father a fit and proper person and entitled to the custody and guardianship of his child. Aside from any evidence as to the grounds on which the child's mother divorced respondent and as to respondent's previous failure to provide for his child, the evidence as to respondent's fitness is shown to be conflicting, and it cannot be said that there is no evidence to support a finding that respondent was a fit person for a guardian of the child. A judgment following a hearing at which all the parties were personally before the court and the court was afforded an opportunity to observe the parties at first hand, and determine their respective fitness accordingly, indicates no such abuse of discretion in the circumstances here presented. Under the circumstances, such a finding cannot be set aside on appeal, unless the grounds of the divorce in question and the subsequent failure of respondent to provide for the minor can alone be held to have disqualified him for guardianship at the time of his petition herein.

[3-6] As already noted, the court found that respondent had not deserted, abandoned or failed to support his child. Such a finding must be considered as reflecting the conditions and circumstances existing at the time of the hearing on respondent's petition. "The failure to provide may, no doubt, be shown as one of the items of evidence bearing upon the question of competency. But it is not the same thing as incompetency, nor does it in and of itself require a conclusion that the parent is incompetent. The past failure of a parent to provide for his child may well coexist with a present ability to fully discharge all the duties of guardianship." Matter of Forrester, 162 Cal. 493, 495, 123 P. 283, 284. It has also been held that in the light of a finding of present fitness for guardianship, any findings concerning fitness or unfitness in the past are mere surplusage, for the determining factor in cases of this character is the parent's fitness for guardianship at the time of the hearing of the petition. See In re Green, 192 Cal. 714, 719, 221 P. 903, citing Guardianship of Snowball, 156 Cal. 240, 104 P. 444. A finding of present fitness, therefore, cannot be said to lack support merely because there may be evidence of a previous desertion or failure to provide. Moreover, it would appear from the language employed in section 1409 of the Probate Code that the legislature did not intend abandonment or failure to provide to create a forfeiture forever of the right of a parent to guardianship of his

child. It is there provided that a parent guilty of such abandonment or failure "forfeits all right to the guardianship"; but the same section further provides that a parent who, under certain conditions, knowingly permits his child to remain for one year in an orphan asylum "abandons and forever forfeits all right to the guardianship of the child". The apparent distinction thus drawn between mere "forfeiture" and "abandonment and forfeiture forever" would indicate that in the former case the forfeiture is not to be permanent, while in the latter the penalty imposed is a permanent bar to all future custody. Were the penalty intended to be the same in each case the same language would undoubtedly have been applied to both situations.

[7] As to a failure to make a specific finding on the issue of the child's best interest, it is settled that the law presumes that the interest of a child will be best subserved by awarding its care to a parent, unless he or she is unfit to have its care; and unless the parent is found to be unfit he is entitled to the care and custody of his minor child. Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, approving Newby v. Newby, 55 Cal.App. 114, 202 P. 891.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

WEST KEY NUMBER SYSTEM

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46 Cal.App.2d 404

MUSKIN v. GERUN et al.

Civ. 11513.

District Court of Appeal, First District,
Division 1, California.

Aug. 7, 1941.

Rehearing Denied Sept. 6, 1941.

Hearing Denied Oct. 2, 1941.

1. Appeal and error 🔑1069(3)

In personal injury suit, giving and rereading to jury of general instructions favorable to defendants on doctrine of contributory negligence *held* not ground for reversal of judgment on jury's verdict for defendants, in absence of showing that such instructions embodied incorrect statements of law.

2. Trial 🔑312(1)

It is within trial court's province to reread to jury any portion of charges given or to give additional instructions clarifying such charges on jury's request.

3. Appeal and error 🔑1067

In action for injuries to acrobatic dancer, impaled on large splinter in floor of defendants' cafe while performing her act, giving of instruction that it was defendants' duty to exercise ordinary care to keep their premises in reasonably safe condition, without giving instruction to consider nature of plaintiff's employment in determining whether defendants exercised reasonable care, as requested by plaintiff, was error prejudicial to plaintiff, where entire charge over-emphasized contributory negligence and question sought to be submitted was not covered in negative general instructions on duty owed invitee by invitor.

4. Negligence 🔑105

While a person assumes perils naturally incident to position he has taken, he does not assume dangers arising only from another's negligent act.

5. Negligence 🔑136(22)

In action for injuries to acrobatic dancer, impaled on large splinter in floor of defendants' cafe while performing her act, whether defendants exercised reasonable care to maintain premises in reasonably safe condition for plaintiff to perform particular service for which defendants hired her was fact question for jury to determine under all circumstances of case.

6. Negligence 🔑121(3)

In action for injuries to acrobatic dancer, impaled on large splinter in floor of defendants' cafe while performing her act, "res ipsa loquitur doctrine" was inapplicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur Doctrine".

◆

Appeal from Superior Court, City and County of San Francisco; Everett A. McKeage, Judge.

Action by Florence Muskin against Tom Gerun and others for injuries sustained as a result of being impaled on a large splinter on the floor of defendants' cafe while plaintiff was performing act as professional acrobatic dancer. Judgment for defendants, and plaintiff appeals.

Reversed.

Rehearing denied; Ward, J., dissenting.

I. B. Padway, of San Francisco (John R. Golden, of San Francisco, of counsel), for appellant.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, for respondents.

KNIGHT, Justice.

Plaintiff, a professional acrobatic dancer, while performing her act at a cafe owned and operated by defendants, became impaled on a large splinter on the floor; and she brought this action to recover damages for the injuries so received, which she alleged were sustained as a result of defendants' negligence. Defendants denied the allegations of negligence, and as special defense pleaded contributory negligence. A jury returned a verdict in defendants' favor; and from the judgment so entered, plaintiff appeals.

The principal facts may be stated as follows: Plaintiff was a member of a professional acrobatic dancing team consisting of herself and two other young women. For some time they had been putting on their performance in cafes and theaters in various cities; and plaintiff had been taking part in this same act for about six years in many of the larger cities in the United States and in London. The defendants owned and operated the Bal Tabarin cafe in San Francisco, and hired plaintiff and her partners as independent contractors, at a salary of $400 a week, to give two floor shows each night at Bal Tabarin. Before the first floor show was put on and during the intermission between the two shows the portion of the floor on which the team was required to perform was used for dancing by the patrons of the cafe. Their engagement at Bal Tabarin started on May 24, 1939, and continued up to the night of the accident, on June 9, 1939. They wore thin, ankle length dresses; and as part of the act plaintiff ran across the floor, and when about a yard from the band stand took a leap and slid across the floor on her stomach. On the night of the accident, in performing this usual routine, she took the leap and started to slide, but "stopped dead". She did not know what had happened, but she could not get up and was in great pain. She called the orchestra leader over; and it was discovered that she was impaled to the floor by a large splinter, which remained attached to the floor at its base and impaled her by entering her leg just below the groin and emerging below the knee. Some of the employees of the cafe tried to release her from the floor by using a chisel to pry up the boards, but were unable to remove her; and she remained pinned to the floor some twenty or thirty minutes before she was finally taken off by an ambulance crew, and conveyed to the emergency hospital, where the splinter was removed. It was about seventeen inches long, two and a half inches wide and an inch thick at the base, and tapered off to a point. It had entered her leg about three inches below the groin, and emerged about four inches below the upper border of the knee cap. She was transferred to the St. Francis Hospital under the care of the personal physician of one of the defendants, where she remained for about six days. She was then taken to an apartment, and later returned to Los Angeles. At the time of trial she had done some work, including some dancing in a chorus in Los Angeles, but was unable to take part again in the acrobatic dancing performance she had been putting on when injured. The trial took place about nine months after the accident, and at that time there were several scars on her leg where the splinter entered and came out, and another scar where a hypodermic needle had been used to draw off fluid; she complained of numbness around the knee; and it was also shown that at the time of trial she still had a small splinter under the skin, which the medical testimony showed could be removed by a simple operation.

The floor on which the accident occurred was constructed of hard maple, tongue and groove boards 2½ inches wide and 13/16ths inches thick, nailed to a wooden floor. After the accident the part of the floor which had been chopped up to remove plaintiff was repaired, and several other boards were replaced; and later the arrangement was changed so that a raised platform was placed over part of the floor, and a new floor laid over the platform. The testimony shows that at the time the accident occurred there were small cracks in the floor, which one witness said was due to driving nails into the top surface of the boards, and one of the defendants testified that he found about eleven nails which had been so placed in the tops of the boards. Under stipulation the jury visited the cafe to view the floor as reconstructed. One of the defendants had witnessed the performance in Los Angeles and elsewhere before he engaged the team to perform at Bal Tabarin.

Plaintiff testified that she and the other girls looked the floor over when they rehearsed before opening their engagement at the Bal Tabarin, and also at that time asked the defendant Tom Gerun, by whom they had been employed, if he could have someone go over the floor with a felt pad to clean the floor, as they wore white "sharkskin" (a synthetic silk) evening dresses and would like to have the floor kept as clean as possible; that Gerun said he would take care of everything—see that everything was "fine" for them to work with. Gerun denied that anything was said to him by plaintiff or other members of the act about keeping the floor clean; but it appears from the record that about 5 o'clock every evening the floor was swept by bus boys, to see if there was any gum on it. If there was, it was scraped off and the floor polished with steel wool, and then mopped up with a damp mop; and once a week the floor was polished by hand with wax. But as stated, between the first and second floor shows the public used the floor for dancing, and before the second floor show began defendants neither inspected nor cleaned the floor.

[1, 2] The grounds of appeal relate to the matter of the instructions. In this regard plaintiff complains that she was not accorded an impartial trial for several reasons, among them being that the trial court's charge to the jury upon the doctrine of contributory negligence was grossly unfair in that the instructions given on that subject were overwhelmingly in favor of defendants, and besides were over-emphasized by reading most of them to the jury three times. An examination of the record shows that there is much force in the criticisms offered by plaintiff in this behalf. It is true that nearly all of the instructions given on that subject were general in character, and that an analysis of them fails to disclose any specific statement of law which can be said to be contrary to the established rules governing said doctrine. But as plaintiff points out, almost all of the instructions so given were proposed by defendants, and while she submitted a number of instructions upon that subject also, which in terms applied more particularly to the facts of the present case, and some of which embodied principles of law not covered by the court's charge, most of them were refused. And with respect to plaintiff's complaint that the court's charge relating to contributory negligence was over-emphasized, the record shows the following: During the deliberations of the jury it returned to the courtroom and requested that "the latter part of the instructions" be read again. The court inquired what particular subject the instructions covered the jury desired to have reread, and the foreman replied, "We would like to ascertain just what constitutes guilt on both sides", and stated that he referred to the instructions "on the long sheet, not the ones in the book". Thereupon the court read to the jury several of the instructions theretofore given, including some on the subject of contributory negligence; and after this was done there was further discussion between the court and the foreman of the jury as to whether or not the instructions just read were the ones to which the foreman referred. The court then stated that all of the instructions on the "long sheet" would be reread, and this was done. Four of the five instructions which were repeated twice, and two of the four repeated once, had to do with contributory negligence. The basis of plaintiff's complaint is that although contributory negligence was made an issue in the case, the evidence wholly failed to establish that fact, and that therefore the effect of giving a lengthy set of instructions on that subject favorable to defendants, and then rereading most of them to the jury a second and third time, diverted the attention of the jury from the real issue in the case, and prejudicially affected the rights of plaintiff. We are not warranted in holding, as plaintiff seems to contend, that the giving of said instructions and rereading them to the jury, standing alone, constitutes ground for reversal, because it does not appear that said instructions embodied incorrect statements of law, and it is doubtless within the province of a trial court, when so requested by a jury, to reread any portion of the charge already given, or to go even further and give additional instructions to clarify those already given.

[3] However, the facts show and the jury was instructed that plaintiff was an invitee on the premises, and we are convinced that the jury was not only inadequately but erroneously instructed as to her rights as such. In this connection the record shows that plaintiff offered a series of instructions on the duty owed by an invitor to an invitee. These were refused by the trial court on the ground that they had been covered by other instructions. The trial court did give three invitee instructions, but all three were negative instructions. They properly informed the jury that an invitor is not an insurer; that he is not liable for obvious defects; that he is not bound to exercise the highest degree of care; that he is not required to keep his premises absolutely safe; that he is not bound to discover defects which reasonable inspection would not disclose; and that by hiring plaintiff defendants did not guarantee that plaintiff would not be injured. Included in these negative instructions also were statements to the effect that "It is his duty to exercise ordinary care to keep his premises in a reasonably safe condition". But no instruction was given to the effect that in determining whether the defendant exercised reasonable care the nature of the particular employment should be considered. That was the very heart of plaintiff's case. The plaintiff offered several instructions on this general subject, none of which was given. The following offered instruction is typical: "I instruct you that if you find from the evidence that the defendants were the owners or occupants of the premises upon which the accident happened and that the plaintiff was dancing thereon at the invitation, express or implied, of said defendants, then it was the duty of the defendants to use reasonable care to keep the premises in a reasonably safe condition *for the necessary and reasonable use of the premises by the plaintiff in connection with her work,* and such failure on the part of the defendants, if you so find would constitute negligence." (Italics ours.) No instruction was given that covered this basic theory of the plaintiff. To instruct the jury that the defendants were bound to exercise "reasonable care", without telling them that in determining whether the defendants exercised such "reasonable care" they should consider the nature of the employment, was in our opinion error of a most serious nature. Obviously, what would constitute reasonable care in the case of a patron, who is also an invitee and who was using the dance floor for normal dance purposes, would not be the same as the reasonable care owed plaintiff, who was employed by defendants to use the floor for an unusual purpose. This point was not covered in the negative general instructions, to which reference has been made. When this error is considered with the charge as a whole, with its overemphasis on contributory negligence, it is clear that this error was prejudicial.

[4, 5] In support of the verdict defendants contend that in any event the evidence would have been insufficient as a matter of law to uphold a verdict in plaintiff's favor had such a verdict been rendered, and that therefore any error committed in the giving of the instructions becomes immaterial. This contention is based upon the doctrine of assumption of risk, and upon the premise that the evidence wholly fails to establish any negligence on the part of defendants. We are unable to agree with defendants on either of these points. As to the first, it will suffice to say that while a person assumes the perils which are naturally incident to the position he has taken, he does not assume dangers which come only from the negligent act of another. 19 Cal. Jur., p. 589. And as to the second point, it was clearly a question of fact for the jury to determine whether under all the circumstances of the case defendants exercised reasonable care to maintain the premises in a reasonably safe condition for plaintiff to render the particular service she was hired to perform.

[6] In view of the conclusion we have reached that the cause must be remanded for a new trial, it should be stated that the case in our opinion is not one in which the doctrine of res ipsa loquitur may be properly applied, and that therefore the trial court was justified in refusing to give the instructions proposed by plaintiff on that subject. It should also be stated that other instructions were refused which could properly have been given, and some of those given are subject to criticism. But we do not deem it necessary to elaborate upon them for the reason that grounds for reversal have already been shown.

The judgment is reversed.

We concur: PETERS, P. J.; WARD, J.

46 Cal.App.2d 472

COWLIN v. PRINGLE.

Civ. 12547.

District Court of Appeal, Second District, Division 1, California.

Aug. 12, 1941.

1. Jury 🔑12(1)

In action for personal injuries resulting from automobile accident, plaintiff was entitled to a jury trial as a matter of right under Constitution, unless plaintiff waived such right in the manner prescribed by law. Code Civ.Proc. § 631, subds. 4, 5; Const. art. 1, § 7.

2. Jury 🔑25(6)

In action for injuries arising from automobile accident, plaintiff's demand for a jury trial made in written memorandum for setting the case for trial constituted substantial compliance with statutory requirement that a jury must be demanded, when case is first set upon the trial calendar. Code Civ.Proc. § 631, subd. 4.

3. Jury 🔑26

Where plaintiff in action for injuries arising from automobile accident demanded a jury trial and jury fees for the first and second days of the trial were regularly deposited by one of the defendants, the failure of plaintiff to deposit or tender such jury fees for the first and second days did not constitute a "waiver" of constitutional right to trial by jury, since the law neither does nor requires idle acts. Code Civ.Proc. § 631, subds. 4, 5; Civ.Code, § 3532; Const. art. 1, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

4. Jury 🔑26

Where trial court in action for injuries arising from automobile accident accepted plaintiff's deposit of jury fees for the third day of trial and ordered proceeding to continue as a jury case, plaintiff was thereby relieved of waiver, if any, upon her part of her constitutional right to a jury trial, notwithstanding that jury fees for the first and second days of trial had been paid by one of the defendants in whose favor a judgment of nonsuit was thereafter entered. Code Civ.Proc. § 631, subds. 4, 5, 7; Const. art. 1, § 7.

5. Jury 🔑26, 28(17)

Court may relieve a litigant of a waiver of constitutional right to jury trial, and such relief may be granted where alleged waiver consisted in failure to deposit jury fees. Code Civ.Proc. § 631, subds. 5, 7; Const. art. 1, § 7.

6. Jury 🔑28(1)

Statute providing manner in which jury trial may be waived was intended to grant parties right to waive jury trial, and not to impose conditions constituting irrevocable waiver. Code Civ.Proc. § 631, subds. 4, 5, 7; Const. art. 1, § 7.

7. Jury 🔑28(17)

Where a doubt exists as to the propriety of granting relief from a waiver of jury trial, such doubt, by reason of constitutional guarantee of trial by jury, should be resolved in favor of according to litigant a jury trial. Code Civ.Proc. § 631, subds. 4, 5, 7; Const. art. 1, § 7.

8. Appeal and error 🔑1167

Where plaintiff in action for injuries arising from automobile accident was entitled to a jury trial as a matter of right under the Constitution, denial of such right amounted to a "miscarriage of justice," requiring a reversal of judgment in favor of defendant rendered by court. Code Civ.Proc. § 631, subds. 4, 5, 7; Const. art. 1, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

Appeal from Superior Court, Los Angeles County; Charles L. Burnell, Judge.

Action by Patricia Cowlin against William A. Pringle to recover damages for personal injuries arising out of an automobile accident. From a judgment for defendant rendered by the court after discharge of the jury, plaintiff appeals.

Judgment reversed, and cause remanded for new trial.

Eugene L. Wolver and Louis Miller, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, by Philip C. Sterry, all of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff appeals from a judgment in favor of defendant, William A. Pringle, in action to recover damages for personal injuries arising out of an automobile accident in which such injuries are alleged to have occurred as a result of the concurrent negligence of respondent herein and various other defendants named in the complaint. After issue had been joined through the filing of answers by all defendants the plaintiff, appellant herein, caused the case to be set for trial by filing with the court a written memorandum for setting for trial. In this written memorandum, which is supplied by the court clerk, there appears the interrogatory, "Is jury demanded?"; and which query plaintiff answered in the affirmative by inserting thereafter the word "Yes". Pursuant to said memorandum the case was on March 9, 1939, set for "pre-trial", a procedure preliminary to trial on the merits then in vogue in the superior court of Los Angeles county. The pre-trial date was fixed for March 24, 1939. On the last named date, when all parties were represented by their counsel, the court, with plaintiff's jury demand on file and before it, set the case for trial on its merits on June 12, 1939. On June 2nd, ten days before the date set for trial, the attorney for one of the defendants, R. Leslie Sparks, deposited with the clerk of the superior court the sum of $24, as the first day's jury fees. Plaintiff had not theretofore paid any jury fees.

With plaintiff's demand for a jury still on file and the jury fees deposited as aforesaid the case, after several continuances, was finally called for trial on October 4, 1939, with all parties personally present and represented by their respective counsel. A jury was duly and regularly empaneled and sworn to try the cause. Plaintiff proceeded with the introduction of her evidence and the cause was adjourned at the close of the first court day to the following morning, when the defendant R. Leslie Sparks paid the required jury fees for the second day of trial. During the afternoon of the second day plaintiff rested her case. Thereupon all of the answering defendants, including respondent herein, made respective motions for nonsuit. All of such motions were granted except that of the respondent, whose motion was denied. During a recess which followed the rulings on the motions for nonsuit the court advised counsel for plaintiff and the remaining defendant that unless the jury fees for the following day were paid the case could not proceed as a jury trial. Counsel for plaintiff thereupon requested that the matter continue as a jury trial and deposited the jury fees for the following day and at the same time offered to pay all other fees that might thereafter be required. At this time counsel for respondent advised the court and counsel for appellant that the defendant had not demanded a jury trial, did not desire to try the case before a jury, and would not pay any portion of any jury fee, and further, that in the opinion of counsel it was extremely doubtful as to plaintiff's right to proceed with the trial of said cause before a jury.

The court, however, ordered that the payment of the fees by the plaintiff be set forth in the minutes and that the trial continue before the jury. Respondent thereupon proceeded with his defense and presented the same in its entirety to the jury, examining several witnesses, and thereupon rested. Adjournment was taken until the following morning, October 6th. Upon the last named date, during the absence of the jury, respondent moved the court for a dismissal of the jury, which motion was granted and the jury was discharged. An immediate motion was made by appellant for a mistrial, which was denied. Thereupon, over the objection of appellant the court ordered that the cause proceed before the court sitting without a jury. All of the evidence having been taken in the presence of the jury, the only proceedings had before the court sitting without a jury was the argument of counsel. Following such argument and submission of the case, the court signed findings of fact and conclusions of law and entered judgment in favor of respondent. Appellant's motion thereafter made for a new trial was denied. This appeal is from the judgment.

Appellant first urges a reversal on the ground that by its action in dismissing the jury the trial court deprived her of the right to a trial by jury as guaranteed by section 7, article I of the Constitution of this state. The applicable portion of the constitutional provision reads as follows: "The right of trial by jury shall be secured to all, and remain inviolate * * *".

[1-3] The action here in question being a personal injury case the plaintiff was entitled to a jury trial as a matter of right under the Constitution (Bieser v. Davies, 119 Cal.App. 659, 664, 7 P.2d 388) unless she waived such right in the manner prescribed by law. Subdivision 4 of section

631 of the Code of Civil Procedure provides for a waiver of a jury trial by failure to demand the same when the cause is first set upon the trial calendar when, as here, it is so set by notice or stipulation; and Subdivision 5 of the same section declares that a jury trial is waived when there is a failure to deposit the amount of one day's jury fees in the manner provided by law. That appellant made her demand for a jury trial seems beyond question. She made such demand in her written memorandum for setting the case for trial and such demand was before the court when the case was called on the pre-trial calendar and set for trial on its merits. Manifestly, this amounted to a substantial compliance with the requirement that a jury must be demanded when the cause is first set upon the trial calendar. Respondent, however, contends that because appellant, as plaintiff in the court below, did not deposit jury fees for the first and second days of the trial, even though such fees were regularly deposited by one of the defendants, she thereby waived her right to a jury trial. This claim is without merit. The record affirmatively shows that one of the defendants deposited the first day's jury fees on the tenth day before the date originally set for trial and months before the case was actually called for trial. We cannot assume that had such defendant not paid the jury fees for the first day's trial appellant would not have done so. Further, when such fees were paid, we perceive no existing necessity for plaintiff to also tender another jury fee for the first day of trial. "The law neither does nor requires idle acts." Sec. 3532, Civ.Code. The only object for the requirement in civil cases that the first day's jury fees must be deposited in advance of the trial date would seem to be that of a reasonable precaution to prevent the jurors from being defrauded by unscrupulous parties. In other words, to insure provision being made by the litigants in civil cases for the jury's compensation. Also, possibly to prevent a demand for a jury being used as a pretext to obtain continuances and thus trifle with justice. Conneau v. Geis, 73 Cal. 176, 177, 14 P. 580, 2 Am.St.Rep. 785. No such considerations or reasons appear here, nor is there anything in the record which suggests that by proceeding with the case as a jury trial the proceedings would have been delayed or that respondent would have been injured in any manner.

[4-7] Even though it be conceded that appellant waived her right to a jury trial, as held by the trial court, it seems clear to us that when the court accepted the appellant's deposit of jury fees for the third day of the trial and ordered the proceedings to continue as a jury case the appellant was thereby relieved of any waiver upon her part of a jury trial. That the court has power to relieve a litigant of a waiver of trial by jury is firmly established in our law. Subdiv. 7, sec. 631, Code Civ.Proc.; Doll v. Anderson, 27 Cal. 248; Bullock v. Consumers' Lumber Co., 3 Cal. Unrep. 609, 31 P. 367; Dickey v. Kuhn, 125 Cal.App. 68, 13 P.2d 834; Hill v. Peres, 136 Cal.App. 132, 140, 28 P.2d 946; Nevin v. Mallon, 136 Cal.App. 571, 573, 29 P.2d 303; Stern v. Hillman, 115 Cal.App. 156, 159, 300 P. 972; Duran v. Pickwick Stages System, 140 Cal.App. 103, 109, 35 P.2d 148. Such relief may be granted by the court after failure to deposit jury fees. Davis v. Conant, 10 Cal.App.2d 73, 75, 51 P.2d 151; Stern v. Hillman, supra. There is also creditable authority for the statement that the purpose of section 631 of the Code of Civil Procedure is to grant the parties the right to waive a jury trial, but not to make such waiver irrevocable, Duran v. Pickwick Stages System, supra. Whenever a doubt exists as to the propriety of granting relief from such waiver of jury trial such doubt, by reason of the constitutional guarantee, should be resolved in favor of according a litigant a trial by jury. Loranger v. Nadeau, 215 Cal. 362, 368, 10 P.2d 63, 84 A.L.R. 1264.

[8] Where as here the right to trial by jury is denied to one justly entitled thereto such denial amounts to a miscarriage of justice and a reversal of the judgment is required. Union Oil Company of California v. Hane, 27 Cal.App.2d 106, 110, 80 P.2d 516.

The foregoing conclusions at which we have arrived render unnecessary the discussion or determination of other points raised on this appeal.

The judgment is reversed and the cause remanded for a new trial in conformity with the views herein expressed.

We concur: YORK, P. J.; DORAN, J.

45 Cal.App.2d 664

DETER v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13058.

District Court of Appeal, Second District, Division 1, California.

June 30, 1941.

Hearing Denied Aug. 28, 1941.

1. Workmen's compensation ⚿1912

Where compensation case was remanded because Industrial Accident Commission had acted in excess of its jurisdiction, it was neither necessary nor proper for court to determine whether there was evidence to support finding concerning whether accident occurred during course of employment.

2. Workmen's compensation ⚿1802

Where referee rendered decision on rehearing in compensation case without knowledge of testimony of at least two witnesses and without knowledge of all of testimony adduced at original hearing, award made was in excess of jurisdiction of Industrial Accident Commission.

◆

Proceeding under the Workmen's Compensation Act by Hursel Wayne Deter, petitioner, opposed by J. A. Crane, and the Pacific Fidelity Owners, Limited, employers, and the National Automobile Insurance Company, insurance carrier. An award was made by the Industrial Accident Commission in favor of the employers and the insurance carrier, and the petitioner filed an application for review.

Award annulled and cause remanded with directions.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

Fred M. Riedman, of Long Beach, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

WHITE, Justice.

[1] This cause comes before us on the application of the above-named petitioner to review an award made by the Industrial Accident Commission in favor of J. A. Crane, Pacific Fidelity Owners, Ltd., and National Automobile Insurance Company, a corporation. The record discloses that petitioner was employed in the capacity of a horse trainer and ranch hand by respondents J. A. Crane and Pacific Fidelity Owners, Ltd., on a ranch at Cypress, California. On March 3, 1940, while petitioner was engaged in the act of roping a horse, the rope parted and one end thereof flew back, striking petitioner in the left eye. Respondents concede that the accident occurred during the hours of employment and at a place where the employee had a right to be. The contention that the accident occurred during the course of the employment, however, is disputed by respondents. Inasmuch as the cause is remanded for another reason, it is unnecessary to determine, nor in the light of the record would it be proper to determine, whether there is evidence to support such a finding.

[2] Petitioner's claim that the award made by the commission in favor of respondents was in excess of the commission's jurisdiction in our opinion is well founded and entitled to be sustained. The record discloses that the case was originally heard before Referee W. Bond, who decided the issue against the applicant. A petition for a rehearing was filed and by the commission granted. Without having the evidence received at the original hearing transcribed, the rehearing took place before Referee Mort L. Clopton, at which time all of the evidence received at the first trial was not introduced. During the proceedings had on rehearing, the applicant requested and was granted a continuance to secure the attendance of two witnesses. When these witnesses were produced, their testimony was taken before still another referee, Harold B. Jeffrey. This last-mentioned testimony was never transcribed, but nevertheless Referee Clopton rendered a decision against petitioner and in favor of respondents on the rehearing. In other words, it is apparent that the referee who made the decision rendered the same without knowledge of the testimony of at least two witnesses, and without knowledge of all the testimony introduced at the original hearing.

Although respondents dispute petitioner's contention that any prejudice resulted therefrom, we are not persuaded that such issue should be permitted on review in the circumstances here presented. To the contrary, it is our conviction that when the commission handed down a decision through the instrumentality of a referee who had neither heard nor read all of the evidence in the case, it acted in excess of its jurisdiction.

For this reason, therefore, the award is annulled and the cause remanded to the commission with directions to conduct a hearing or hearings in accordance with the views herein expressed.

We concur: YORK, P. J.; DORAN, J.

46 Cal.App.2d 492

HOWARD v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13045.

District Court of Appeal, Second District, Division 1, California.

Aug. 13, 1941.

Hearing Denied Oct. 10, 1941.

Workmen's compensation 🔑2052

Petitioner could not bring certiorari to review an order of the Industrial Accident Commission denying a petition to vacate commission's order terminating liability of an insurance carrier for injuries received by petitioner in course of his employment, where petitioner had previously applied to District Court of Appeal for a writ of review of order denying petition and such writ had been refused, and petitioner on certiorari was making same contentions and raising same issues as had been made on application for writ of review.

Proceeding in certiorari by Harry Howard against Industrial Accident Commission and others, to review an order of the Commission denying a petition to vacate its order terminating liability of an insurance carrier.

Order affirmed.

Leland E. Zeman and A. A. Golden, both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

DORAN, Justice.

The petitioner applied to the Industrial Accident Commission to have a certain order terminating liability of the insurance carrier, for injuries received by petitioner in the course of his employment, vacated on the ground that the same was void. The application was denied and the matter comes before this court for a review of the order of the Industrial Accident Commission denying the petition to vacate the order terminating liability. Respondents contend that the precise question here involved has already been decided adversely to petitioner upon a previous application; and that the Supreme Court denied a hearing in the matter.

The petition to vacate the order terminating liability was filed with the Industrial Accident Commission on January 14, 1941, the grounds therein stated being the same as those set forth in the petition for the writ of review herein, namely, that the order was void for lack of proper notice of intention to terminate liability. It appears from the record that on September 6, 1940, petitioner filed with the Industrial Accident Commission a "petition for hearing and order for award of past due compensation", to which respondent State Compensation Insurance Fund interposed an answer setting up lack of jurisdiction of the commission on the ground of the existence of the order terminating liability, which the said respondent claimed had become final; and respondent claimed also that more than 245 weeks had elapsed since the date of injury. The commission denied the petition to reopen the matter and the petitioner applied to this court for a review of the order denying that petition. It further appears from the record of petitioner's former application to this court that the invalidity of the order terminating liability was therein urged by petitioner, upon the grounds now urged. This court denied a writ of review upon the former petition and the Supreme Court subsequently denied petitioner a hearing in the matter. In the present proceeding petitioner makes the same contentions as previously urged and the same issue is raised as to the validity of the order. The end sought by petitioner in the instant proceeding is the same as that sought in the former application, namely, reopening the question of petitioner's right to compensation; and the reasons urged therefor are the same. In scope and effect the petition here presented is the same as that formerly made by the petitioner and passed upon by this court; and it follows that the question here raised has already been decided adversely to petitioner. Petitioner, having applied unsuccessfully for the reopening of his case on the ground of the alleged invalidity of the order terminating it, may not now return with a petition to have the order of termination vacated because of its alleged invalidity. The question necessarily involved is not changed merely by stating it in another way. The matter stands adjudicated, and the order of the Industrial Accident Commission denying the vacation of the order terminating liability of the insurance carrier is accordingly affirmed.

We concur: YORK, P. J.; WHITE, J.

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46 Cal.App.2d 443

DIAMOND v. GRATH et al.

Civ. 6579.

District Court of Appeal, Third District, California.

Aug. 9, 1941.

1. Evidence 🔑471(26)

Generally, ownership of property is a "fact" to which a witness may testify and not a "legal conclusion".

See Words and Phrases, Permanent Edition, for all other definitions of "Fact" and "Legal Conclusion".

2. Quieting title 🔑44(4)

Where plaintiff answered affirmatively questions as to whether he was the owner of property described in complaint in action to quiet title and as to whether he was owner by reason of a certain trust agreement and there was no other evidence in the record, finding that plaintiff had no interest in the property was contrary to the evidence.

3. Quieting title 🔑42

Where plaintiff alleged in action to quiet title that he was owner of described land and plaintiff testified that he was the owner and that he was owner by reason of a certain trust agreement, court should have required plaintiff to amend title and body of complaint to show clearly for whom he was trustee so that the litigation could be determined on its merits expeditiously and completely.

4. Appeal and error 🔑918(1)

Where appellant contended that trial court erred in denying motion to amend complaint but failed to show in what respect complaint was sought to be amended, reviewing court was not justified in assuming what amendment was proposed by the appellant since error is never presumed.

5. Dismissal and nonsuit 🔑7(1)

A plaintiff has the right to dismiss an action as to all or any of the defendants at any time before final submission of the case provided that a counterclaim has not been set up or affirmative relief sought by a cross-complaint or answer of the defendant.

6. Appeal and error 🔑684(4)

Reviewing court could not determine whether trial court erred in denying motion to dismiss an action to quiet title as to appearing defendants where the answers of the appearing defendants were not in the record.

7. Appeal and error 🔑1071(1)

The failure to make findings after trial of an issue is reversible error. Code Civ. Proc. § 632.

8. Judgment 🔑359

Where trial court entered first judgment in action to quiet title without making findings, vacating first judgment on ground of misapprehension and misunderstanding and the entry of a second judgment on findings, facts, and conclusions of law was not reversible error, notwithstanding that better procedure would have been to vacate the judgment on a motion for new trial. Code Civ.Proc. § 632.

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action to quiet title by Harry P. Diamond against W. P. Grath and others. From a judgment for the defendants, plaintiff appeals.

Reversed and remanded.

Will H. Winston, of Long Beach, for appellant.

Arthur E. Schifferman, of Los Angeles, Walter S. McEachern, of Pasadena, Samuel J. Jones, William B. Acton and O'Brien, Dibert & Acton, all of San Francisco, J. G.

Crichton, of Fresno, and Caryl Warner, William H. Brawner, and H. A. Andrews, all of Los Angeles, for respondents.

SCHOTTKY, Justice pro tem.

Appellant appeals from a judgment in favor of respondents, entered in a quiet title action. Appellant filed an action against a large number of defendants to quiet title to certain oil royalty interest. The complaint set forth that appellant was the owner of the property described therein; that defendants claimed an interest adverse to appellant; and then alleged further: "That the plaintiff herein is holding title to the property herein described as Trustee for various persons named in a certain Agreement of Trust, which said Agreement of Trust is in writing * * * and reference is being hereby made to said Agreement of Trust for the names and interest of all said parties under said trust."

Only a few of the defendants appeared in the action. One filed a disclaimer and defaults were entered against others for failure to appear. The case came on for trial on October 6, 1938, and according to the bill of exceptions appearing in the transcript, the following proceedings were had:

Plaintiff and appellant was called as a witness by plaintiff and was asked: "Q. Are you the owner of the property described in the complaint, Mr. Diamond?" The objection of defendants that the question was incompetent, irrelevant and immaterial and calling for the conclusion of the witness was overruled by the court, and the witness answered, "I am". The witness was then asked: "Q. Are you the owner by reason of a certain trust agreement?" A similar objection by defendants was overruled, and the witness answered: "I am".

The witness was next asked: "Q. I show you, Mr. Diamond, * * * what purports to be a trust agreement and ask you if this is the document by which you claim ownership and if it was signed by the parties whose signatures it purports to bear?" Objection was made that it was an attempt to prove ownership in the plaintiff as trustee under an alleged trust, whereby it would be shown that Mr. Diamond was not the owner of the property as alleged in the complaint, but was merely a trustee in a purported trust; also that the defendants objected to any evidence with respect to the purported trust as a material variance, and that the action was not being prosecuted in the names of the real persons in interest. These objections were sustained. The trust agreement referred to was not received in evidence and is not in the record.

Plaintiff thereupon moved to amend his complaint, though the nature of the amendment does not appear in the record, which motion was denied by the court. Plaintiff then moved to dismiss the action as to the answering defendants only, which motion was opposed by the answering defendants and denied by the court. Plaintiff declined to proceed further and the answering defendants moved for judgment. The minutes of the court then show: "Judgment is ordered for answering defendants against plaintiff without prejudice. Judgment is ordered for plaintiff against defaulting defendants as prayed. Plaintiff is to prepare judgment."

Thereafter, on October 11, 1938, without any findings being filed, a decree quieting title was entered adjudging and decreeing that plaintiff was the owner of the property described in the complaint, that the defaulting defendants have no interest whatever in said property; that plaintiff is the owner of said property as trustee for various persons named in said agreement of trust; that it appearing the plaintiff is not the proper party plaintiff as against the appearing defendants (naming them), judgment is hereby entered on behalf of said appearing defendants, and they are entitled to recover their costs from plaintiff.

Thereafter, a motion was made by the appearing defendants to set aside the decree "upon the ground that the said judgment was a void judgment or order, there not having been signed any findings of fact or conclusions of law prior to its rendition". This motion was granted, the minutes stating that "the motion is granted and the judgment is set aside on the ground of misapprehension and misunderstanding in order to allow further argument. Plaintiff is given five days to prepare findings and judgment."

Thereafter, on January 30, 1939, findings of fact and conclusions of law were made and entered, in which the court found as a fact that plaintiff is not the owner of the property or any interest therein, and as a conclusion of law that the answering defendants are entitled to judgment with their costs. A judgment was entered decreeing that plaintiff take nothing against the answering defendants, respondents herein, but said judgment was silent as to the defendant who disclaimed, and the remaining defendants, whose defaults had been entered.

Appellant's first contention is that the judgment is contrary to the law and the evidence. The record shows that only two questions were asked and answered. First, plaintiff was asked, "Are you the owner of the property described in the complaint?" and "Are you the owner by reason of a certain trust agreement?", both of which were answered in the affirmative after respondents' objection had been overruled. No further questions were allowed to be answered, so the foregoing was all the evidence before the court.

The court found that plaintiff is not the owner of the property described in the complaint, nor of any interest therein, and the conclusions of law and the judgment followed the findings of fact. The judgment stated that evidence was introduced and the cause submitted for decision and findings of fact and conclusions of law filed.

[1, 2] Respondents argue that the testimony of appellant that he was the owner was a legal conclusion and has no weight as evidence. However, the law is well settled that the ownership of property is, as a general rule, a fact to which a witness may testify. Skinner v. City of Los Angeles, 5 Cal.2d 317, 54 P.2d 446. The evidence of plaintiff may not be strong, but standing uncontradicted in the record, a finding that appellant had no interest in the property is clearly contrary to that evidence.

[3] The allegations and evidence that plaintiff was the owner and that he was holding title as trustee created at most an uncertainty. There is no necessary inconsistency between the two statements, and when read together the only reasonable conclusion to be drawn from them would be that the plaintiff was claiming to be a trustee for various unnamed persons. The usual and better procedure, when such a situation became apparent in court, would have been for the court to require plaintiff to amend both the title and the body of the complaint to show clearly for whom he was trustee. Courts should be eager to have the facts in dispute brought out clearly so that litigation may be determined on its merits expeditiously and completely.

[4] Appellant's next contention is that the court erred in denying his motion to amend his complaint. However, the record fails to show in what respect appellant was seeking to amend the complaint. Error is never presumed and an appellate tribunal is not justified in assuming what amendment was proposed by appellant. However, if appellant sought permission to show that he was prosecuting the action as a trustee for certain persons, the court should have permitted such an amendment, both in the title and body of the complaint.

[5, 6] Appellant next contends that the court erred in denying his motion to dismiss as to the appearing defendants. The rule is that a plaintiff has the right to dismiss a case as to all or any of the defendants at any time before the final submission of the case, "provided that a counter-claim has not been set up, or affirmative relief sought by a cross-complaint or answer of the defendant". The answers of the appearing defendants are not in the record, and we are, therefore, not in a position to decide whether or not the motion to dismiss should have been granted.

Appellant contends further that the court erred in vacating the first judgment entered. The record shows that the respondents made a motion to set aside the first judgment "on the ground that such judgment was a void judgment or order, there not having been signed findings of fact and conclusions of law prior to its rendition".

[7] No findings were made prior to the entry of the first judgment, as required by section 632 of the Code of Civil Procedure, and it is reversible error for a court to fail to make findings after the trial of an issue. In the Estate of Pendell, 216 Cal. 384, at page 386, 14 P.2d 506, at page 507, the following language from Estate of Ingram, 99 Cal.App. 660, 279 P. 208, was quoted: "These latter sections [C.C.P. 632, 633] render it necessary for the court to make its decision in writing, i. e., to sign findings. It has been said by this court that 'the right to findings is a substantial right, as inviolate, under the statute, as that of trial by jury under the Constitution. * * * "The right to have a material issue presented by the pleadings in a cause determined by a finding of the court is one important to the parties to a suit, and the failure to make such a finding results in prejudicial error entitling the complaining suitor to reversal." (Huntington v. Vavra, 36 Cal.App. 352, 355, 172 P. 166.)'"

In Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988, 990, it was said: "While a court has power to correct mistakes in its records and proceedings, and to set aside judgments and orders inadvertently made, which are not actually the result of the exercise of judgment, it has no power, having once made its decision after regular submission, to set aside or amend for judicial error." Citing cases.

[8] We think it unnecessary to prolong this opinion by any lengthy discussion of this question, because it is clear that even if the first judgment had been permitted to stand, it would have to be reversed because of the absence of findings. That being so, we are not prepared to hold that the trial court committed reversible error in vacating the first judgment on the ground of misapprehension and misunderstanding, although we are inclined to believe that the better procedure would have been to vacate the judgment on a motion for a new trial.

Numerous other points are discussed in the briefs, but in view of the fact that we are convinced that the judgment must be reversed, it is unnecessary to discuss them.

We believe that the judgment should be reversed and the case remanded for a new trial. It is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

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46 Cal.App.2d 418

WHITE et al. v. CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES. et al.

Civ. 2757.

District Court of Appeal, Fourth District, California.

Aug. 7, 1941.

Hearing Denied Oct. 2, 1941.

1. Trusts 🔑183

Generally, trustee's violation of equitable duty, whether fraudulently or through negligence, mere oversight or forgetfulness, is breach of trust, and trustee may be charged with rents, profits and income which he never received, but might and should have received by exercise of due and reasonable care and diligence.

2. Trusts 🔑172

Generally, such language as that of provision in declaration of trust that trustee shall not be responsible or liable for acts of agent, appointed by trustee pursuant to trustor's desire, expressed in declaration, after trustor's death, applies generally to agent's torts against third persons, and trustor cannot, either singly or in conjunction with trustee, limit trustee's liability for such torts in any manner.

3. Evidence 🔑11

The District Court of Appeal may take judicial notice of depression period.

4. Trusts 🔑236

Where trust to secure trustor's indebtedness to trustee bank was indebted to trustee in sum exceeding amount of rentals, which agent, appointed by trustee pursuant to trustor's expressed wish after trustor's death, testified that he received from trust property and appropriated to his own use, no damages could be awarded to beneficiaries under either such estimate or lower estimate of trustee's expert witness, as trustee could have appropriated all trust income in satisfaction of such indebtedness at any time.

5. Trusts 🔑172

Trustor's grandchildren, named as beneficiaries of trust to secure trustor's indebtedness to trustee bank in trust declaration expressing trustor's wish that trustee appoint such beneficiaries' father, in whom trustor had great confidence, as agent to manage trust property after trustor's death as he had theretofore, cannot successfully complain in action against trustee for accounting of rents, collected by such agent and appropriated to his own use, that trustee was negligent in selecting him as agent.

6. Trusts 🔑172

A trust agreement, executed primarily to secure trustor's indebtedness to trustee bank, without imposing any active duties on trustee until trustor's death, whereupon trustee was to assume full management and control of trust corpus, and expressing trustor's wish that his son be appointed by trustee as agent to manage trust property after trustor's death, created purely "holding trust" for trustor's lifetime, with reservation of management of trust estate to trustor until his death, after which his son should take his place in such management and become exclusively responsible for performance of his duties as was trustor until his demise.

See Words and Phrases, Permanent Edition, for all other definitions of "Holding Trust".

7. Appeal and error ⚷882(5)

Where trial judge, on filing of amendment to answer during trial, stated to plaintiffs' counsel that judge would give them more time to meet new issue presented, if it appeared at end of trial to be needed, but such counsel made no request for additional time, plaintiffs cannot properly complain on appeal of allowance of amendment on grounds that they were taken by surprise and afforded no time to meet such issue.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Eugene Loren White and another against the Citizens National Trust & Savings Bank of Los Angeles and another for an accounting by named defendant as trustee and restoration to trust estate of lost trust property, with rents, issues and profits therefrom, or market value thereof. Judgment for defendants, and plaintiffs appeal.

Affirmed.

P. E. Cavaney, of Los Angeles, for appellants.

Cosgrove & O'Neil and Roscoe C. Andrews, all of Los Angeles, for respondents.

GRIFFIN, Justice.

On October 3, 1929, one James White was indebted to respondent Citizens National Trust and Savings Bank of Los Angeles in the sum of $13,000, which amount was subsequently reduced by payments made thereon to the sum of $4,500. On that date he assigned and transferred certain real and personal property to respondent bank in trust, primarily for the purpose of securing that indebtedness. The trust was merely a "holding trust" during the lifetime of the trustor with no active duties imposed upon the trustee, but upon the trustor's death the trustee was to assume full management and control of the corpus of the trust. The purposes for which the trust was created were generally "for the security of any notes, loans or advancements made by the Trustee to the Trustor. * * * To hold title to said property with no other duties during the lifetime of the Trustor or until the revocation of this trust, * * * In the event this trust is not revoked, * * * during his lifetime, any property upon his death then subject to this trust to be held by Trustee for the benefit of the Trustor's beneficiaries herein named, said Trustee assuming full duties of the management of said property as hereinafter provided. Provided, however, it is the desire and express wish of the trustor that J. Loren White, his son, and upon his retirement or decease, Eugene Loren White, Trustor's grandson, be appointed by said trustee as agent for said property, to keep said property in good condition and repair, by proper care, inspection, repair, or otherwise, and to permit no waste or deterioration thereof, said agent aforesaid to receive a salary of $150 per month, chargeable to said trust, for his services. Said trustee shall not, however, be responsible or liable for any act of said agent in the performance of his duties aforesaid."

As can be seen from an examination of this paragraph, upon the death of the trustor, the trustee was to assume the management of the property and hold the same for the benefit of the trustor's beneficiary designated in the trust. This clause further provided for the appointment of J. Loren White, the trustor's son, as agent for the properties, and it was further agreed between the trustor and the trustee that the trustee should not be responsible or liable for any acts of J. Loren White incurred in the performance of his duties in and about the management of the properties. The trustee was directed to disburse the net income, after the death of the trustor, as follows: one-twelfth to Margaret White, granddaughter of the trustor, until she attains the age of 43 years; one-twelfth to Eugene Loren White, grandson, until he attains the age of 45 years; five-twelfths to J. Loren White, son, during his life, and upon his death to his wife Grace B. White, if living, or if she be dead, then to Eugene and Margaret, grandchildren; five-twelfths to Daisy Florence Smith, daughter, during her life.

Included in the trust was certain real property designated therein as parcels one to nine. Four parcels of this property were lost through foreclosure. There was included in the corpus of the trust a few items of personal property, but there were no items of furniture referred to therein.

The trustor, James White, died on November 17, 1931. For several years immediately preceding his death, J. Loren White, his son, had assumed all the care and control of the properties, including the collection of the rents therefrom. January 5, 1931, trustor, being seriously ill, assigned his beneficial interest in the trust to his son, J. Loren White. After the death of the trustor the trustee, in obedience to the express wish and desire of the said trustor, as indicated in the declaration of trust, permitted J. Loren White to continue his management of the properties and the collection of rents. Out of these collections he paid for all repairs and upkeep, as well as his salary of $150 per month. He was instructed by the trustee to report his collections and expenditures once each month. On December 16, 1931, and February 3, 1932, he turned over to the trustee the sums of $100 and $137.25 respectively. In August, 1934, the trustee furnished to appellants a purported account of the trust estate but appellants claim the account did not show the receipts by the trustee of the rents, issues and profits of the trust property since the death of the trustor, or disclose what had become of the same. The appellants Eugene Loren White and Margaret Elizabeth Murphy, nee White, are the son and daughter respectively of J. Loren White, and are grandchildren of James White, trustor.

Appellants in their complaint sought an accounting and asked that the trustee be compelled to restore to the trust estate the properties that were lost through foreclosure, together with the rents, issues and profits therefrom, and in the event that the said property could not be restored to the trust estate, that the court determine the market value thereof and enter judgment for appellants in that amount. After a trial the court found that the trustee had rendered a full, complete and true accounting, which accounting showed that the appellants were not entitled to recover anything whatsoever either for themselves or for the benefit of the trust estate; that the trustee was not indebted to the appellants in any amount; that the trust estate was indebted to the trustee for the balance of principal due on its promissory note, advances, trust deeds, fees and interest, in the total sum of $11,342.70. The court further found that the allegations contained in the third separate defense to the complaint setting forth the defense of estoppel were true. Judgment upon these findings was subsequently entered by the court and this appeal is taken from that judgment. The gist of appellant's contention is that the trustee was guilty of negligence in its supervision of J. Loren White as the agent for the various real properties constituting the trust. It is appellants' contention that their father, J. Loren White, collected the rents from the various properties, embezzled the same, and failed to account to the respondent trustee and for the amounts so received, and that the trustee should be held liable for all funds not accounted for which belong to the trust estate.

[1] Many cases are cited to the effect that a violation by a trustee of a duty which equity lays upon him, whether fraudulent or through negligence, or arising through mere oversight or forgetfulness, is a breach of trust, and the trustee may be charged with the rents, profits and income which he never in fact received, but which he might and should have received by the exercise of due and reasonable care and diligence. Gaver v. Early, 58 Cal.App. 736, 209 P. 394; Bone v. Hayes, 154 Cal. 759, 99 P. 172; Ellig v. Naglee, 9 Cal 683; Hayden Plan Co. v. Wood, 97 Cal. App. 1, 275 P. 248; Saunders v. Webber, 39 Cal. 287.

[2] Counsel for respondent has no quarrel with the authorities cited, but contends that they have no application to the instant case, and contends that the rule is that if the beneficiary seeks to surcharge a trustee for negligence the burden rests upon the beneficiary to establish such negligence, citing Wheeler v. Bolton, 92 Cal. 159, 171, 28 P. 558. It is first argued that the clear and precise language of the declaration of the trust itself absolves the trustee from any liability for the acts of the agent J. Loren White, wherein it is provided that "said trustee shall not, however, be responsible or liable for any act of said agent in the performance of his duties aforesaid".

Respondent recognizes the general rule that such language as this applies generally to the torts of an agent committed against third persons, and that the trustor, either singly or in conjunction with the trustee, cannot in any manner limit the liability of the trustee for his torts as to third persons. Restatement of the Law, Trusts, sec. 264, subparagraph d. It is argued, however, that the most reasonable and logical interpretation is to construe this clause to mean that the trustee shall not be liable to the beneficiaries for any act of the agent appointed by the trustor and that the trustor has an absolute right to limit the rights of the beneficiaries as against the trustee, because the only rights that the beneficiaries acquire at all are under the terms of the trust instrument itself and, consequently, they are bound by all of its terms.

In construing this provision of the trust, the trial court in a well considered opinion said: "There is as much difference between this trust and its background of fact, on the one hand, and another and common type of trust and the factual set-up involved, on the other hand, as there is between two wills, drawn under entirely different circumstances and to accomplish entirely different purposes. * * * The primary purpose of the trust in question, in the intention of both the trustor and the trustee, was to give the trustee security for an indebtedness owing to it from the trustor. Thus it was purely a holding trust as long as the trustor lived, and the latter reserved to himself the management of the estate. Naturally that arrangement could not continue after his death, but he made as close an approach to such a continuation as possible by including in the trust agreement the provisions of paragraph 'thirdly' with respect to his son J. Loren White. What he intended to say, and what he did say, in my opinion, in effect was this: 'When I am dead, I want my son to take my place in the management of the estate and to carry on as I have done and intend to do until that event. If the trustee will execute this request, it is my direction that the responsibility for the performance of his duties will rest with my son exclusively, just as it will with me until my demise, and that the same relationship with respect to responsibility shall exist between the Trustee and my son, to the extent of his duties undertaken, as will exist between the Trustee and myself until my death."

It is respondent's contention that, irrespective of the provisions of the declaration of trust just referred to, the trustee was not guilty of negligence; and that the respondent trustee used ordinary care and diligence in the execution of the trust and was not guilty of any breach of trust, citing Estate of Cousins, 111 Cal. 441, 44 P. 182; Civil Code, section 2259.

[3] At the outset, J. Loren White, father of appellants, was not a party plaintiff. He was joined as a party defendant. He was not served and the case was subsequently dismissed as to him. The voluminous record, when analyzed, supports respondents' argument that appellants' case is tainted with collusion and was J. Loren White's "brain child". It appears that White, himself, served a subpoena on one of the witnesses to testify on behalf of appellants. He was the main witness for them and played an active part in seeking a recovery from the respondent bank for his admitted defalcations. White, although not a party plaintiff, would, under the trust, personally profit to the extent of five-twelfths of any pecuniary benefit that might result from the litigation, as against one-twelfth for each of appellants. It is not also strange that appellants, having a right as beneficiaries so to do, have not in this action sought a judgment against their father, J. Loren White, requiring him to pay over to the trustee the alleged misappropriated funds? Appellants were adults and lived with and were supported by White during most of the time in question. They were at all times on quite friendly terms. White testified to the receipt of rentals in the sum of $10,975, which he appropriated to his own use. He endeavored to substantiate his testimony by the production of a rent receipt record, portions of which were thoroughly established to be spurious. It contained alleged receipts for rent for certain properties for many months when in fact the property had been sold by him under the trust and no rental was paid on that property. One of the record sheets admittedly had been torn from the record book and recopied for the occasion. Under the terms of the trust the title to the furniture in the several properties was not mentioned. The trust did not refer to the furniture. Apparently J. Loren White exercised personal control over some of it at least, because he, personally, sold a portion of it without the knowledge of the trustee. The foreclosures involved in the trust took place during the depression period, of which depression period the court may take judicial notice. Camerer v. California Savings & Commercial Bank of San Diego, 4 Cal.2d 159, 48 P.2d 39, 100 A.L.R. 667.

[4-6] An expert witness for respondent bank testified that the reasonable and fair amount of rentals that should have been received from the properties in question, over the period of time involved, was much less than that testified to by White; that $2,668 was the estimated operating and upkeep cost of the property and that 40 per cent of the rents received ($4,390) was the property of White because he, personally, owned the furniture; that after deducting White's allowable salary of $150 per month for twenty-nine months ($4,350) there would still be a deficiency of $433.

Regardless of the conflict and correctness of the amount of rentals received, under the undisputed evidence the trust was still indebted to the trustee in the sum of $11,342.70, as an offset. The trustee, under the terms of the trust, could have at any and all times, appropriated any and all income earned by the trust in satisfaction of the bank's note and the trustee's advances. Therefore, no damages could be awarded under either estimate. It is evident that the trustor, the father of J. Loren White, trustee, had great confidence in his son. There was no apparent reason why the trustee should not have the same confidence in him at the time he was selected to act as agent under the terms of the trust. Appellants cannot successfully complain that respondents were negligent in selecting him as such agent. Donaldson v. Allen, 182 Mo. 626, 81 S.W. 1151. The trial court's interpretation of the trust agreement above quoted receives ample support in the record and the findings fully support the judgment as to the questions above presented.

[7] Appellants next complain of the trial court's action in allowing, during the course of the trial, an amendment to the answer as a defense, i. e., that appellants were estopped, by their actions, from asserting any claim against respondent. It it argued that they were taken by surprise and were not afforded time to meet the issue then presented. There is no merit to this argument. The record shows that the trial judge, upon the filing of the amendment, stated to counsel for appellants: "if it appears at the end of this trial that you need more time I will give it to you". No request was made for any additional time. The rules of law covering such cases are so well and thoroughly settled that it seems hardly necessary to cite authorities in support thereof. Mills v. Jackson, 19 Cal.App. 695, 127 P. 655; 21 Cal.Jur., p. 205, sec. 141.

The other objections to the claimed improper admission of testimony of the expert appraiser is equally without merit. 10 Cal.Jur. p. 963, sec. 220.

Judgment affirmed.

We concur: BARNARD, P. J.; KELLY, Justice pro tem.

46 Cal.App.2d 477

SHIELDS v. OXNARD HARBOR DIST. et al.

JENKINS v. SAME.

Civ. 13017, 13018.

District Court of Appeal, Second District, Division 2, California.

Aug. 12, 1941.

Hearing Denied Oct. 10, 1941.

1. Automobiles 🔑238(2)

In consolidated actions for injuries sustained in automobile accident, allegations in complaints that individual defendant was, and now is, employed by defendant harbor district, and that individual defendant was acting as servant, agent, and employee of defendant harbor district and within course and scope of his employment at time of collision, were sufficient to state cause of action against defendant harbor district under provision of Vehicle Code imposing liability upon a district established by law for damages resulting from negligent operation of a vehicle owned by it by its employee when acting within scope of his office, agency, or employment. Vehicle Code, § 400, St.1935, p. 152.

2. Evidence 🔑29

The courts will take judicial notice of acts of the legislature.

3. Statutes 🔑279

In consolidated actions against harbor district and port director for injuries sustained when automobile driven by port director collided with automobile in which plaintiffs were riding, plaintiffs were not required to allege terms of section of Vehicle Code imposing liability upon a district established by law for negligent operation of an automobile by an employee acting within scope of his employment and expressly conferring right to bring suit against such district upon such a cause of action in their complaints, since court would take judicial notice of the section. Vehicle Code, § 400, St.1935, p. 152.

4. Statutes 🔑105(1)

The main object of constitutional provision that every act shall embrace only one subject, which shall be expressed in its title, is to inform the legislators and the public relative to subject matter of proposed legislation. Const. art. 4, § 24.

5. Statutes 🔑107(1), 109

Under constitutional provision that every act shall embrace only one subject, which shall be expressed in its title, matters which are logically germane to title of the act and are included within its scope may be united, it being sufficient to declare general purpose of the statute, and it is not necessary to set forth in title the details by which general purposes as expressed in title are to be accomplished. Const. art. 4, § 24.

6. Statutes 🔑105(1)

The constitutional provision that every act shall embrace only one subject, which shall be expressed in its title, should be liberally construed with the end of upholding proper legislation which is reasonably germane to title of an act. Const. art. 4, § 24.

7. Statutes 🔑107(1), 123(4)

The section of Vehicle Code imposing liability upon a district established by law for damages resulting from negligent operation of a vehicle owned by it by its employee when acting within scope of his employment is relevant and germane to "vehicles and vehicular traffic", which according to title of Vehicle Code is subject of provisions of the Code, and is not unconstitutional on ground that it violates constitutional provision that every act shall embrace only one subject, which shall be expressed in its title. Vehicle Code, § 400, St.1935, p. 152; Const. art. 4, § 24.

8. Automobiles 🔑242(6)

If there is proof that an automobile belongs to an employer, and at time of an accident is being operated by an employee of the owner, an inference arises sufficient to support a finding that employee was operating the automobile by authority of his employer and within scope of his employment.

9. Automobiles 🔑245(30)

The testimony of employee or other witnesses that at time of automobile accident employee was not engaged in scope of his employment does not dispel as a matter of law the inference which has arisen upon proof that automobile belongs to employer and at time of accident was being operated by employee, but simply raises a conflict in the evidence for determination of jury, whose determination is binding upon an appellate court.

10. Automobiles 🔑242(6)

In consolidated actions against harbor district and port director for injuries sustained when automobile driven by port director collided with automobile in which plaintiffs were riding, evidence that automobile which port director was driving at time of accident belonged to harbor district, and that port director was employed by harbor district, created an inference sufficient to support implied finding of jury that port director at time of accident was acting within scope and course of his employment, which inference jury properly weighed in connection with other evidence in the case. Vehicle Code, § 400, St.1935, p. 152.

11. Automobiles 🔑243(12)

In consolidated actions against harbor district and port director for injuries sustained when automobile driven by port director collided with automobile in which plaintiffs were riding, testimony of port director on questions of who his employer was and what his duties were was admissible as tending to establish fact of port director's agency and scope thereof. Vehicle Code, § 400, St.1935, p. 152.

12. Principal and agent 🔑121

The testimony of an agent is admissible and competent to prove nature and scope of his authority.

13. Evidence 🔑258(1)

In consolidated actions against harbor district and port director for injuries sustained when automobile driven by port director collided with automobile in which plaintiffs were riding, where evidence as to agency of port director had been received, evidence of declarations and admissions made by port director at time of and after accident was admissible. Vehicle Code, § 400, St. 1935, p. 152; Code Civ.Proc. § 1870, subd. 5.

14. Constitutional law 🔑314
Trial 🔑28(1)

The statute authorizing trial court in its discretion to permit jury to view scene of an accident does not deprive a party of his property without "due process of law" contrary to Fourteenth Amendment of Federal Constitution. Code Civ.Proc. § 610; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

15. Appeal and error 🔑201(1)

Objections to method in which view by jury of scene of accident was conducted, which were not urged before trial court, were "waived" by defendants, and would not be considered on appeal. Code Civ.Proc. § 610.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

16. Trial 🔑295(1)

The instructions to jury must be read as a whole and if, thus read, they accurately state the law, a reversal may not be predicated upon verbal inaccuracies, isolated sentences or phrases, or because a single instruction does not contain all of the conditions and limitations which are to be gathered from a reading of all the instructions.

17. Trial 🔑235(1)

In consolidated actions for injuries sustained in an automobile accident, an instruction that jury was not bound to decide in conformity with declarations of any number of witnesses which did not produce conviction in their minds, against a lesser number, or against a presumption or other evidence satisfying their minds, was correct statement of law, and was not objectionable because it authorized jury to consider as part of the evidence their view of scene of the accident. Code Civ.Proc. § 610.

18. Trial 🔑237(1)

In consolidated actions for injuries sustained in automobile accident, an instruction that in a civil action affirmative of the issue must be proved, and when evidence is contradictory decision should be made according to preponderance of evidence, and, therefore, unless jury should believe, from testimony in case taken together, that plaintiffs had by a preponderance of evidence established all material and controverted allegations of their complaints, then jury should find for defendants, was proper, and was not subject to objection that it gave to jury right to determine material and controverted allegations of the complaints.

19. Trial 🔑256(1)

If defendants desired more specific instructions on a point, they should have submitted to trial court a proper request for such desired instructions.

20. Trial 🔑296(3)

In consolidated actions against harbor district and port director for injuries sustained when automobile driven by port director collided with automobile in which plaintiffs were riding, an instruction that, if jury should find that port director made trip to Santa Barbara primarily upon a mission for harbor district, then even though he combined the trip with some personal business of his own, harbor district was responsible for his negligence, if any, in operating automobile owned by harbor district upon his return trip on and along normal and ordinary route between Santa Barbara and his place of employment, was proper, in view of evidence and other instructions. Vehicle Code, § 400, St.1935, p. 152.

21. Trial 🔑194(16)

In consolidated actions for injuries sustained in automobile accident, an instruction that one driving an automobile in a fog or where his vision was obscured by glare upon his windshield from lights of an approaching automobile was required to proceed with reasonable care and caution and with due regard to safety of others, and depending upon particular circumstances of case the exercise of reasonable care and caution by such driver might require him to stop as soon as he could reach a place by side of the road, or if, under all of the circumstances only way in which he could safely proceed was to look around edge of windshield, then he was negligent in failing to adopt such a plan, was not improper as invading province of jury.

22. Trial 🔑296(3)

In consolidated actions against harbor district and port director for injuries sustained when automobile driven by port director collided with automobile in which plaintiffs were riding, an instruction that it was duty of port director to have used ordinary care in driving and operation of his automobile, and a failure, if any, on his part to have used such care was negligence, and if such negligence, if any, was sole, proximate cause of any injuries to plaintiffs, then jury would find damages for them and each of them, as defined in other instructions, was proper, when read in connection with other instructions. Vehicle Code, § 400, St.1935, p. 152.

23. Trial ⚷296(3)

In consolidated actions against harbor district and port director for injuries sustained when automobile driven by port director collided with automobile in which plaintiffs were riding, an instruction that if jury should find from a preponderance of evidence that port director was driving automobile at time and place alleged in complaints, and that while so driving he was under influence of intoxicating liquor and that fact that he was under influence of intoxicating liquor was sole, proximate cause of injuries sustained by plaintiffs, then verdict should be in favor of plaintiffs, was proper, when read in connection with other instructions. Vehicle Code, § 400, St.1935, p. 152.

24. Trial ⚷296(3)

In consolidated actions for injuries sustained in automobile accident, an instruction that it was an undisputed fact that one of plaintiffs was not driving, operating, or controlling automobile being driven and operated by other plaintiff at time of accident, and therefore, even though jury should believe by a preponderance of all evidence that plaintiff driver was guilty of negligence proximately contributing to his injuries and to those of other plaintiff, nevertheless if jury should also believe that defendant driver was also guilty of negligence which proximately contributed to injuries suffered by plaintiff not driving automobile, verdict would be in favor of plaintiff not driving automobile, was proper, when read in connection with other instructions.

25. Trial ⚷296(3)

In consolidated actions for injuries sustained in automobile accident, an instruction that one who, while riding in private conveyance of another, was injured by negligence of a third party, could recover against third party, notwithstanding that negligence of driver of conveyance contributed to injury where person injured was without fault and had no authority over driver, was proper, when considered with other instructions.

26. Automobiles ⚷246(56, 57)

In consolidated actions for injuries sustained in automobile accident, an instruction that if jury should believe that defendant driver was driving his automobile at time and place of accident in violation of basic speed law, and that such violation, if any, was sole, proximate cause of injuries and damages, if any, by plaintiffs sustained, then defendant driver was guilty of negligence as a matter of law, and jury should award damages for plaintiffs as defined in other instructions, was proper, in view of evidence that defendant driver's automobile swerved suddenly onto a sidewalk and then swerved across road before striking plaintiffs' automobile, and that defendant driver had consumed four or five bottles of beer prior to accident, that his windshield was foggy, and that when 400 or 500 feet from automobile in which plaintiffs were riding he was blinded by headlights of other automobiles. Vehicle Code, § 510, St.1935, p. 176.

27. Trial ⚷232(3)

In consolidated actions against harbor district and port director for injuries sustained when automobile driven by port director collided with automobile in which plaintiffs were riding, an instruction that there had been prepared forms of verdict, and, whenever three-fourths of jury's number have agreed upon a verdict, appropriate form should be filled and signed by foreman and then returned into court, and that jury should retire in charge of sheriff, whose duty it would be to keep them together in a convenient place until they had agreed upon a verdict or been discharged by court, was not erroneous as directing jury to return a verdict against defendant harbor district, should they find a verdict against defendant port director. Vehicle Code, § 400, St.1935, p. 152.

28. Automobiles ⚷246(60)

In consolidated actions against harbor district and port director for injuries sustained when automobile driven by port director collided with automobile in which plaintiffs were riding, contributory negligence instruction was not erroneous, on ground that it was susceptible to interpretation that it required defendants to prove all acts of contributory negligence alleged in their answer. Vehicle Code, § 400, St.1935, p. 152.

29. Automobiles ⚷246(23)

In consolidated actions against harbor district and port director for injuries sustained when automobile driven by port director collided with automobile in which plaintiffs were riding, contributory negligence instruction properly included statement that before negligence of plaintiff driving automobile would constitute contributory negligence it must be a proximate cause of plaintiff's injuries. Vehicle Code, § 400, St. 1935, p. 152.

30. Appeal and error ⚷1001(1)
Trial ⚷343

A general verdict imports findings in favor of prevailing party on all material issues and, if there is substantial evidence to sustain a verdict on one count which is unaffected by error, fact that there is not sufficient evidence to sustain the necessary findings of fact upon another count to support a verdict, or that there have been errors in connection with such other count, will not justify a reversal of the general verdict.

31. Appeal and error ⚷1027

Where there was substantial evidence free from error, in action for recovery of money, to sustain a general verdict in favor of plaintiffs on the first count of their complaints, any errors in connection with second count of their complaints would not justify a reversal. Code Civ.Proc. § 625.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Consolidated actions by John S. Shields against the Oxnard Harbor District and another, and by Warren Jenkins against the same defendants, for injuries arising out of an automobile accident. From judgments for plaintiffs, the defendants appeal.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant Oxnard Harbor Dist.

Chas. F. Blackstock and Wm. A. Reppy, both of Oxnard, for appellant Alexander M. McDougall.

Henderson & Churchill, of Ventura, Norris Montgomery and Dickson Montgomery, both of Santa Barbara, and James C. Hollingsworth, of Ventura, for respondents.

McCOMB, Justice.

The above entitled cases, which are actions to recover damages for injuries resulting from an automobile accident, were tried together before a jury in the Superior Court and by stipulation of counsel are submitted to this court upon a single record and set of briefs. From judgments in favor of plaintiffs, defendants appeal.

The evidence being viewed most favorably to plaintiffs (respondents), the essential facts are:

On June 17, 1939, defendant Oxnard Harbor District, was engaged in constructing a harbor in the county of Ventura. Defendant McDougall was employed by his codefendant Oxnard Harbor District as port director with the duty of supervising the construction of the harbor and its operation. On the 17th of June in an automobile owned by his codefendant, defendant McDougall drove to Santa Barbara, where he inspected the harbor facilities. He then drove to a cafe, where he consumed alcoholic beverages, leaving the cafe around 2:00 A.M. on June 18, 1939, to return to his home, which was located in the city of Oxnard. At about 3:30 A.M., while driving the automobile belonging to his codefendant in a southerly direction on the state highway between Ventura and Santa Barbara, the car which defendant McDougall was driving collided with an automobile in which plaintiffs were traveling in a northerly direction on the same highway. As a result of the accident plaintiffs suffered serious injuries.

The complaints are in two counts, the first count predicating the action upon section 400 of the Vehicle Code, St.1935, p. 152, and the second count predicating the action upon section 402 of the Vehicle Code as amended by St.1937, p. 2353.

Defendants urge reversal of the judgments on the following propositions:

First: The complaints do not state a cause of action in that (a) count I of the complaints does not allege that defendant McDougall was at the time of the accident "acting in and about the accomplishment of some object having a direct connection with the improvement or development of the harbor" of defendant harbor district, and (b) there is not any statutory authority permitting a suit against defendant Oxnard Harbor District, a government agency.

Second: Section 400 of the Vehicle Code is unconstitutional in that the title of the Vehicle Code does not cover the subject of liability of a governmental agency for negligence of its employees in operating an automobile, and hence to predicate liability thereon in the present case would be a violation of article IV, section 24 of the Constitution of the State of California.

Third: There is no substantial evidence to sustain the implied finding of the jury that defendant McDougall was an agent of his codefendant and acting within the course and scope of his employment at the *time and place of the accident here involved.*

Fourth: The trial court committed prejudicial error in admitting testimony of (a) defendant McDougall on the question of who his employer was, and (b) declarations and admissions of defendant McDougall.

Fifth: Section 610 of the Code of Civil Procedure, which permits the court to allow the jury to have a view of the scene of an accident is unconstitutional because contrary to the fourteenth amendment of the Constitution of the United States of America, and, therefore, the trial court committed prejudicial error in permitting the jury to view the scene of the accident in the instant case.

Sixth: The trial court committed prejudicial error in instructing the jury as follows:

(a) "You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds."

(b) "In a civil action, such as this pending here, the affirmative of the issue must be proved, and when the evidence is contradictory the decision should be made according to the preponderance of the evidence; therefore, unless you believe, from the testimony in the case taken together, that the plaintiffs have by a preponderance of the evidence established all the material and controverted allegations of their complaints, then you should find for the defendants.

"By a preponderance of evidence is meant such evidence as, when weighed to that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests."

(c) "If you find that defendant McDougall made the trip to Santa Barbara primarily upon a mission for his employer, defendant Oxnard Harbor District, then even though he combined the trip with some personal business of his own, his employer, defendant Oxnard Harbor District, is responsible for his negligence, if any, in operating the automobile owned by the Oxnard Harbor District upon his return trip from Santa Barbara on and along the normal and ordinary route or highway between Santa Barbara and the place of employment of defendant McDougall."

(d) "You are instructed that one driving an automobile in a fog or where his vision is obscured by the glare upon his windshield from the lights of an approaching automobile must proceed with reasonable care and caution and with due regard to the safety of others, and depending upon the particular circumstances of the case the exercise of reasonable care and caution by such driver may require him to stop as soon as he can reach a place by the side of the road, or if, under all of the circumstances the only way in which he can safely proceed is to look around the edge of the windshield, then he is negligent in failing to adopt such a plan."

(e) "It was the duty of the defendant, Alexander M. McDougall, on the occasion in controversy to have used ordinary care in the driving and operation of his Plymouth automobile, and a failure, if any, on his part to have used this care was negligence, and if such negligence, if any, was the sole, proximate cause of any injuries to the plaintiffs, then you will find damages for them and each of them, as defined in other instructions herein.

"If you find from, preponderance of the evidence that the defendant, Alexander McDougall, was driving the automobile involved in this case at the time and place alleged in the complaint, and that while so driving the said automobile he was under the influence of intoxicating liquor and that the fact he was under the influence of intoxicating liquor was the sole proximate cause of the injuries sustained by the plaintiffs, then your verdict must be in favor of the plaintiffs.

"It is an undisputed fact in this case that the plaintiff, Warren Jenkins, was not driving, operating or controlling the automobile being driven and operated by John S. Shields at the time of the accident on June 18, 1939, and therefore, even though you should believe by a preponderance of all the evidence that the said John S. Shields was guilty of negligence proximately contributing to his injuries and to those of Warren Jenkins, nevertheless if you also believe that the defendant, Alexander McDougall, was also guilty of negligence which proximately contributed to the injuries suffered by Warren Jenkins, your verdict will be in favor of the plaintiff, Warren Jenkins.

"You are instructed that one, who, while riding in the private conveyance of an-

other, is injured by the negligence of a third party, may recover against the latter, notwithstanding that the negligence of the driver of the conveyance in driving his automobile contributed to the injury where the person injured is without fault and has no authority over the driver. Therefore, if you believe from all the facts and circumstances of this case that the driver of the Ford sedan automobile, to-wit, John S. Shields, was negligent, and you believe that the driver of the defendants' car was negligent, it would still be your duty to bring in a verdict in favor of Warren Jenkins, who at that time was an occupant of the automobile being driven by the other plaintiff, John S. Shields.

"Section 510 of the Vehicle Code reads as follows:

"'Basic Speed Law. No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.'

"Therefore, if you believe from all the facts and circumstances of this case that the defendant, Alexander McDougall, was driving and operating his automobile at the time and place in question in violation of this section, and such violation, if any, was the sole proximate cause of the injuries and damages, if any, by plaintiffs sustained, then I instruct you that the defendant, Alexander McDougall, was guilty of negligence as a matter of law, and you should award damages for the plaintiffs as defined to you in other instructions herein."

(f) "There have been prepared forms of verdict which are now given you, and whenever three-fourths of your number, that is nine of you, have agreed upon a verdict, the appropriate form should be filled and signed by your foreman and then returned into Court. You may now retire in charge of the Sheriff whose duty it will be to keep you together in a convenient place until you shall have agreed upon a verdict or been discharged by the Court."

(g) "In view of the fact that contributory negligence as alleged in this case by the defendant, Alexander McDougall, is an affirmative plea, the burden of proof under the evidence of the whole case is on the defendant, Alexander McDougall, to prove that the plaintiff, Warren Jenkins, was guilty of contributory negligence as alleged in his answer, and that the same proximately caused the injuries to him, and unless you so find from all the evidence of the case, you will find in favor of the plaintiff, Warren Jenkins, on that issue."

Seventh: The court committed prejudicial error in refusing to submit to the jury forms of verdicts, which would have indicated upon which cause of action the jury predicated its verdicts against defendant Oxnard Harbor District.

[1] Defendants' first proposition is untenable.

(a) Section 400 of the Vehicle Code imposes liability upon a "district established by law" for damages resulting from the negligent operation of a vehicle owned by it by its employee when acting within the scope of his office, agency, or employment. The first cause of action in the complaints here involved contained this allegation: "That at all times herein mentioned the defendant, Alexander M. McDougall, was, and now is, employed by the Oxnard Harbor District, * * * and that at the exact time of this collision hereinafter referred to, said defendant, Alexander M. McDougall, was then and there acting as the servant, agent and employee of the said Oxnard Harbor District, * * and within the course and scope of his employment."

The foregoing allegation was a sufficient allegation that defendant McDougall at the time of the accident was the servant and agent of his codefendant and was acting within the course and scope of his employment. From the facts stated, it was substantially alleged that at the time of the accident defendant McDougall was "acting in and about the accomplishment of some object having a direct connection with the improvement or development of the harbor" being constructed by his codefendant.

[2, 3] (b) Section 400 of the Vehicle Code expressly imposes liability upon a "district established by law" and political subdivisions of the state for negligent operation of an automobile by an employee acting within the scope of his employment, and expressly confers the right to bring suit against such district or political subdivision upon such a cause of action. It is therefore obvious that it was unnecessary for plaintiffs to allege the terms of section 400 of the Vehicle Code in their

complaint, as the court takes judicial notice of acts of the legislature, of which section 400 of the Vehicle Code is one.

Defendants' second proposition is also untenable. Article IV, section 24 of the Constitution of the State of California provides in part thus: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title."

The title to the Vehicle Code is as follows: "An act to establish a Vehicle Code, thereby consolidating and revising the law relating to vehicles and vehicular traffic, and to repeal certain acts and parts of acts specified herein."

[4, 5] The law is established in California that the main object of the constitutional provision, article IV, section 24, as quoted above, is to inform the legislators and the public relative to the subject matter of proposed legislation and that any matters which are logically germane to the title of the act and are included within its scope may be united, it being sufficient to declare the general purpose of the statute and it is not necessary to set forth in the title the details by which the general purposes as expressed in the title are to be accomplished. Evans v. Superior Court, 215 Cal. 58, 62, 63, 8 P.2d 467.

[6] It is further established that the constitutional provision above quoted will not receive a narrow or technical construction but is to be construed liberally with the end of upholding proper legislation which is reasonably germane to the title of the act. Evans v. Superior Court, supra, 215 Cal. at page 62, 8 P.2d 467; see also Heron v. Riley, 209 Cal. 507, 510, 289 P. 160.

The title of the Probate Code, which contains 1700 sections, reads as follows: "An act to revise and consolidate the law relating to probate, including the custody, disposal by will, succession, administration and distribution of estates of decedents, the custody and administration of estates of persons under guardianship, and the custody of persons under guardianship; to repeal certain provisions of law therein revised and consolidated and therein specified; and to establish a Probate Code." St. 1931, p. 587.

[7] In Evans v. Superior Court, supra, our Supreme Court held the title sufficient to meet the requirements of the constitutional provision above quoted. In the present case, we are of the opinion that section 400 of the Vehicle Code is relevant and germane to "vehicles and vehicular traffic", which according to the title of the Vehicle Code is the subject of the provisions of said code.

[8] Defendants' third proposition is without merit. The law is established in California that, if there is proof that (1) an automobile belongs to an employer, and (2) at the time of an accident is being operated by an employee of the owner, an inference arises sufficient to support a finding that the employee was operating the automobile (a) by the authority of his employer, and (b) within the scope of his employment. Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 565, 2 P.2d 550.

[9] It is likewise established that testimony of the agent or other witnesses that at the time of the accident the employee was not engaged in the scope of his employment does not dispel as a matter of law the inference which has arisen upon proof of the foregoing facts, but simply raises a conflict in the evidence for the determination of the jury, which is binding upon an appellate court. Bushnell v. Yoshika Tashiro, supra; Megown v. City of Los Angeles, 7 Cal.2d 80, 83, 59 P.2d 1012; Prickett v. Whapples, 10 Cal.App.2d 701, 702, 52 P.2d 972.

[10] In the present case the uncontradicted evidence discloses that (1) the automobile which defendant McDougall was driving at the time of the accident belonged to his codefendant, and (2) defendant McDougall was employed by his codefendant. Therefore, under the rules above stated, an inference sufficient to support the implied finding of the jury that defendant McDougall at the time of the accident was acting within the scope and course of his employment arose, which the jury properly weighed in connection with the other evidence in the case and impliedly accepted in lieu of inferences and evidence to the contrary.

[11, 12] Defendants' fourth proposition is also without merit.

(a) The trial court permitted defendant McDougall over objection to answer the following questions:

(1) What are your duties?

(2) You serve as a sort of general manager of that place over there?

(3) You have charge of all of these operations?

(4) Do you have anything to do with the shipments that go through that port?

(5) You direct that?

(6) Were those your duties in 1939 when you were first employed?

(7) What other activities did you have in prospect at that time?

(8) Was anything given you for your services in addition to money?

The foregoing questions were permissible as tending to establish the fact of defendant McDougall's agency and the scope thereof, the law being established in California, as aptly stated in 1 Cal.Jur. (1921) 718, thus: "The testimony of the agent is admissible and competent to prove the nature and scope of his authority." Kast v. Miller & Lux, 159 Cal. 723, 727, 115 P. 932.

[13] (b) The trial court also properly permitted evidence of declarations and admissions of defendant McDougall. The rule is established in California that after evidence of an agency has been received as in the instant case, declarations or admissions of the agent are admissible against the employer. Sec. 1870, subsec. 5, Code Civ.Proc. Therefore, the trial court properly admitted in the present case evidence of declarations and admissions made by defendant McDougall at the time of and after the accident.

[14] Defendants' fifth proposition is without merit. Section 610 of the Code of Civil Procedure authorizes the trial court in its discretion to permit the jury to view the scene of an accident. Such section does not deprive a party of his property without due process of law contrary to the provisions of the fourteenth amendment of the Constitution of the United States of America. The process traditionally known as a "view" provided for by section 610 of the Code of Civil Procedure has been recognized since the beginning of jury trials in England as an appropriate method of producing before the jury evidence which because of its immobility would not otherwise be available for the consideration of the jury. In People v. Pompa, 192 Cal. 412, at page 422, 221 P. 198, at page 203, Mr. Justice Richards speaking for our Supreme Court says: "* * * There is no special sacredness in the atmosphere of a courthouse or the walls or furnishings of a courtroom which requires that sessions of the court shall be held there and not elsewhere, if otherwise the forms of law governing the trial of causes are observed."

See also for a full and complete discussion of the inherent power of the trial court to order a "view", even in the absence of statute, IV Wigmore on Evidence, 3rd ed.[1940] 268, secs. 1162, et seq.

[15] As defendants did not urge before the trial court any objections to the method in which the "view" was conducted, the additional objections, which are presented in this court, have been waived by defendants. People v. Nakis, 184 Cal. 105, 113, 193 P. 92.

[16] Defendants' sixth proposition is also without merit. The following rule relative to instructions must be borne constantly in mind:

The instructions to the jury must be read as a whole and, if, thus read, they accurately state the law, a reversal may not be predicated upon verbal inaccuracies, isolated sentences or phrases, or because a single instruction does not contain all of the conditions and limitations which are to be gathered from a reading of all of the instructions. 24 Cal.Jur.(1926) 857, sec. 113.

[17] The instruction set forth in paragraph (a) of defendants' sixth proposition was an accurate and correct statement of the law and was not objectionable because it authorized the jury to consider as part of the evidence the view of the scene of the accident.

[18, 19] The instruction set forth in paragraph (b) of defendants' sixth proposition is a correct instruction and is not subject to the objection that it gives to the jury the right to determine the material and controverted allegations of the complaint. If defendants desired more specific instructions on this point, they should have submitted to the trial court a proper request for such desired instructions.

[20] The instruction set forth in paragraph (c) of defendants' sixth proposition is proper since (1) there was evidence from

which the jury might have believed that defendant McDougall made the trip to Santa Barbara on behalf of his employer defendant Harbor District, (2) the jury in other instructions were properly instructed to the effect that defendant McDougall must have been an agent acting in the scope of his employment at the time of the accident before his codefendant would be liable, and (3) the instruction when read in the light of the other instructions given by the court, instructs the jury that of necessity they must find that defendant McDougall was acting within the scope of his employment at the time the accident occurred before they could attach liability to his codefendant.

[21] The instruction set forth in paragraph (d) of defendants' sixth proposition did not invade the province of the jury, since when read in the light of the other instructions given to the jury, it contained a full and accurate statement of the principles of law contained therein. See Woodhead v. Wilkinson, 181 Cal. 599, 603, 185 P. 851, 10 A.L.R. 291.

[22-26] The instruction set forth in paragraph (e) of defendants' sixth proposition did not purport to be a formula instruction and therefore, when read in connection with the other instructions given to the jury, was an accurate statement of the principles of law contained therein. There was evidence that defendant McDougall's car swerved suddenly onto a sidewalk and then swerved across the road before striking plaintiffs, also that defendant McDougall had consumed four or five bottles of beer prior to the accident, that his windshield was foggy, and that when 400 or 500 feet from the car in which plaintiffs were riding he was blinded by headlights of other cars. In view of the foregoing evidence, the court properly read to the jury section 510 of the Vehicle Code and gave the instruction above quoted.

[27] The instruction set forth in paragraph (f) of defendants' sixth proposition was not erroneous as directing the jury to return a verdict against defendant Oxnard Harbor District, should they find a verdict against defendant McDougall.

[28, 29] The instruction set forth in paragraph (g) of defendants' sixth proposition when read in connection with other instructions on contributory negligence given to the jury was not susceptible to the interpretation that it required defendants to prove all of the acts of contributory negligence alleged in their answer. The instruction properly included the statement that before negligence of the plaintiff would constitute contributory negligence it must be a proximate cause of plaintiff's injuries.

[30] Defendants' final proposition is without merit and is governed by the following rules of law:

(1) In an action for the recovery of money only the jury in their discretion may render a special or general verdict. Sec. 625, Code Civ.Proc.

(2) A general verdict imports findings in favor of the prevailing party on all material issues and, if there is substantial evidence to sustain a verdict on one count which is unaffected by error, the fact that there is not sufficient evidence to sustain the necessary findings of fact upon another count to support a verdict, or that there have been errors in connection with such other count, will not justify a reversal of the general verdict. Hume v. Fresno Irr. Dist., 21 Cal.App.2d 348, 356, 69 P.2d 483; King v. Schumacher, 32 Cal.App.2d 172, 179, 89 P.2d 466; see also 2 Cal.Jur. (1921) 1029.

[31] Applying the foregoing rules to the facts of the instant case, in view of our conclusions as set forth above, there was substantial evidence free from error to sustain a verdict in favor of plaintiffs on count I of the complaints. Therefore, it is immaterial that there may have been errors in connection with count II of the complaints. Since it would not change the result, we refrain from discussing the alleged errors presented by defendants relative to the second counts of the complaints. Mitchell v. Towne, 31 Cal.App.2d 259, 267, 87 P.2d 908.

For the foregoing reasons the judgments are and each is affirmed.

MOORE, P. J., and WOOD, J., concurred.

46 Cal.App.2d 538

PACIFIC BRICK CO. v. SOUTHERN CALIFORNIA EDISON CO., Limited.

Civ. 12904.

District Court of Appeal, Second District, Division 2, California.

Aug. 19, 1941.

Rehearing Denied Sept. 12, 1941.

Hearing Denied Oct. 14, 1941.

1. Electricity 🔑11

Where regulation, filed with Railroad Commission by company engaged in furnishing electricity to consumers, respecting consumers' responsibility for equipment for receiving electric energy, was part of contract between company and a consumer, regulation had no effect beyond life of contract, and after consumer had ordered power disconnected and a reasonable time had elapsed to enable company to carry out the order the contractual relationship between them terminated.

2. Electricity 🔑18(2)

A consumer of electricity could assume that company which furnished electricity under contract with consumer would disconnect power within reasonable time after being notified to do so, and consumer was under no obligation to maintain his equipment suitable to safely receive electricity after company had had reasonable time for disconnecting power, as regards liability of company to consumer for damages to consumer's equipment sustained when a rain caused a short circuit and fire after company had been notified to disconnect power line.

3. Electricity 🔑16(1)

A company engaged in furnishing electricity to consumers was without authority to continue flow of electricity into a consumer's switch house and equipment beyond period needed to disconnect electricity after consumer notified company to do so, and, when company thereafter continued unauthorized flow of power to consumer's plant during a rain during which water reached coil box in consumer's switch house causing a short circuit and fire, company was negligent and liable for damages proximately caused by such negligence.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by the Pacific Brick Company against the Southern California Edison Company, Limited, to recover damages for negligence. From a judgment for plaintiff, defendant appeals.

Affirmed.

Rehearing denied; McCOMB, J., dissenting.

Hearing denied; TRAYNOR, J., dissenting.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for appellant.

J. Howard Edgerton, Bundy Colwell, and Massey, Edgerton & Colwell, all of Los Angeles, for respondent.

R. H. SCOTT, Justice pro tem.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for negligence, defendant appeals.

For some time prior to November 15, 1938, defendant was furnishing electricity to plaintiff at the latter's brick plant by means of wires supported on a line of poles running across plaintiff's property. These wires of defendant were attached to plaintiff's wires approximately three feet outside of plaintiff's switch-house. The switch-house and electrical equipment therein belonged to plaintiff.

The trial court found that on November 15, 1938, plaintiff notified and directed defendant to disconnect its power line and cease furnishing electricity to the plant. Defendant failed to follow this instruction and continued furnishing electricity on this line. On December 15, 1938, during a heavy rain storm, water penetrated plaintiff's switch-house by running down the main conduit into the room. The water reached the coil box, causing a short circuit and a fire which damaged the switch-house and equipment.

It appears that in the application which plaintiff made to defendant for electrical power there was a provision that the service should be "in accordance with the rates, rules, and regulations of the" defendant. At such time one of the defendant's rules and regulations on file with the Railroad Commission of the State of California read as follows: "Rule and Regulation No. 26. Consumer Responsible for Equipment for Receiving Electric Energy. The consumer shall at his own risk and expense, furnish, install and keep in good and safe condition all electrical wires, lines, machinery, and apparatus, which may be required for receiving electric energy from the Company, and for applying and utilizing such energy, including all necessary protective appliances and suitable buildings therefor, and the company shall not be responsible for any loss or damage occasioned or caused by the negligence, want of proper care or wrongful act of the consumer or of any of his agents, employees or licensees on the part of consumer in installing, maintaining, using, operating or interfering with any such wires, lines, machinery or apparatus."

We may assume that this rule just stated became a part of the contract between plaintiff and defendant.

[1, 2] This rule and regulation however had no force and effect beyond the life of the contract between the parties. After the plaintiff had ordered the power disconnected and a reasonable time had elapsed to enable the defendant to carry out the order the contractual relationship between them terminated. The plaintiff had a right to assume that the defendant would disconnect the power and was under no obligation to maintain a switch-house and equipment suitable to safely receive and utilize electricity which it had not ordered but had expressly told defendant to shut off.

[3] Defendant was without right or authority to continue the flow of electricity into plaintiff's switch-house and equipment beyond the brief period needed to disconnect it, and when it continued this unauthorized flow of power during the storm of December 15, 1938, with resulting short circuit and fire, it was negligent and was responsible for the damages proximately caused by such negligence.

The judgment is affirmed.

WOOD, Acting P. J., concurs.

MOORE, P. J., deeming himself disqualified, takes no part in the consideration or decision of this case.

McCOMB, Justice (dissenting).

I dissent:

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for negligence, defendant appeals.

Viewing the evidence most favorably to plaintiff (respondent), the essential facts are:

December 15, 1938, defendant was furnishing electricity to plaintiff, which engaged in the business of manufacturing bricks. Defendant delivered electricity to plaintiff by means of wires supported on a line of poles running across plaintiff's property. These wires of defendant were attached to plaintiff's wires approximately three feet outside of plaintiff's switch-house, which belonged to plaintiff together with all of the electrical equipment contained therein. On December 15, 1938, the switch-room, not being watertight, allowed water during a heavy rain storm to penetrate into the switch-room by running down the main conduit into the room, where the rain water reached the coil box, causing a short circuit and a resultant fire, which damaged the switch-house and equipment therein.

It may also be conceded that prior to the time of the fire plaintiff by telephone had requested defendant to discontinue the power service.

This is the sole question necessary for our determination:

Was plaintiff contributorily negligent?

This question must be answered in the affirmative. In the application which plaintiff made to defendant for electric power there was a provision that the service should be "in accordance with the rates, rules, and regulations of the" defendant. At such time one of defendant's rules and regulations on file with the Railroad Commission of the State of California read as follows:

"Rule and Regulation
"No. 26

"Consumer Responsible for Equipment for Receiving Electric Energy

"The consumer shall at his own risk and expense, furnish, install and keep in good and safe condition all electrical wires, lines, machinery, and apparatus, which may be required for receiving electric energy from the Company, and for applying and utilizing such energy, including all necessary protective appliances and suitable buildings therefor, and the Company shall not be responsible for any loss or damage occasioned or caused by the negligence, want of proper care or wrongful act of the consumer or of any of his agents, employees or licensees on the part of consumer in installing, maintaining, using, operating or interfering with any such wires, lines, machinery or apparatus."

The rule just stated became a part of the contract between plaintiff and defendant. Riaboff v. Pacific T. & T. Co., 39 Cal.App. 2d Supp. 775, 778, 102 P.2d 465.

From the foregoing it appears that plaintiff agreed by its contract with defendant, at its own risk and expense, to keep in a good and safe condition all electrical apparatus in its plant, including suitable buildings therefor. Since plaintiff in its brief concedes that the switch-room was not water-tight and admitted water during a rain storm, which was one of the causes of the fire resulting in damage to plaintiff's switch-house and equipment, plaintiff was contributorily negligent and may not recover damages from defendant.

For the foregoing reasons the judgment in my opinion should be reversed.

46 Cal.App.2d 507

SMITH v. COLEMAN et al.

Civ. 12910.

District Court of Appeal, Second District,
Division 2, California.

Aug. 15, 1941.

Hearing Denied Oct. 10, 1941.

1. Appeal and error 🔑931(1)

Where appellate court determines the sufficiency of evidence to support judgment, it must resolve all conflicts in evidence in favor of prevailing party and indulge all reasonable inferences in support of the findings and judgment.

2. Physicians and surgeons 🔑14(4)

A physician had duty to apply to the case that degree of care, skill, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under similar circumstances in the locality where the treatment was administered.

3. Physicians and surgeons 🔑18(8)

In malpractice action, testimony of medical experts that defendant physician in not taking an X-ray picture of plaintiff's injured finger, nor discovering the fracture therein for two weeks, in not employing extensions of the finger to reduce the fracture, and in not applying a splint to protect the tendons, did not employ that degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing in the locality, was sufficient to show that defendant physician was negligent and that such negligence was the proximate cause of plaintiff's injury.

4. Physicians and surgeons 🔑18(8)

In malpractice action, there is no requirement that evidence must demonstrate conclusively and beyond the possibility of doubt that physician's negligence was proximate cause of plaintiff's injury, it being sufficient if there is substantial evidence which reasonably supports the judgment.

5. Workmen's compensation 🔑2253

Where a release by the injured plaintiff was expressly limited to plaintiff's claims against his employer, the latter's insurance carrier, and their agents on account of an industrial injury received on June 18, 1938, release did not cover claims for damages for malpractice of a physician who later negligently treated the injury.

6. Workmen's compensation 🔑1178

Where recovery is sought by an employee against his employer or the employer's insurance carrier for a new or aggravated injury resulting from negligence of a physician in treating an industrial injury, the Industrial Accident Commission has exclusive jurisdiction to determine the claim.

7. Workmen's compensation 🔑2253

Where recovery for a new or aggravated injury which resulted from negligence of physician who treated workman's industrial injury was sought against the physician only, and neither the employer nor the latter's insurance carrier was a party, plaintiff could recover in an ordinary civil action for malpractice, and a release given for the industrial injury was no defense to action for subsequent injury caused by physician's malpractice.

8. Trial 🔑387(1)

A judge has the right to announce the mental processes by which he determines the credibility of witnesses and by which he arrives at conclusions.

9. Appeal and error 🔑949

Where judge in a trial without a jury announced by remarks the mental processes by which he determined credibility of the witnesses and arrived at his conclusions, a new trial could not be demanded on ground that judge had exceeded bounds of propriety.

10. Damages 🔑96

Determination of the amount of general damages to compensate for injuries suffered involves the exercise of a broad discretion by the trier of facts.

11. Physicians and surgeons ⚷18(11)

$6,000 for injury to finger resulting in permanent loss of power of extension, caused by malpractice of physicians, was not excessive.

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Dan E. Smith against Denver D. Coleman and another, for damages for alleged malpractice as physicians and surgeons. From judgment for plaintiff, defendants appeal.

Affirmed.

Hearing denied; HOUSER, J., dissenting.

Fred O. Reed and Richard L. Kirtland, both of Los Angeles, for appellant Coleman.

Fred O. Reed, of Los Angeles, for appellant Winfield Smith.

Paul G. McIver, of Montebello, and Burke, Hickson, Burke & Marshall, of Los Angeles, for respondent.

WOOD, Justice.

The defendants, who are physicians and surgeons, have appealed from a judgment entered against them in the sum of $6,000 in an action in which plaintiff based his complaint upon the malpractice of defendants.

Plaintiff was injured on June 18, 1938, while in the course of his employment by the Utility Trailer Manufacturing Company as a body builder and welder. The injury consisted of a deep laceration nearly encircling the little finger of his left hand, which exposed the tendons, and of a fracture of the proximal phalanx of the little finger, the bone having been broken into five pieces. At the request of the Industrial Indemnity Exchange, the workmen's compensation insurance carrier of plaintiff's employer, plaintiff went immediately to the office of defendant Coleman for treatment. Defendant Smith, who was Coleman's employee, treated plaintiff for shock, gave first aid, took four sutures in the laceration, and bandaged the finger. No X-ray picture of the injured finger was taken at that time and although defendants continued to treat plaintiff they did not X-ray the finger until July 1, 1938, at which time they first discovered that the finger was fractured and that the comminuted fragments of bone were not completely in place, there being some degree of telescoping or fixation of one fragment into the other. Defendants continued to treat plaintiff but made no attempt to reduce the fracture, merely cleansing and bandaging the laceration from time to time until July 11, 1938, when plaintiff was sent to another doctor. After the laceration had healed plaintiff returned to work on August 1, 1938, and continued to perform his duties as a body builder and welder until the time of trial. Although able to work, any attempt to use the little finger was painful and he was unable to use the finger effectively because he had permanently lost the power of extension of that finger. The loss of the power of extension was caused either by the severance or sloughing off of the tendons or by the adhesion of the tendons to the scar tissue. At the time of trial the fracture was almost completely healed with reasonably good alignment. As a result of prior accident plaintiff had lost the two middle fingers on his left hand so that at the time of his present injury he had only three fingers on the left hand, the thumb, the index and the little finger.

[1] The testimony concerning the nature of the treatment furnished by defendants is conflicting, as is the testimony relative to the standard of care which should have been observed in caring for such an injury. Since we are called upon to determine the question of the sufficiency of the evidence to support the judgment, we must resolve all conflicts in the evidence in favor of plaintiff and must indulge all reasonable inferences in support of the findings and judgment. Hutchinson v. California Trust Co., 43 Cal.App.2d 571, 111 P.2d 401. The evidence, when considered in the light of this rule, discloses that defendants' treatment of plaintiff's injury consisted of cleaning and disinfecting the laceration, suturing it and applying bandages and repeating this technique from time to time as long as the treatment continued. Defendants failed to discover that the little finger was fractured until nearly two weeks after they first undertook to care for plaintiff, at which time they first X-rayed the finger. Defendants failed to apply a splint to plaintiff's little finger at any time and made no attempt to reduce the fracture. It was established by the testimony of medical experts that plaintiff's inability to extend his little finger at the

time of trial was a permanent condition which was caused by the severance of the tendons or by the adhesion of the tendons to the scar tissue. The severance of the tendons or their adhesion to the scar tissue was caused by an infection or inflammation which was brought about by the presence in the laceration of foreign bodies. Dr. Strayhorn, testifying on behalf of plaintiff, stated that the inflammatory process which resulted in the adhesions "might be caused partly by bruising and by the presence in the soft tissue of comminuted bone, which acts as a foreign body." He stated that extension, which could have been effected by the use of splints, should have been applied to the injury to pull the comminuted particles back into place. Defendant Smith, who stated that on June 18, 1938, the tendons of plaintiff's finger were not severed and were functioning, testified that "normally, without any infection or inflammation, the function (of the tendons) would have probably been restored."

[2] It was the duty of defendants to apply to the treatment of plaintiff's finger that degree of care, skill, knowledge and attention ordinarily possessed and exercised by practitioners of the medical profession under similar circumstances in the locality where the treatment was administered. Taylor v. Fishbaugh, 26 Cal.App. 2d 300, 79 P.2d 174. It was established by the testimony of medical experts that in failing to take an X-ray picture of plaintiff's finger when he first appeared for treatment defendants did not employ that degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing practicing in the locality. Defendant Coleman admitted that the use of the X-ray is endorsed in discovering fractures of small bones such as the fracture of plaintiff's little finger. It was also established by expert testimony that one who possessed the degree of care and skill ordinarily used by physicians and surgeons in good standing practicing in that locality would have employed extension to plaintiff's finger by the use of splints in order to reduce the fracture and that the ordinary standard of care of physicians and surgeons practicing in the locality in question required that a splint be applied to a laceration of the type received by plaintiff in order to protect the tendons and prevent any stress or strain upon them.

[3, 4] The record contains sufficient evidence to support the finding by the trial court that defendants were negligent in failing to discover and reduce the fracture and, in addition, that they were negligent in failing to apply a splint to plaintiff's finger in order to protect the tendons. There is also substantial evidence to sustain the finding that such negligence was the proximate cause of plaintiff's permanent loss of the ability to flex his little finger. The court was justified in concluding that the loss of the power of flexion was caused by the severance of the tendons or their adhesion to the scar tissue, which in turn was caused by infection or inflammation, and that the infection or inflammation was caused by the failure to apply a splint to the injured finger. Although it is true that the evidence does not demonstrate conclusively and beyond the possibility of doubt that defendants' negligence was the proximate cause of plaintiff's permanent injury, there is no such requirement in malpractice actions, it being sufficient if there is substantial evidence which reasonably supports the judgment. Barham v. Widing, 210 Cal. 206, 291 P. 173; Dimock v. Miller, 202 Cal. 668, 262 P. 311. The record contains such evidence.

As an affirmative defense defendants alleged that on December 12, 1938, plaintiff for valuable consideration executed a complete release for any and all claims which existed at that time and that such release was approved by the Industrial Accident Commission. The action of the trial court in refusing to receive such release in evidence is now assigned as error. The material portions of such release are: "* * * said applicant D. H. Smith does hereby release and forever discharge the said employer Utility Trailer Mfg. Co. and said insurance carrier, Industrial Indemnity Exchange, an Interinsurance Exchange, their officers, agents, employees, or representatives, or surgeons, physicians, acting in their behalf of and from all claims, demands, actions, or causes of action of any kind or nature whatsoever, on account of, or by reason of the injury alleged as aforesaid, and in particular of any and all liability for any claim or claims which the undersigned * * * may have had, or have, or shall hereafter have including those now known or those which may hereafter become known against said employer and/or said insurance carrier under the Workmen's Compensation and Safety Laws of the State of California, on account of the aforesaid alleged injuries." The injuries described in the release are those sustained on June 18, 1938, "occurring in the course of and arising out of his (plaintiff's) employment, which injuries were substantially as follows: Fractured left little finger * * *" Since the document purports to release physicians and surgeons acting in behalf of the employer or the insurance carrier, defendants claim that it is a bar to the present action.

[5-7] The trial court did not err in refusing to receive such release in evidence. The release was executed in connection with plaintiff's application to the Industrial Accident Commission to recover compensation for the injury of June 18, 1938, which arose out of his employment. Although broad in its description of the claims affected, the release was expressly limited to plaintiff's claims against his employer and the latter's insurance carrier "on account of, or by reason of the injury alleged as aforesaid," and was further restricted to claims "under the Workmen's Compensation and Safety Laws." The injury "alleged as aforesaid" was the injury of June 18th. The release, therefore, did not cover expressly or by implication any injury other than the industrial injury of June 18th. If, as contended by defendants, the Industrial Accident Commission had exclusive jurisdiction over claims for the recovery of damages for the malpractice of a physician in the treatment of an industrial injury, it might properly be held that the release was a bar to the present action. However such is not the law. Where recovery is sought by an employee *against his employer or the employer's insurance carrier* for a new or aggravated injury resulting from the negligence of a physician in treating an industrial injury, the Industrial Accident Commission has exclusive jurisdiction to determine the claim. Fitzpatrick v. Fidelity & Casualty Co. of New York, 7 Cal.2d 230, 60 P.2d 276; Nelson v. Associated Indemnity Corp., 19 Cal.App.2d 564, 66 P.2d 184. But where, as in the instant case, recovery for the new or aggravated injury which resulted from the negligence of the physicians who treated plaintiff's industrial injury is sought against the physicians only, and neither the employer nor the latter's insurance carrier is a party, plaintiff may recover in an ordinary civil action for malpractice. Smith v. Golden State Hospital, 111 Cal.App. 667, 296 P. 127. The present action is not a claim under the Workmen's Compensation and Safety Laws, St.1913, p. 279. The release was effective only as to plaintiff's employer and the insurance carrier and did not bar his action against defendants for the separate and subsequent injury which was caused by defendants' malpractice.

[8, 9] Defendants charge that certain remarks of the trial judge made at the conclusion of the trial show bias and prejudice on his part. These remarks were to the effect that defendants, whom the judge referred to as "butchers and bunglers," were either committing perjury or were suffering from a loss of memory; and that Dr. Cass, an expert witness for defendants, "was doing all he could to cover up his professional brethren." In reference to the firm for which plaintiff was employed the judge said: "If the concern were to fail—and if Roosevelt remains in office much longer everybody will fail—then he may be looking for another job." The action was tried before the court without a jury and it was the duty of the judge to pass upon the credibility of the witnesses and to determine the facts from the evidence. The judge had the right to announce the mental processes by which he determined the credibility of the witnesses and by which he arrived at his conclusions. A new trial cannot be demanded upon the ground that the judge in exercising this right may have exceeded the bounds of propriety.

[10, 11] Defendants charge that the damages awarded are excessive. The determination of the amount of general damages which will compensate an injured party for injuries suffered involves the exercise of a broad discretion by the trier of facts. It cannot be held that the amount awarded is so disproportionate to the injuries suffered that it "may be said to shock the conscience" and justify a reversal of the judgment. Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745, 748.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

BARD v. KENT.

Civ. No. 13186.

District Court of Appeal, Second District, Division 2, California.

Aug. 15, 1941.

Hearing Granted Oct. 10, 1941.

1. Trusts 🔑372(1)

Under the statutes, there was presumption that a business manager, who had obtained an option to extend a lease from his employer, had done so without sufficient consideration and by undue influence. Civ.Code, §§ 2219, 2235.

2. Trusts 🔑372(1)

Where a business manager obtained option to renew a lease from his employer for purpose of subleasing at a higher rental, the business manager obtained an "advantage" within the statutes establishing the presumption that transactions entered into between trustees and beneficiaries by which the trustee obtains an advantage are presumed to be without consideration. Civ. Code, § 2235.

See Words and Phrases, Permanent Edition, for all other definitions of "Advantage".

3. Appeal and error 🔑1010(1)

Where, under the statutes, there was a presumption of insufficiency of consideration for an option for extension of a lease, unless the presumption had been dispelled as a matter of law, the appellate court was required to hold that evidence afforded by such presumption was sufficient to support the judgment against the option even though there was evidence to contrary. Civ.Code, §§ 2219, 2235.

4. Evidence 🔑89

Generally, a presumption is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying upon the presumption, or of such party's own witness, when such testimony is not product of mistake or inadvertence.

5. Evidence 🔑89, 597

A presumption is not dispelled by evidence produced by opposite party but remains as evidence in the case sufficient to support a judgment, except in rare cases in which the rebutting evidence is absolutely conclusive.

6. Evidence 🔑89

Where sole evidence to rebut a presumption as to insufficiency of consideration for an option to renew a lease was the testimony of the party opposing the presumption, and his witnesses, it was insufficient to dispel the presumption as a matter of law since it was not absolutely conclusive.

7. Estoppel 🔑93(1)

Where landlord did not promise to grant option to extend a lease to her business manager for subleasing, upon a condition that the business manager would employ an architect to make certain estimates, the landlord's administrator was not "estopped" to deny validity of the option, after the landlord's death although the business manager did hire an architect to make certain estimates at the owner's suggestion.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

8. Landlord and tenant 🔑80(1)

Where landowner leased land to her business manager, who subleased the land to others at a higher rental with her knowledge, the business manager acted for himself and as general agent for the owner, but each in effect was leasing property to the third parties.

9. Landlord and tenant 🔑86(1)

Where a business manager incurred expense for architect's services at suggestion of employer and landowner, with the idea of leasing employer's land and subleasing it to others at an increased rental, the option to the business manager to extend the lease was not irrevocable under the doctrine of "promissory estoppel" because the supposed detriment suffered by the business manager in hiring the architect would not have been incurred in reasonable reliance upon any promise made by the landlord.

See Words and Phrases, Permanent Edition, for all other definitions of "Promissory Estoppel".

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Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Ben Bard, special administrator of the estate of Ruth Roland Bard, against L. E. Kent, to cancel and set aside a purported option to extend a lease. From a judgment in plaintiff's favor, defendant appeals.

Affirmed.

Bautzer & Ryan, Gregson Bautzer, and G. Bentley Ryan, all of Hollywood (Bertin Weyl, Jr., of Los Angeles, of counsel), for appellant.

Paul Vallee and Jerome H. Kann, both of Los Angeles, for respondent.

WOOD, Justice.

This action was commenced by the special administrator of the estate of Ruth Roland Bard to cancel and set aside a purported option to extend a lease on the ground that the option was fraudulently obtained and was without consideration. Defendant has appealed from a judgment in plaintiff's favor.

For many years prior to the death of Mrs. Ruth Roland Bard, who will be herein referred to as Roland, her business name, defendant had managed her business affairs, acting in a fiduciary capacity as her confidential agent under a general power of attorney. On February 20, 1933, defendants as agent for Roland leased a parcel of real property owned by her to a Mr. Odums and a Mr. Berkson for a period of five years. Odums and Berkson constructed a building on the property and entered into conditional sales contracts for the purchase of fixtures and equipment to be used in conducting a restaurant business on the premises. The restaurant, which operated under the fictitious name of The Cat and the Fiddle, was a failure and Odums and Berkson were forced to abandon the venture. Later in 1933 defendant and a Mr. Hastings and a Mr. Carpenter, as the sole stockholders, organized a corporation known as The Cat and the Fiddle Company, which assumed the obligations of Odums and Berkson relative to the improvements, fixtures and equipment. The corporation as a tenant of Roland unsuccessfully endeavored to conduct a restaurant business on the premises in question. When this second venture proved unprofitable, defendant bought all of the stock of Hastings and Carpenter in The Cat and the Fiddle Company and continued to pay off the obligations which the company had assumed. Various sub-lessees who thereafter tried to operate a restaurant on the premises were also unsuccessful.

Roland executed on August 21, 1935, a lease of the premises in question to The Cat and the Fiddle Company for a term of five years. By the terms of the lease the lessee agreed to pay the lessor five per cent of the weekly gross receipts with a minimum guarantee of $70 per week. On August 29, 1935, The Cat and the Fiddle Company obtained an extension of the lease for an additional year ending August 31, 1941, and also written authority from Roland to sub-lease the premises to a Mr. McDonnell. On August 30, 1935, The Cat and the Fiddle Company sub-leased the premises to McDonnell for a term of five years ending August 31, 1940, with an option to renew the lease for a period of one year. The lease from The Cat and the Fiddle Company to McDonnell included the right to use the equipment and fixtures on the premises and provided for a rental of ten per cent of the gross receipts up to $6,000 and eight per cent of receipts over that amount, with a minimum rental of $450 per month. The restaurant which McDonnell operated on the premises proved to be very successful and McDonnell erected additional improvements on the real estate at an approximate cost of $30,000. Defendant, having dissolved the corporation and distributed its assets to himself, was then doing business under the fictitious name of The Cat and the Fiddle Company. He contributed more than $6,250 toward the cost of such improvements. All of the foregoing facts had been fully disclosed to Roland by defendant.

During the latter part of 1936 defendant, McDonnell and Roland on several occasions discussed the possibility of adding certain improvements which McDonnell desired to make at a cost of approximately $10,000. McDonnell at that time stated that he did not wish to make the improvements unless he was assured that his lease would be extended for an additional period of four years. Roland indicated in subsequent conversations with defendant that she would be willing to grant the desired option provided the cost of the contemplated improvements would be approximately $10,000. After further negotiations Roland agreed to give The Cat and the Fiddle Company an option to extend its lease for an additional four-year period in order that it in turn could give McDonnell an extension of his lease. The option under dispute was executed on August 17, 1937, and was signed for Roland by defendant as her attorney in fact. The option recited that "For and in consideration of Ten Dollars ($10.00) and other valuable consideration" The Cat and the Fiddle Company was granted an option to extend its lease for an additional period of four years. On September 22, 1937, and before the option was exercised, Roland died. It was stipulated that the sum of $10 was not in fact paid to Roland and that none of the contemplated improvements were ever made. Based upon these facts the trial court found that defendant had made a full and complete disclosure of all of the foregoing transactions to Roland and that defendant was not guilty of any fraud or wrongdoing in his dealings with her, but it also found that there was no consideration for the option. The court concluded that the option was revoked and terminated by the death of Miss Roland.

It is contended on this appeal that there is no evidentiary support for the court's finding that there was no consideration for the option. Although it is admitted by defendant that the $10 mentioned in the option was not actually paid, it is urged that there is substantial evidence of other valuable consideration sufficient to support the option. During the negotiations between Roland, McDonnell and defendant, which led to the signing of the option, Roland was informed that if the contemplated improvements were made the amount of rental which she would receive would be substantially increased. She told defendant that she did not desire to spend any money on the improvements and, according to defendant's testimony, "suggested that Mr. Kenneth McDonald be hired as the architect and that we check the figures—or, rather, I check the figures on the cost of the improvement, and if McDonnell's figures were approximately $10,000, then in that event an extension would be granted on his present lease." After the option was signed defendant consulted with Kenneth McDonald and the latter at defendant's request prepared sketches of the proposed improvements. McDonald died shortly after Roland's death and the representative of his estate submitted a bill of from $50 to $75 to defendant for McDonald's services in preparing the sketches. This bill was paid by defendant. It is argued that as a matter of law either the detriment suffered by defendant by reason of the payment of the architect's bill or the contemplated benefit by way of increased rentals which would have inured to Roland was sufficient consideration for the option.

[1, 2] Plaintiff, on the other hand, contends that the evidence as to the consideration for the option is not conclusive and that the most that can be argued is that it created a conflict with the presumption arising under the provisions of section 2235 of the Civil Code. That section provides: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." It cannot be successfully contended that the presumption of no sufficient consideration provided by section 2235 does not apply, for by section 2219 of the Civil Code it is provided that "everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee." That defendant obtained an advantage from Roland is apparent, for the option, if valid, assured him an additional four years' rental which, he operating as The Cat and the Fiddle Company, would otherwise be compelled to forego upon the termination of the existing lease.

[3-5] Unless the presumption as to the insufficiency of the consideration can be said to be dispelled as a matter of law, we must hold that the evidence afforded by such presumption is sufficient to support the judgment even though there be evidence to the contrary. Pitt v. Southern Pacific Co., 121 Cal.App. 228, 233, 9 P.2d 273. Defendant's contention that the presumption as to the insufficiency of the consideration was dispelled as a matter of law must be determined in the light of the following principles as enunciated in Engstrom v. Auburn Auto Sales Corp., 11 Cal. 2d 64, at page 70, 77 P.2d 1059, at page 1063: "Generally speaking, however, it may be said that a *presumption* is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness, when such testimony was not the product of mistake or inadvertence. Smellie v. Southern Pac. Co. [212 Cal. 540, 553, 299 P. 529]; Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 8, 210 P. 269; Pitt v. Southern Pac. Co., 121 Cal.App. 228, 232-235, 9 P.2d 273; Peters v. California Bldg.-Loan Ass'n, 116 Cal.App. 143, 154, 2 P.2d 439; Fortier v. Hogan, 115 Cal.App. 50, 56, 57, 1 P.2d 23.

However, a presumption is not dispelled by evidence produced by the opposite party but remains as evidence in the case sufficient to support a judgment, except in rare cases in which the rebutting evidence is absolutely conclusive. Smellie v. Southern Pac. Co., supra."

[6] The sole evidence tending to rebut the presumption as to the insufficiency of the consideration is found in the testimony of defendant and his witnesses. Since defendant is the party against whom the presumption operated, the rebutting evidence must be absolutely conclusive before it can be held that the presumption is dispelled as a matter of law. Far from being conclusive, the character of the evidence relating to the alleged consideration is weak and unsubstantial. The most that can be said for such evidence is that it shows that Roland *suggested* that an architect be employed to check McDonnell's figures on the proposed improvements. Such testimony cannot be construed as a representation or promise on the part of Roland that she would grant the option if defendant employed an architect. Considered in its most favorable light, the testimony merely created a conflict in the evidence which was for the trial court to determine. The issue having been determined against defendant on conflicting evidence, an appellate court will not interfere.

[7-9] Defendant asserts that under the doctrine of promissory estoppel the judgment must be reversed. He relies on the proposition that where one has led another to incur substantial detriment in reasonable reliance on his representation of fact, he cannot thereafter deny the truth of the representation in litigation between the two. That such doctrine is inapplicable is evident from the fact that Roland did not promise that she would grant the option upon the condition that defendant employ an architect. Roland was the owner of the land and defendant was the owner of an interest in the building erected thereon and of its equipment. By adopting the method of a lease from Roland to defendant and a sublease from defendant to McDonnell, with the provision that the percentage of the gross receipts payable as rent in the sublease be approximately double the percentage fixed in the original lease, Roland and defendant put themselves in position for each to receive approximately one-half of the rent paid by the tenant in possession. In handling the combined property defendant acted for himself and as general agent for Roland but each in effect was leasing property to McDonnell. When Roland executed the option in question and defendant accepted it they together took a step in the direction of an extension of the tenant's lease, a step which was rendered ineffective by the death of Roland. When defendant at Roland's suggestion engaged in the services of the architect who checked the proposed improvements he was acting in the interest of Roland and of himself. If he had desired contribution from Roland for part of the $50 or $75 paid to the architect he could have filed a claim with the administrator of Roland's estate. It follows that the supposed detriment suffered by defendant in hiring the architect could not have been incurred in reasonable reliance upon any representation or promise made by Roland.

The judgment is affirmed.

We concur: MOORE, P.J.; McCOMB, J.

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46 Cal.App.2d 871

PEOPLE v. TAYLOR.

Cr. 466.

District Court of Appeal, Fourth District, California.

Aug. 14, 1941.

Criminal law 🔑1182

Where clerk's and reporter's transcripts on defendant's appeal were filed in the reviewing court on July 1, 1941, the matter was regularly placed on the calendar for August 12, 1941, and no appearance was made in the reviewing court for defendant, the people's motion to affirm the judgment under statute was granted, and the judgment was affirmed. Pen.Code, § 1253.

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Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Proceeding by the People against Franz Cowden Taylor. From the judgment, defendant appeals, and the People move to affirm the judgment under section 1253 of the Penal Code.

Motion granted and judgment affirmed.

No appearance for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Judge.

The clerk's and reporter's transcripts on this appeal were filed in this court on July 1, 1941. No appearance has been made in this court for the appellant. The matter was regularly placed on the calendar for August 12, 1941, and no one then appearing for the appellant the respondent moved to affirm the judgment under section 1253 of the Penal Code.

The motion is granted and the judgment is affirmed.

We concur: GRIFFIN, J.; MUNDO, J. pro tem.

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46 Cal.App.2d 535

PEOPLE v. MURRAY.

Cr. 2186.

District Court of Appeal, First District, Division 1, California.

Aug. 19, 1941.

1. Criminal law 🔑1192

Where two informations were filed against defendant, each charging a separate offense of receiving stolen goods, informations were consolidated for trial and separate verdicts were returned finding defendant guilty on each charge, on appeal conviction "in each case" was affirmed, and cause was remanded with directions to pronounce sentence "for the two convictions", the trial court properly imposed a separate sentence for each conviction and ordered that the sentences run consecutively. Pen.Code, § 669.

2. Criminal law 🔑1192

Even if defendant who was convicted on two separate charges of receiving stolen goods and was sentenced separately for each conviction had made application to introduce evidence to establish that only one crime was committed, the application could not have been granted where two informations, each charging a separate offense, were filed and consolidated for trial, separate verdicts were returned finding defendant guilty on each charge, on appeal conviction "in each case" was affirmed, and cause was remanded with directions to pronounce sentence "for the two convictions".

3. Criminal law 🔑589(1)

Where defendant's counsel just before hour set for pronouncing sentence entered judge's chambers and began discussing with judge matters relating particularly to question whether two sentences imposed should run concurrently or consecutively, and counsel was told to leave on account of his conduct, but there was nothing in record justifying inference that because of that incident judge entertained the slightest degree of bias or prejudice against defendant, refusal to comply with counsel's demand for a continuance to prepare and file an affidavit to disqualify judge for bias was not error.

4. Criminal law 🔑1192

An order directing that two sentences imposed on defendant for each of two convictions on separate charges of receiving stolen goods should run consecutively did not constitute an abuse of discretion, where evidence disclosed that defendant had a criminal record of five prior convictions of felony. Pen.Code, § 669.

5. Criminal law 🔑1126

Contention that trial court first directed that two separate sentences should run concurrently and then changed its order to make them run consecutively could not be urged in support of appeal where it affirmatively appeared from clerk's and reporter's transcripts that order directing sentences to run consecutively was the only order made. Pen.Code, § 669.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Frank Murray was convicted of receiving stolen goods on two separate charges, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

Appellant was found guilty by a jury on two separate charges of receiving stolen goods; and at the time of sentence he was adjudged an habitual criminal and sentenced as such to imprisonment in the state prison. Upon appeal the two convictions were affirmed, but the adjudication that appellant was an habitual criminal was annulled, and the cause was remanded to the trial court with directions to re-sentence appellant on said two convictions. People v. Murray, 42 Cal.App.2d 209, 108 P.2d 748. Thereafter and pursuant to the directions so given appellant was brought before the trial court, the same judge presiding, and a separate sentence of imprisonment was imposed for each conviction, and it was ordered that the sentences run consecutively; thereupon counsel for appellant gave oral notice of appeal.

[1, 2] In support of the appeal it is contended that the two convictions involved a single crime for which but one sentence could be imposed; and that therefore the trial court erred in imposing two sentences and ordering that they run consecutively. There is no merit in the point. As shown by the record, two informations were filed against appellant, each charging a separate offense; the informations were consolidated for trial, and separate verdicts were returned whereby appellant was found guilty on each charge; on appeal the conviction "in each case" was affirmed, and the cause was remanded with directions to pronounce sentence "for the two convictions". Thus it will be seen that in pronouncing two sentences the trial court acted not only in conformity with judgments of conviction but in accordance with the directions given in the judgment of affirmance; and as provided in section 669 of the Penal Code, where two or more sentences are imposed it becomes the duty of the trial court to direct whether they shall run concurrently or consecutively. Appellant contends nevertheless that he was entitled to introduce evidence to establish that only one crime was committed, that he sought to do so, and that his application was denied. But nowhere in the record does it appear that any such application was made; and even if it had been made there would have been no error in denying the same for the reason that the state of the record called for the imposition of a separate sentence on each conviction.

[3, 4] At the opening of the proceedings for the re-sentencing of appellant his counsel demanded a continuance, stating he desired to prepare and file an affidavit to disqualify the trial judge for bias. There was no error in refusing to comply with such a demand. In this regard, it appears that just before the hour set for pronouncing sentence counsel for appellant entered the judge's chambers and began discussing with the judge matters relating to the case, and particularly with reference to whether the two sentences should run concurrently or consecutively; and on account of counsel's conduct, he was told to leave. However, there is an entire absence of anything in the record which would justify an inference that because of the incident mentioned the judge entertained the slightest degree of bias or prejudice against the appellant. Therefore since it does not appear that any grounds of disqualification existed, the demand for continuance was properly denied. People v. Emmett, 123 Cal.App. 678, 12 P.2d 92. Nor can it even be said that the order directing that the sentences run consecutively amounted to an abuse of discretion in view of the fact that the evidence disclosed that appellant had a criminal record of five prior convictions of felony.

[5] Likewise without merit is appellant's final contention that the trial court first directed that the sentences run concurrently and then changed its order to make them run consecutively. To the contrary it affirmatively appears from both the clerk's and the reporter's transcripts that but one order was made, to wit: that the sentences run consecutively.

The judgments of sentence and the order directing that they run consecutively are and each of them is affirmed.

PETERS, P. J., and WARD, J., concur.

46 Cal.App.2d 498

THREE G DISTILLERY CORPORATION, v. LOS ANGELES COUNTY et al.

Civ. 2779.

District Court of Appeal, Fourth District, California.

Aug. 14, 1941.

Hearing Denied Oct. 10, 1941.

1. Intoxicating liquors 🔑6

Constitutional provision, giving state exclusive right and power to control, license, and regulate manufacture, sale, purchase, possession, transportation and disposition of intoxicating liquor within the state, vested in state exclusive rights to license for purpose of revenue those engaged in manufacturing, dealing in, or handling intoxicating liquors. Const. art. 20, § 22.

2. Municipal corporations 🔑966(9)

The constitutional provision, vesting in the state the exclusive rights to license for revenue those engaged in manufacturing, dealing, or handling intoxicating liquors, did not by its terms nor by implication prohibit a levy of personal property taxes on such property, by the municipality and other like subdivisions of the state, nor exempt owners of such property from personal property taxation. Const. art. 20, § 22; art. 13, §§ 1, 14.

3. Taxation 🔑79, 80

Under the statutes, the duty of paying taxes rests primarily upon the person who holds legal title, and ownership is the usual and common basis for taxation. Pol.Code, §§ 3628, 3629, 3630, 3632.

4. Counties 🔑190(1)
Municipal corporations 🔑966(9)

Where constitutional provision reserved to the state the exclusive right to license and regulate "the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the state" and failed to include as well the power to license and regulate the ownership thereof, the power to tax the ownership thereof was not exclusively retained by the state but could be exercised by city and county where distillery was located. Const. art. 20, § 22.

5. Intoxicating liquors 🔑6
Taxation 🔑67

The power to "tax" intoxicating liquors as personal property of the owners is separate and distinct from the power to "regulate" the manufacture, dealing in and handling of the intoxicating liquors.

See Words and Phrases, Permanent Edition, for all other definitions of "Regulate" and "Tax".

6. Commerce 🔑63, 72

The exclusive power of Congress to regulate commerce does not prevent imposition of a tax by a state upon interstate commerce.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the Three G Distillery Corporation against the County of Los Angeles and others for refund of taxes. From order sustaining defendant's demurrers, and judgment of dismissal, plaintiff appeals.

Affirmed.

Gang & Kopp, Martin Gang, and Robert E. Kopp, all of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, and Ralph W. Swagler, City Atty., of Burbank, for respondents.

GRIFFIN, Judge.

The plaintiff and appellant instituted an action for refund of taxes against the respondent County of Los Angeles and the City of Burbank to recover the sum of $14,550.88, plus interest, being the total amount of taxes paid by the appellant during the years 1936-1937, 1937-1938, and 1938-1939, on account of the Burbank City Tax and the Burbank School District and Metropolitan Water District taxes. No recovery was sought because of the taxes levied by the County of Los Angeles for its own use and benefit. The City and the County each filed demurrers to the complaint, which demurrers were sustained without leave to amend. This appeal is taken from the order of the lower court sustaining defendants' demurrers and from the judgment of dismissal which was subsequently entered.

The complaint alleged that the appellant owned a distillery and warehouse and stored a large amount of intoxicating liquors in the City of Burbank; that the City of Burbank, the Burbank School District and the Metropolitan Water District, through the County of Los Angeles, which was acting as tax collecting agent, had assessed and collected personal property taxes upon this intoxicating liquor for the tax years above mentioned. The complaint also contained appropriate allegations with reference to the filing of a due and timely claim for the refund of the taxes pursuant to section 3804 of the Political Code. The basis for the refund set forth in the claim and complaint was as follows:

"It is the contention of claimant that under the constitution of the State of California, and particularly section 22 of Article XX thereof no personal property tax can be imposed by any municipality or municipal tax district or by any other instrumentality other than the State of California upon alcoholic beverages or intoxicating liquors and, therefore, your claimant contends that so much of the enclosed tax bill as represents taxes on intoxicating liquors other than those imposed by the County of Los Angeles have been illegally and erroneously collected and your claimant is entitled to a refund thereof."

The complaint also specifically set forth the fact that the taxes imposed were imposed purely upon intoxicating liquor owned by the appellant, and that no portion of the refund which the plaintiff sought involved taxes upon bottles or casks. It is therefore argued that the constitution of the State of California has reserved the sole power to impose any taxes of any nature upon intoxicating beverages to the state under section 22 of Article XX, which provides as follows:

"The State of California, subject to the Internal Revenue Laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the States shall have the exclusive right and power to regulate the importation into and exportation from the State, of intoxicating liquor."

The same section also states: "The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper."

It is the contention of appellant that the purpose of this section of the constitution is to set up a comprehensive scheme of taxation of intoxicating liquors whereby the state will be the sole taxing agency and the municipalities will share in the receipts of this taxation by receiving from the state a portion of the revenue collected by the state; that the question here involved is whether or not the phrase above quoted, "to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor * *" includes the power to tax, for, if such is the case, it is contended, the exclusive right and power to tax intoxicating liquors would then under the constitutional provision above set forth, reside in the state, citing Los Angeles Brewing Co. v. City of Los Angeles, 8 Cal.App.2d 391, 48 P.2d 71; Vitale v. City of Los Angeles, 13 Cal.App.2d 704, 57 P.2d 993; Whitmore v. Brown, 207 Cal. 473, 279 P. 447; Willmon v. Powell, 91 Cal.App. 1, 5, 266 P. 1029; Philadelphia & Reading R. R. Co. v. Pennsylvania, 15 Wall. 232, 82 U.S. 232, 21 L.Ed. 146; Philadelphia & S. M. S. S. Co. v. Pennsylvania, 122 U.S. 326, 7 S.Ct. 1118, 30 L.Ed. 1200; and Low v. Austin, 13 Wall. 29, 20 L.Ed. 517.

In reply respondent argues that appellant's stock of intoxicating liquors within the county were taxable under the rule that all property within the taxing jurisdiction is taxable except as excused by valid exemption provisions within the mandate of article XIII, section 1 of the California State Constitution, which provides in part:

"All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed * * *"; that it is "otherwise in this Constitution provided" (Art. XIII, § 14) that "the Legislature shall have the power * * * and may exempt entirely from taxation any or all forms, types or classes of personal property"; that the legislature has not exercised such power of exemption with regard to intoxicating liquors; and no legislative provision purports to exempt intoxicating liquors from taxation.

[1, 2] This same provision of the Constitution (§ 22, art. XX) was before us for consideration in Los Angeles Brewing Co. v. City of Los Angeles, supra, wherein it was held that a license tax could not be levied by such entities upon the business of manufacturing and distributing liquors. See, also, Los Angeles Brewing Co. v. City of Los Angeles 8 Cal.App.2d 379, 48 P.2d 65; and Vitale v. City of Los Angeles,

supra. The other cases cited by appellant are not particularly helpful. The question here presented is whether our constitutional provision (§ 22, art. XX), because of the language therein used, must be construed as taking away the right of municipalities and other entities of that character of levying personal taxes on subjects which fall within the language of the other constitutional provision above quoted (art. XIII, § 1.) An examination of the terms of the constitutional provision (§ 22, art. XX) impels the conclusion that it does not by its terms or any reasonable implication prohibit such a levy of personal property taxes, nor does it clearly exempt such property from taxation. The case of Los Angeles Brewing Co. v. City of Los Angeles, supra, did not involve the particular question here presented and should not be construed as extending the rule so as to exempt such property as here involved from taxation under article XIII, section 1 of the Constitution.

[3, 4] Appellant relies principally upon the theory that the power to license and regulate given under section 22, article XX of the Constitution, also conferred the power to tax; that the state, having power to tax, therefore had exclusive power to levy any and all taxes on such properties. It cites Smith v. Bohler, 72 Ga. 546, which involved "An Act to regulate public instruction in the county of Richmond." It was there held that under the act the Board of Education had power to levy a tax for public school purposes. We do not believe this case to be similar or controlling. The constitutional provision in question here gives to the state the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the state. This provision cannot be construed as exempting the owner of such properties from a personal property tax. Ownership is the usual and common basis for taxation. Primarily the duty of paying taxes rests upon the person who holds the legal title. Estate of Backesto, 63 Cal. App. 265, 269, 218 P. 597. The assessor is required under section 3628 of the Political Code, during the assessment season, to "ascertain the names of all taxable inhabitants, and all property in his county subject to taxation" and to "assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was * * *" on the tax date. He is required to exact from such person a statement under oath setting forth expressly "all the real and personal property not exempt from taxation owned by such person, or in his possession, or under his control, * *" Pol.Code, §§ 3629, 3630, 3632. It thus appears on the slightest survey of the statutory provisions and the decisions that ownership is the common basis of tax liability. The very fact that article XX, section 22, reserves to the state the exclusive right and power to license and regulate "the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State" and the significant failure to include as well the power to license and regulate the ownership thereof, i. e., omission of a reservation of power to the state with regard to the common and usual basis of assessment and taxation, is most significant against appellant's contention herein that the reservation also includes a reservation of the power to tax.

[5, 6] In Wiggins Ferry Co. v. City of East St. Louis, 107 U.S. 365, 2 S.Ct. 257, 264, 27 L.Ed. 419, 423, the court pointed out a distinction between the power to tax and the power to regulate when it said: "In Gibbons v. Ogden [9 Wheat. 1, 6 L.Ed. 23], it was settled that the clause of the constitution conferring on congress the power to tax, and the clause regulating and restraining taxation, are separate and distinct from the clause granting the power to congress to regulate commerce." (See, also, Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001, which upheld the constitutionality of the California Caravan Act, Stats. 1937, chap. 788, p. 2253, wherein it was unsuccessfully claimed that the exclusive power of congress to regulate commerce prevented the imposition by a state of a tax upon interstate commerce.)

No valid interpretation of article XX, section 22 of the Constitution warrants a conclusion of an intention thereby to divest the respondents of and reserve to the state the power of taxation of intoxicating liquors as herein described. Neither does the language of the provision nor the reasoning thereof lead to such results. The authority of the decided cases does not support such a contention.

Judgment affirmed.

We concur: BARNARD, P. J.; MUNDO, Justice pro tem.

46 Cal.App.2d 870

PEOPLE v. MANSER.

Cr. 464.

District Court of Appeal, Fourth District, California.

Aug. 14, 1941.

Criminal law 🔑1182

A judgment of conviction, from which defendant appealed, would be affirmed, where the clerk's and the reporter's transcripts were filed in office of clerk of District Court of Appeal on June 17, 1941, and case was placed on calendar for argument on August 12, 1941, and no briefs had been filed and no appearance had been made for the defendant. Pen.Code, § 1253.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Johnnie Manser was convicted for assault with a deadly weapon, and he appeals.

Affirmed.

No appearance for appellant.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

MUNDO, Justice pro tem.

The defendant was charged in an amended information with the offense of assault with a deadly weapon. He admitted three prior convictions of a felony. A jury found him guilty of the offense charged and he appeals from the judgment of conviction. The clerk's and the reporter's transcripts in the action were filed in the office of the clerk of this court on June 17, 1941, and the case was placed on the calendar for argument on August 12, 1941. No briefs have been filed and no appearance has been made for the defendant. The people moved to affirm the judgment under the provisions of section 1253 of the Penal Code. It is apparent that the motion must be granted. People v. Phillips, 38 Cal.App.2d 412, 101 P.2d 547.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

OLIVERA v. GRACE.

Civ. 2777.

District Court of Appeal, Fourth District. California.

Aug. 14, 1941.

Hearing Granted Oct. 10, 1941.

1. **Pleading** 🔑34(1)

Upon general demurrer, complaint will be liberally construed with view to substantial justice, but this rule will not be applied so as to allow an unmeritorious cause of action to be veiled by a subterfuge of loose and equivocal statements.

2. **Pleading** 🔑48

Substantial justice requires that the essential facts appear at least by necessary implication from the allegations set forth in the complaint.

3. **Evidence** 🔑63

The presumption is that a person is sane.

4. **Evidence** 🔑63, 67(3)

Insanity exists only from time when it is proven to exist and proof of insanity carries back no presumption of past existence.

5. **Insane persons** 🔑100

Where decedent had not been declared incompetent until about two years after default judgment was taken against her, plaintiff in that action was not chargeable with knowledge of decedent's incompetency, as proof of insanity carries back no presumption of past existence.

6. **Insane persons** 🔑1

A person might be "incompetent" in the general acceptation of the term yet not to the extent that she would be unable to carry on her business, or be deprived entirely of the powers of knowing and understanding the nature of a summons and a complaint.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompetent".

7. **Insane persons** 🔑100

Where decedent was not declared incompetent until about two years after default judgment was taken against decedent, the presumption was that the service was made in good faith and in accordance with law, and that plaintiff believed that decedent understood nature of papers served.

8. Insane persons 🔑95

Although notice of starting action was required to be served by delivering a copy of the summons to both the incompetent party and her guardian, where the party had not been judicially declared insane, service on the party herself was valid and the court had jurisdiction to render judgment against her. Code Civ.Proc. § 411, subds. 4, 7.

9. Judgment 🔑461(1)

In an action by an administratrix to have a judgment against decedent set aside, every intendment must be indulged in favor of the judgment against decedent.

10. Judgment 🔑443(1)

Where fraud charged by an administratrix in a suit to set aside a default judgment against decedent related to matters upon which judgment was regularly obtained, and an opportunity had been given decedent to present any available defense, the courts would not set aside a judgment against decedent on ground of fraud.

11. Judgment 🔑443(3)

Where the unsuccessful party to an action has been prevented from exhibiting his case by fraud or deception practiced on him by his opponent, and there has never been a real contest in the trial of the case, the former judgment may be set aside and the case opened for a new and fair hearing.

12. Judgment 🔑443(3)

Equity grants relief in a suit to set aside a judgment on the ground that by reason of fraud practiced on the plaintiff against whom the judgment was obtained, there was no adversary trial of the issues in the action; that he was prevented through such fraudulent act of his adversary, without fault of his own, from presenting a meritorious defense to action against him.

13. Judgment 🔑460(4)

Where complaint by an administratrix in an action to set aside judgment against the decedent contained no allegations of any fraudulent acts which had prevented the decedent from presenting a defense, the judgment against the decedent could not be set aside for fraud.

14. Executors and administrators 🔑116

Where the administratrix of a daughter brought action against the mother to reform a joint tenancy deed and administratrix held the opinion that the mother was insane, there was no duty on administratrix to disclose this opinion.

15. Fraud 🔑17

One is not charged with concealment of any fact unless he is under some obligation to disclose it, and the mere omission to mention the fact, in absence of knowledge on his part that it is requisite to make such mention, falls far short of fraud.

16. Judgment 🔑443(1)

Where an administratrix asking for reformation of joint tenancy deed placed on the witness stand only favorable witnesses although she knew of other witnesses who had been consulted by the parties to the deed at the time of its making, the judgment by default for the administratrix asking for reformation could not be set aside by the administratrix of the other party to the deed on the ground of "extrinsic fraud" upon the court reforming the deed, as there was no duty to call any persons as witnesses who might have talked previously with the parties to the deed.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

17. Appeal and error 🔑931(5)

There is a presumption that the trial court heard sufficient evidence to support its judgment.

18. Judgment 🔑403

Equity will not do the vain thing of setting aside a judgment when the result would be the same.

19. Judgment 🔑460(6)

Where the administratrix of the party against whom a judgment of reformation had been rendered failed to show in her complaint in an action to set aside the judgment of reformation that her decedent possessed a defense to the original action upon the merits and that she was able to present the evidence constituting that defense, the petition was insufficient, as facts constituting the defense were required to be incorporated into the complaint so that court might determine if decedent would have been entitled to judgment had facts been admitted.

20. Appeal and error 🔑236(2)

Where plaintiff made no request to amend her complaint after the court sustained demurrer to it, she "waived" her right to assert that the court had abused its discretion in sustaining demurrer without leave to amend.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Marguerite Olivera, administratrix of the estate of Emilie Rust, against Rosaline Grace, administratrix of the estate of Hattie Haas to have a judgment against Emilie Rust and in favor of Rosaline Grace, administratrix, set aside. From a judgment sustaining defendant's demurrer to plaintiff's amended complaint without leave to amend, plaintiff appeals.

Affirmed.

Harold M. Davidson, of Alhambra, for appellant.

Daniel A. Knapp, of Los Angeles, for respondents.

MUNDO, Justice pro tem.

The question presented on this appeal is whether the court erred in sustaining defendants' demurrer to plaintiff's third amended complaint without leave to amend. The third amended complaint alleged substantially that Emilie Rust, a widow, owned certain real property; that she conveyed the property to John and Marie V. Zell, who thereafter reconveyed the property to Emilie Rust and her daughter Hattie Haas, as joint tenants; that in connection with the said conveyance Emilie Rust sought the advice of Judge Bidwell and William Getz as to the legal consequence and incidents of the disposition of her property; that subsequent to the execution of the joint tenancy Emilie Rust sustained an injury to her head resulting in the complete loss of her mentality so that thereafter she was, up to her death, wholly devoid of understanding and incapable of transacting business of any nature; that she was judicially declared incompetent on April 8, 1938, and that plaintiff Marguerite Olivera was appointed her guardian; that Emilie Rust died on December 13, 1938, and that plaintiff Marguerite Olivera was appointed administratrix of her estate; that on April 23, 1936, Hattie Haas died and defendant Rosaline Grace was appointed administratrix of her estate; that on July 10, 1936, defendant Rosaline Grace commenced an action to reform the joint tenancy deed, asking that it be reformed to a conveyance in fee to Hattie Haas, with reservation of an estate for life in Emilie Rust; that defendant Rosaline Grace served Emilie Rust with process in said action; that Emilie Rust failed to answer and a default was entered; that judgment was secured reforming said joint tenancy deed to convey a fee to Hattie Haas with a life estate reserved in Emilie Rust; that defendant Rosaline Grace knew that Emilie Rust was incompetent but notwithstanding such knowledge failed to have a guardian appointed for her; that defendant Rosaline Grace knew that Emilie Rust had talked with Judge Bidwell and that she had told him she wanted to create a joint tenancy with her daughter Hattie Haas; that defendant Rosaline Grace also knew that Emilie Rust had talked with William Getz respecting the joint tenancy; that notwithstanding this knowledge, defendant failed to call these men as witnesses in the action to reform the deed; that defendant failed to inform the court of the facts concerning Emilie Rust's mental condition; that except for said fraud the decree reforming the deed would not have been rendered; and that plaintiff did not know of said action until January 4, 1939, when she found the complaint among the papers of Emilie Rust.

[1-10] The rule is that upon a general demurrer a complaint will be liberally construed with a view to substantial justice, but the court will not apply this rule so as to allow an unmeritorious cause of action to be veiled by a subterfuge of loose and equivocal statements. Substantial justice requires that the essential facts appear at least by necessary implication from the allegations set forth. Risco v. Reuss, 45 Cal.App.2d 243, 113 P.2d 914. In the third amended complaint it is alleged that Rosaline Grace knew that Emilie Rust was incompetent, but the fact also appears from the third amended complaint that Emilie Rust was not declared to be incompetent until about two years after the default judgment had been taken. It follows that Rosaline Grace could not have known of Emilie Rust's incompetency as an adjudicated fact. The presumption is that a person is sane. Proof of insanity carries back no presumption of its past existence. It exists only from the time when it is proven to exist. Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann.Cas. 795. A person may be incompetent in the general acceptation of the term and yet be able to carry on his business. Here, Emilie Rust may have been incompetent, yet her incompetency may not have been of such a character as to deprive her entirely of the powers of knowing and understanding the nature of the summons and complaint

which were served on her in the action to reform the deed. San Francisco Credit Clearing House v. MacDonald, 18 Cal.App. 212, 122 P. 964. She did not throw them away but placed them with her other papers. To know that a person is insane one must have proof thereof and not be merely guessing or conjecturing. Because one may think a man is insane that does not make him so. The law does not permit labels of insanity to be so easily tacked upon a person whose actions and conduct are such as to lead his friends to believe he is insane. His friends might be wrong. Until the court has declared a person to be incompetent he is presumed to be sane. One may have an opinion of another's insanity but that would not be the same as having knowledge of the fact of another's insanity. The statement that Rosaline Grace knew of Emilie Rust's incompetency is equivalent to saying that she had knowledge that the incompetency mentioned had been proved to exist. From a legal standpoint this could not be true because the incompetency had not been determined to exist until April 8, 1938. Avery v. Avery, 42 Cal.App. 100, 183 P. 453. We may presume that the service was made in good faith; that it was made in accordance with the law; that Rosaline Grace was innocent of any wrong; and that she believed her grandmother Emilie Rust understood the nature of the papers served. Nothing in the third amended complaint would lead us to discard these presumptions or to presume otherwise. Had Emilie Rust at the time the papers were served been judicially declared to be of unsound mind or incapable of conducting her own affairs and a guardian had been appointed for her, the service to be valid would have had to be made by delivering a copy of the summons to her and also to her guardian. But we know the fact to be that she had not been declared incompetent and she had no guardian. The service in these circumstances, to be valid, had to be made on Emilie Rust personally. This was done and she was therefore properly before the court and the court had jurisdiction to render a judgment against her. Code Civ. Proc., § 411, subds. 4 and 7; Sacramento Savings Bank v. Spencer, 53 Cal. 737; Winslow v. McCarthy, 39 Cal.App. 337, 178 P. 720. Every intendment must be indulged in favor of the degree rendered in the action referred to (Freeman v. Gray-Cowan, Inc., 219 Cal. 85, 25 P.2d 415) and the decree may not be set aside on the ground of fraud unless it is shown that the fraud was practiced directly upon Emilie Rust and that she was by reason thereof prevented from presenting her case to the court. The courts will not relieve a party from the effect of a judgment when the fraud charged relates to matters upon which the judgment was regularly obtained and where an opportunity was given to the party against whom it was entered to contest the matters in issue or present any defense which was available. Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L.R.A.,N.S., 579.

[11] In United States v. Throckmorton, 98 U.S. 61, 65, 25 L.Ed. 93, the court said: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

[12] In Flood v. Templeton, supra, the court in commenting on the rule laid down in the Throckmorton case, said (152 Cal. page 156, 92 P. page 82, 13 L.R.A.,N.S., 579): "It will be observed that the principal ground upon which equity affords relief, as announced in the Throckmorton Case, is that by reason of the fraud practiced on the plaintiff against whom the judgment was obtained there was no adversary trial of the issues in the action; that he was prevented through such fraudulent act of his adversary, and without any fault on his own part, from presenting a meritorious defense to the action brought against him."

[13-15] There are no allegations in the third amended complaint which charge Rosaline Grace with this kind of fraud, and in view of some of the allegations of the pleading, it is difficult to see how any such charge could consistently be made. Emilie Rust was properly served. She was presumably sane. She saved the summons and

complaint and for all we know she purposely remained away from the court. It is contended that Rosaline Grace practiced extrinsic fraud upon the court by not advising the court that she thought her grandmother was insane. This is a harsh contention and quit untenable. She could not be guilty of fraud in failing to disclose facts of which she had no knowledge. All she had was an opinion, if she had anything on that score, and there was no duty on her part to disclose this opinion to the court. Estate of Shay, 196 Cal. 355, 237 P. 1079.

"One is not to be charged with concealment of any fact unless he is under some obligation to disclose it, and the mere omission to make mention of a fact, in the absence of any knowledge or notice on his part that it is requisite to make such mention, falls far short of fraud." 12 Cal.Jur. § 44, p. 773. See, also, Wickersham v. Comerford, 104 Cal. 494, 38 P. 101.

[16, 17] It is also contended that the conduct of Rosaline Grace "in placing on the stand only witnesses who were favorable to her case and in withholding and keeping from the court all witnesses having knowledge of all the facts and in preventing the defendant from having a fair trial or in fact from being represented at all was the practice of extrinsic fraud upon the court." Emilie Rust may have sought the advice of Judge Bidwell, William Getz and a number of other persons, but unless they had a part in the transaction or knew about it first hand they would not be of much assistance in the case and their testimony most likely would be excluded as being too remote and immaterial. We may assume that there was ample evidence offered by disinterested witnesses to support the complaint; that the Zells, who would be expected to be present at the time of the transfer and would know their own intention and would know the expressions of intention made by the grantees Emilie Rust and Hattie Haas, would present to the court the facts attending the transfer; that nothing was concealed from the court and that all the facts, including the reason for the deed itself, were given to the court even though Hattie Haas could not testify by reason of her death, nor Emilie Rust, if it be true, by reason of incompetency. Rosaline Grace had no duty to call any persons as witnesses who might have talked previously with Emilie Rust respecting the transferring of her property, and her failure to call such witnesses did not constitute a fraud on the court. In re Griffith, 84 Cal. 107, 23 P. 528, 24 P. 381. The trial court must have been satisfied with the evidence offered or it would not have granted the relief. There is a presumption that the trial court heard sufficient evidence to support its judgment. Smith v. Golden Gate Syndicate, 43 Cal. App. 346, 185 P. 209.

[18] What would happen if the judgment were set aside? Would a new trial result in a different judgment? These questions cannot be answered from the third amended complaint. Equity will not do the vain thing of setting aside a judgment when the result would be the same.

[19] "In an action to set aside a judgment for fraud, the plaintiff must not only show by his complaint the facts constituting the fraud which give him his right to the relief, but must also show that he has a defense to the original action upon the merits, and that he is able to present to the court the evidence constituting that defense. It is not sufficient to merely allege these matters as ultimate facts, or to aver them in the form of an affidavit of merits, but the facts themselves—those constituting the fraud, those constituting his defense, and those constituting his ability to present them to the court—must be incorporated into his complaint, so that the court may determine that, if his allegations are admitted by the other party, the plaintiff would have been entitled to a judgment in his favor in the original action." Whitney v. Kelley, 94 Cal. 146, 153, 29 P. 624, 626, 15 L.R.A. 813, 28 Am.St. Rep. 106 (concurring opinion).

[20] Plaintiff made no request to amend her third amended complaint after the ruling upon the demurrer and she thereby waived her right to assert that the court abused its discretion in sustaining the demurrer without leave to amend. See v. Joughin, 18 Cal.App.2d 414, 64 P.2d 149.

Inasmuch as this action was pending when section 472c of the Code of Civil Procedure became effective, the new rule as therein set forth is not applicable.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

46 Cal.App.2d 551

MARVIN et al. v. MARVIN.

Civ. 2784.

District Court of Appeal, Fourth District, California.

Aug. 25, 1941.

Hearing Denied Oct. 23, 1941.

1. Divorce 🔑81

In suit for divorce, no verification of instrument filed entering appearance and refusal to answer was necessary.

2. Divorce 🔑81

Unverified instrument filed in divorce suit entering defendant's appearance and declining to answer complaint was in effect "admission" of matters alleged in complaint.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

3. Judgment 🔑470

As against collateral attack, all presumptions are in favor of the judgment as entered.

4. Divorce 🔑168

Where complaint in a divorce action was filed on July 23, 1903, and hearing was on July 27, 1903, on collateral attack "waiver" of five-day notice under the statute was shown by appearance made in behalf of defendant at hearing on July 27, 1903, by fact that final decree, which was entered on defendant's motion, specifically recited that same attorneys appeared for defendant at both hearings, by decree reciting that cause came regularly to be heard on July 27, 1903, and by defendant remarrying shortly thereafter. Code Civ.Proc. §§ 594, 1014.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

5. Judgment 🔑501

A judgment is conclusive unless wholly invalid on its face, such invalidity appearing from the judgment roll, and on collateral attack any attempt to show mere error of the court must fail.

6. Divorce 🔑172

Where no invalidity in a divorce decree appeared in the judgment roll before the appellate court, the decree was conclusive.

7. Husband and wife 🔑264

Evidence that decedent had purchased land after final decree of divorce was entered was sufficient to support finding that land was "separate property" of decedent.

See Words and Phrases, Permanent Edition, for all other definitions of "Separate Property".

8. Husband and wife 🔑263

Where property is purchased with separate funds of one of the spouses, except where there is a written agreement, the true intention of the parties as to whether the property was to be transmuted into community property may be shown by parol.

9. Husband and wife 🔑266

A husband and wife may by contract transmute the separate property of either or both into community property.

10. Husband and wife 🔑264

Where the separate property of a spouse has been transmuted into community property, the change in status of the property may be shown by the very nature of the transaction or from surrounding circumstances, and it is not essential to show express agreement.

11. Husband and wife 🔑264

Evidence that no money other than community earnings was used to buy property was sufficient to support finding that property was "community property" as it tended to show an executed oral agreement between husband and wife.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

12. Husband and wife 🔑264

Evidence that wife paid part of purchase price of land before her marriage, under oral agreement renewed afterward that land was to be community property, and husband paid remainder of purchase price after marriage from his earnings, and that taxes and assessments were paid from community funds, was sufficient to justify denial of relief to husband's heirs in suit to quiet title, on ground that land was "community property".

13. Husband and wife 🔑273(12)

In suit by decedent's son against decedent's second wife to quiet title to certain real property, whether statements made by decedent and his conduct during 30 years of marriage to defendant indicated an intent to transmute his land to community property was a question of fact.

14. Husband and wife ⚷249

Where decedent and wife agreed before her divorce from former husband to buy land and upon their marriage to make it community property, and this was acted upon and agreed to after the marriage, agreements were not contrary to "public policy" and could not be set aside in an action to quiet title by decedent's heirs.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Alvin H. Marvin and others against Edith L. Marvin to quiet title to real property. From judgment for defendants, plaintiffs appeal.

Affirmed.

Tanner, Odell & Taft and S. W. Odell, all of Los Angeles, for appellants.

John H. Foley, Euler & Subith, Louis Euler and Fred E. Subith, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

In this action plaintiffs sought to quiet their title to two pieces of real property claiming that both parcels were the community property of their parents or, in any event, that they were the separate property of their deceased father. The plaintiffs, who are the sons of John W. Marvin and his first wife, brought the action against his second wife personally and as administratrix of his estate.

On July 28, 1903, John W. Marvin obtained an interlocutory decree of divorce from his first wife in the superior court of Los Angeles county. A final decree of divorce was entered on August 3, 1904. Neither the interlocutory nor the final decree mentioned any property belonging to the parties and it seems probable that they had none since the two properties here in question were purchased by John W. Marvin on contract in September, 1904, and in each case the small down payment was borrowed or obtained from another. The final decree in this divorce case was entered at the request of attorneys for the first wife and she was subsequently married to other men at least twice and possibly three times. The plaintiffs last heard from her in 1918, after which they were unable to find any trace of her, and they rely on the presumption of her death as of 1925.

John W. Marvin married the defendant Edith L. Marvin on April 17, 1905, and they lived together until his death on February 1, 1937. This action was filed on June 18, 1937. The court found in all respects in favor of the defendants and by its judgment decreed that one of the parcels in question, which will be referred to as the Los Angeles property, is the separate property of the defendant Edith L. Marvin, and that the other parcel, which will be referred to as the Santa Monica property, is the community property of John W. Marvin, deceased, and his widow Edith L. Marvin. From this judgment plaintiffs have appealed.

It is first contended that the interlocutory and final decrees above mentioned are void upon their face and invalid, with the result that the respondent was never legally married to John W. Marvin and both pieces of real property are the community property of John W. Marvin and his first wife. It appears from the transcript that a verified complaint for divorce on the ground of desertion was filed by John W. Marvin on July 23, 1903. On the same day an instrument was filed which, omitting the title, reads as follows:

"Comes now the defendant named in the above entitled action and enters her appearance therein and declines to answer the complaint filed by the said plaintiff in said action.

"Hunter & Summerfield,
"Attorneys for Defendant."

On July 28, 1903, an interlocutory decree signed by N. P. Conrey, Judge, was filed which among other things, recites that "This cause came on regularly to be heard this 27 day of July, 1903, upon the complaint herein taken as confessed by the defendant, the defendant having appeared and refused to answer". A final decree signed by the same judge was filed on August 3, 1904, which among other things, recites that this cause came on regularly to be heard on July 27, 1903; that Edwin O. Edgerton then appeared as attorney for plaintiff and Hunter & Summerfield appeared as attorneys for defendant; that the defendant had been served with summons; that the default of the defendant had been duly entered in the manner provided by law; that evidence had been taken and an interlocutory decree entered and filed; that one year had elapsed and no appeal had been taken from the interlocutory decree; that on July 30, 1904, the defendant appeared through her attorneys Hunter & Summerfield and in open court moved for the entry of a final decree of divorce; and that this motion was granted.

[1-7] The appellants argue that both of these decrees are invalid because the instrument filed by the attorneys for the defendant was not verified, because it was not a sufficient notice of appearance under section 1014 of the Code of Civil Procedure, and because the hearing was had four days later and it therefore appears that the defendant could not have had the five days' notice of trial provided for in section 594 of the Code of Civil Procedure. No verification of the instrument filed by the defendant was necessary. It was, in effect, an admission of the matters alleged in the complaint. Whether or not it was sufficient, in itself, to constitute a waiver of notice of further proceedings in the action there is nothing in the record before us which affirmatively shows that notice was not, in fact, waived and all presumptions are in favor of the judgment as entered. The interlocutory decree indicates that an appearance was made in behalf of the defendant at the time of the hearing on July 27, 1903, and the final decree, which was entered at the request of the defendant's attorneys, specifically recites that these same attorneys appeared for the defendant at the hearing on July 27, 1903. Both decrees recite that the cause came on regularly to be heard on July 27, 1903. It not only appears that the final decree was entered at the request of the defendant therein but she acted upon it and married another man shortly thereafter. Regardless of any other consideration a waiver of notice, if any deficiency in that regard existed, sufficiently appears. The judgment was accepted and acted upon by both parties and was in no way attacked for more than thirty years. As was said in Estate of Keet, 15 Cal.2d 328, 100 P.2d 1045, 1048: "On a collateral attack, any attempt to show mere error of the court must necessarily fail. The judgment is conclusive unless wholly invalid on its face, that is, unless its invalidity appears from the judgment roll." While the entire judgment roll in the divorce action is not before us no invalidity appears on the face of that portion which is here presented.

[8] Even if the divorce decree was valid the appellants argue that the Los Angeles property was acquired by their father before a final decree of divorce was entered, and that their mother had a community interest therein which was not affected by his subsequent conveyance of the property to the respondent. They rely on certain testimony that J. W. Marvin was building a small house on this property in June or July, 1904. There is other testimony that the building of this house was not commenced until after the first of September, 1904. There is also evidence that some time during September, 1904, J. W. Marvin purchased this lot on contract for $200, payable $75 in cash and $25 a month for five months, that he borrowed $75 for the first payment from his brother, and that he received a deed to the property on February 15, 1905. There is ample evidence that he purchased the property after the final decree of divorce was entered. He married the respondent on April 17, 1905, and conveyed the property to her by a deed which was recorded on October 27, 1906, there being evidence that he gave this property to her as a birthday present. The court found and decreed that this property is the separate property of the respondent Edith L. Marvin and the evidence supports that finding and conclusion.

The appellants contend that the Santa Monica property was the separate property of their father and that the court's finding that it was the community property of John W. Marvin, deceased, and his widow Edith L. Marvin, is not sustained by the evidence and is contrary to law. It appears that Marvin purchased this property on a written contract dated September 7, 1904, some seven months prior to his marriage to the respondent. The purchase price was $375, payable $10 in cash and $10 a month. The contract which was introduced in evidence had $10 payments endorsed thereon for practically every month until September, 1907, when the property was deeded to Marvin. It is conceded that it was the separate property of Marvin at the time of its acquisition, but the respondent contends that it was, by the agreement of herself and her husband, transmuted into community property.

[9-12] Even where property is purchased with the separate funds of one of the spouses, except where there is a written agreement, the true intention of the parties may be shown by parol. Minnich v. Minnich, 127 Cal.App. 1, 15 P.2d 804.

In Title Insurance, etc., Co. v. Ingersoll, 153 Cal. 1, 94 P. 94, 95, the court said: "There can be no doubt that a husband and wife may by contract transmute the separate property of either or both into community property. * * * But it is not essential in such a case for the husband to show any express agreement on the part of the wife. The gift or change in the status of the property may be shown by the very nature of the transaction or appear from the surrounding circumstances. * * * The question in such cases is whether the evidence of the transaction and its surrounding circumstances clearly shows the intention of the wife to change the status of the property." It has been held that a showing that no money other than community earnings was used in buying the property is amply sufficient to sustain a finding that it is community property. Pretzer v. Pretzer, 215 Cal. 659, 12 P.2d 429. A finding that property is community property is amply supported by evidence tending to show an executed oral agreement to that effect between the parties. Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398. In that case, the parties had orally agreed, both before and after marriage that all of their property was to belong to them equally or "fifty-fifty". The court there said that the existence and consummation of this agreement was established and confirmed by the acts and conduct of the parties during their marital life.

[13, 14] In the instant case it appears that the first $50 or $60 paid on this lot was advanced by the respondent under an agreement with Marvin that the property was to become community property upon their marriage, and that after their marriage in April, 1905, the remaining payments were made from Marvin's earnings. The respondent testified that they looked at the property in September, 1904; that Marvin said he would like to buy it but was unable to handle it; that she asked him if she could not help him and he replied that he did not want to use her name; that she mentioned the fact they intended to be married later on and asked "why not let me make the payments until we are in a position to take care of it after we are married"; that Marvin replied, "If you do make these payments, after we are married it will be our community property"; that she assented and paid the first $10; and that she made the other payments until they were married. She further testified that immediately after their marriage and in the presence of several people Marvin told of this arrangement, stating that he had promised the respondent it would be their community property after they were married, and said: "I am renewing that promise." All of these facts are corroborated by other witnesses, including a brother of the deceased. A number of witnesses testified that Marvin referred to this property as the community property of himself and this respondent over a period of more than thirty years, and that on several occasions he told relatives and friends who were urging him to sell the property that he could not sell it without his wife's consent because it was their community property. There is also evidence that taxes and assessments on this property throughout all of these years were paid from community funds. Whether or not these statements and the conduct of the deceased during this long period indicated an intent on his part to transmute any separate interest he may have had in this property into a community interest with his wife was, at least, a question of fact for the trial court. Estate of Henderson, 128 Cal.App. 397, 17 P.2d 786. The entire purchase price for the property was paid out of community earnings with the exception of some $50 or $60 which was paid by the respondent widow and for which she is making no separate claim. Under the rules of law to which we have referred, it cannot be held that the finding that this was community property is not sustained by the evidence.

The appellants argue that any agreement that this property was to be the community property of the parties was void as against public policy since it was made before the respondent widow secured a divorce from her former husband. It appears that she secured such a divorce in Texas on April 6, 1905. The oral agreement, as originally made, did not provide that the respondent was to obtain a divorce and it was merely an agreement as to what should be done with respect to a particular thing if and when they should be married. Assuming that there was anything illegal in connection with the original agreement there was nothing to prevent the parties from making and acting upon a similar agreement after their marriage, which was done. The intention of the parties is clear and nothing here appears which justifies the setting aside of the agreement which they made and recognized for more than thirty years, as contrary to public policy.

The judgment is affirmed.

GRIFFIN, J., and MUNDO, J. pro tem., concurred.

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46 Cal.App.2d 569

HOWE v. DECK et al.

Civ. 12431.

District Court of Appeal, Second District, Division 1, California.

Aug. 26, 1941.

1. Trial 🔑400(1)

Where original conclusions were consistent with findings and court granted motion to correct conclusions and to enter a new and different judgment, and corrected conclusion of law was contrary to original findings which were unchanged, order to conform judgment to findings and order that conclusions be amended were erroneous. Code Civ.Proc. §§ 663, 663a, 963.

2. Appeal and error 🔑1122(1)

Under statute authorizing reviewing courts in nonjury cases to make findings of fact contrary to or in addition to those made by trial court, reviewing court would not make findings of fact where it appeared from the state of the original pleadings that a new trial should be ordered. Code Civ.Proc. § 956a.

3. Fraud 🔑50

Generally, a plaintiff to recover for false representation must show that representation was as to a material fact, that the fact was false and known to be false by the party making it, or else recklessly made, or without reasonable grounds for believing its truth, that the representation was made with intent to induce the plaintiff to do or refrain from doing some act, that it was relied upon by the plaintiff who was actually misled and deceived and induced by it to act or refrain from acting, that in so acting or refraining from acting he was ignorant of the falsity of the representation and reasonably believed it to be true, and that he thereby suffered damage or injury. Civ.Code, §§ 1572, 1709, 1710.

4. Fraud 🔑42, 45, 46

Where there was no allegation that representations alleged to have been made by defendant were made with intent to deceive or that purchase of interests in oil venture was made in reliance upon such representations and there was no allegation that defendant did not believe in truth of statement attributed to him or that he asserted as a fact an untruth without any reasonable ground for believing it to be true, plaintiff was not entitled to recover purchase price of certain interests in oil venture on ground that the purchase was induced by the false representations of the defendant. Civ.Code, §§ 1572, 1709, 1710.

Appeal from Superior Court, Los Angeles County; Roy D. McPherrin, Judge.

Action by George T. Howe against John Deck and others to recover the purchase price of certain interests in an oil venture. The action was dismissed as against John Deck and John Deck, Jr.; and was prosecuted against D. H. Coyne alone. From a judgment for the plaintiff, first in the sum of $1,000, from an order granting a motion for a new and different judgment in the sum of $3,000, from an order to conform judgment to findings, and from the judgment for the plaintiff for $3,000, D. H. Coyne appeals.

Judgments and orders reversed and cause remanded.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Raphael Dechter and B. L. Hoyt, both of Los Angeles, for respondent.

DESMOND, Justice pro tem.

In this case D. H. Coyne has appealed from a judgment ordered by the court in favor of plaintiff, first in the sum of $1,000; also from an order granting a motion for a new and different judgment in the sum of $3,000 as well as from an order to conform judgment to findings; and finally, from the $3,000 judgment. The case arose from certain transactions in connection with oil drilling upon land in Redondo Beach, upon which Tujax Oil Company, a California corporation, held an oil and gas sublease. John Deck was president, and John Deck, Jr., secretary, of this company. Appellant was local manager of a branch bank which carried its account, and the trial court found that he was also the corporation's agent in three separate transactions, whereby the company undertook to assign a one per cent interest in and to its sublease at the price of $1,000 each, respectively, to the plaintiff, George T. Howe, to his wife and to their four minor children. The form of document employed in each transaction appears in detail in the case of McFaul v. Deck, 30 Cal.App.2d 424, at pages 425 to 427, 86 P.2d 890. In that case the instrument, by which the parties agreed that a tenancy in common in the leasehold was established between them, was held to be a "security" within the meaning of the Corporate Securities Act, St.1917, p. 673, requiring, as a condition of its validity, a permit for its sale or assignment issued by the commissioner of corporations. In the McFaul case, as in the instant case, suit was brought to recover the purchase price, but in that case constructive fraud was alleged to have resulted from the fact that the defendants issued the security without having obtained the permit required by law, while here the fraud alleged is in the form of direct misrepresentation. Originally John Deck and John Deck, Jr., were named as defendants in this case, together with appellant Coyne, but during the trial the cause was dismissed as to the Messrs. Deck, judgment being entered solely against appellant.

The Tujax Oil Company had become bankrupt in the fall of 1936. Prior to the time suit was brought, Mrs. Howe and the minor children undertook to assign to Mr. Howe the interests which had been delivered to them, and the complaint, in causes 1, 3 and 5, sets forth the fraud charged against the defendants in connection with the respective agreements of sale under which the percentage interests were conveyed. Cause 1 alleges, and the court found, that the consent of the plaintiff to the execution of the agreement and to the purchase of the interest was induced through fraud, in that the defendants "represented to the plaintiff that said one per cent (1%) interest so sold and delivered to this plaintiff was sold and issued in conformity with the laws of the State of California and was a good and valid assignment of an interest in and to said leasehold estate." As to Mrs. Howe's purchase, it is alleged in cause 3, and the court found, that consent to the agreement and to the purchase was induced through defendants' fraudulent representation to the purchaser that said one per cent interest in and to said leasehold estate was issued in conformity with and in compliance with provisions of laws of the state of California relative to the issuance of securities. The allegations in cause 5, which the court found to be true, of fraud practiced in connection with inducing consent to the agreement and purchase by the minor children is couched in similar language, "in that defendants * * * severally represented to the plaintiff's assignor * * * that the said assignment as aforesaid was a good and valid assignment and was issued pursuant to the provisions of the laws of the State of California regulating the issuance and sale of securities."

As to these various allegations of fraudulent representations, appellant calls our attention to the testimony of Mr. Howe and Mrs. Howe. From the former's examination we quote the following: "A. Mr. Coyne said that he himself had bought these securities; that he had known Mr. Deck and Mr. Barteaux for a long period of time and was thoroughly convinced of their reliability and the financial stability of old man Deck; and, furthermore, some lawyer by the name of Abrams had talked to Deck, had written the units or the papers connected with this oil deal, and Abrams was one of the leading attorneys of the State, and there was no question in his mind but what everything was in perfect order, and if there had been the least bit of doubt, he said, he would not have put his money into it. * * *

"Q. In other words, he spoke about Mr. Abrams and the fact that he had heard, in effect, about the legality of these documents, before you asked him about their legality? A. Yes, sir; he gave me a little talk on that phase of it.

"Q. Then he started the conversation with respect to the legality of these documents, did he? A. He may have gone into it in detail when I brought up the point that I understood that there might be trickery. He told me about that.

"Q. Did he tell you that Mr. Deck had told him that a lawyer by the name of Abrams, who was representing Mr. Deck, had said that these documents or securities or papers, whatever we might call them—that is, the thing that you were to get—were legal in all respects? A. As I remember it, Mr. Coyne said that Abrams was the lawyer representing the oil company, and he was one of the best oil lawyers in the country, and had carefully gone over the papers, and there was no question but what they were absolutely legal in every way.

"Q. Did he say that Mr. Abrams had said so? A. Yes, sir; he said Abrams had gone over the papers and—

"Q. That Mr. Abrams had said there was no question about them, is that right? A. Well, he said Mr. Abrams had gone over the papers."

Mrs. Howe's testimony was as follows:

"Q. Do you recall the conversation you had with Mr. Howe, Mr. Coyne and yourself in the Bank of America, Santa Monica Branch, at Santa Monica, shortly after the 15th day of May, 1936? A. Yes, sir.

"Q. Where did the conversation take place? A. At Mr. Coyne's desk.

"Q. Who was present? A. Mr. Howe, Mr. Coyne and myself. * * *

"* * * I remember my husband distinctly asking him about them, and wanting to know if they were all right, and he said yes; he assured us that Mr. Abrams had gone all through that, Deck's lawyer; that he was very good and knew the oil business. And Mr. Howe said, 'Are the units we have like yours?' And he said, 'Yes, they are identically the same thing.' * * *

"* * * Q. He told you that Mr. Abrams was Mr. Deck's lawyer, did he? A. Yes, sir.

"Q. Did he tell you that Mr. Deck had told him that Mr. Abrams had said that these documents were perfectly legal, or words in substance to that effect? A. Yes, sir. * * *"

The examination of the appellant shows the following:

"Q. With respect to Mr. Deck, what did you state? A. I told him that Mr. Deck was an honest, reliable man, and had been a successful business man as far as I could tell, and in my opinion was a reliable and honest type of man.

"Q. Did you believe it at that time? A. Yes. * * *

"Q. Will you state, as nearly as you can, in substance, what Mr. Howe said to you and what you said to him relative to that subject? A. Mr. Howe said that he had been in the Navy most of his life and did not understand legal matters, and asked me how he could tell if these papers that he would receive from the Tujax Company would be legal.

"Q. What did you tell him? A. I told him that Mr. Deck had told me that he had taken this matter up with Mr. Abrams, his attorney, and that Mr. Abrams had informed Deck that that conformed to all the necessary requirements.

"Q. Did Mr. Deck tell you that? A. Mr. Deck told me that, yes.

"Q. Did you believe it? A. Yes.

"Q. Did you believe it at the time that you told it to Mr. Howe? A. Yes, I did.

"Q. Had you heard of Mr. Abrams, the lawyer? Just answer yes or no. A. Yes.

"Q. In what connection? A. As attorney for oil interests, I had heard his name mentioned.

"Q. You did not know him personally? A. I had never met him, no.

"Q. Was there any reason at the time Mr. Deck told you this that you had to disbelieve him in his statement to you? A. No."

It appeared at the trial that appellant had received from John Deck three interests in all respects similar to those issued to plaintiff and to the members of his family, and very nearly coinciding with them as to date of issuance. No cash was paid for these Coyne interests, and the transcript discloses that when the matter was inquired into at the office of the corporation commissioner appellant stated that Mr. Deck said "he would like to have me have an interest and offered to give me an interest, and I saw no reason why I should not accept it, and I did". Appellant denied that he had told Mr. Howe or Mrs. Howe that he had invested $3,000 in the well, declaring, "I did tell him that the bank had loaned Deck money which he put into the well, but I did not tell him I put in any".

There is nothing in the transcript to indicate that appellant made any statements to any of the Howe children as to the validity of the interest which they purchased, and it clearly appears that after the first well on the leased property "came in" Mr. Howe seriously considered purchasing another thousand-dollar interest from the Tujax Oil Company, discussed the matter with appellant, and was strongly advised by him not to make the investment, since "the first well was then producing, and it did not seem to be doing so well". It also appeared at the trial that following the first discussion between respondent and appellant concerning the lease and drilling thereon that Mr. and Mrs. Howe, appellant not being present, visited the property frequently, watched the work going on, and engaged the president and other officers and employees of the company in conversation concerning the well then drilling, and finally received the agreements or "interests" directly from the company officers. This was made a matter of affirmative defense, appellant alleging as to each of the investments that an independent or individual investigation concerning the purchase of the agreement was made and that the purchaser dealt directly with the Tujax Oil Company officers in making the agreement. As to each of these affirmative defenses, however, the trial court found that they were untrue.

We have failed thus far to mention causes 2, 4 and 6 of the complaint, each in its first paragraph grounded upon indebtedness for money had and received in the sum of $1,000. Causes 4 and 6 contained the additional allegation of assignment to plaintiff by the purchaser of all right, title and interest in and to the said sum of $1,000 "and that the plaintiff is now the owner and holder of the same". The court found as to each of the common counts that so far as the allegations pertained to defendant Coyne, they were untrue, "for the reason", to quote from respondent's brief, "that the purchase money had not been paid to appellant". As to the allegations of assignment in causes 4 and 6, the court found them to be untrue.

The allegation of assignment of the interest and cause of action of Mrs. Howe and of the minor children set out in causes 3 and 5 the court disposed of in its findings XI and XVII by denominating them "purported assignments" and declaring that the cause of action was not subject to assignment "and said assignment was void".

From these findings the court drew the conclusions of law: I. That the assignments of one per cent interest in the oil lease were securities within the meaning of the Corporate Securities Act, and the same being issued and delivered without a permit from the commissioner of corporations, were and are void. II. That the purported assignments of the causes of action were invalid and said claims and causes "herein attempted to be assigned were not, as a matter of law, subject to assignment". III. That the plaintiff recover from defendant Coyne the sum of $1,000, with interest and costs. Judgment in that amount in favor of this respondent was entered on June 2, 1939.

On June 8, 1939, a notice to vacate the judgment, to correct the conclusions of law and to enter a new and different judgment in the sum of $3,000, was filed. The ground specified was "that conclusion of law No. II is incorrect and erroneous, and is not consistent with findings Nos. XI and XVII, but is contrary thereto". The trial judge signed an order dated July 17th, granting the motion to correct the conclusions and to enter a new and different judgment of $3,000, reciting that said motion was presented in accordance with sections 663 and 663a of the Code of Civil Procedure. The record shows that on July 25th the same order was entered in the minutes nunc pro tunc as of July 17th, and included in that entry was the decision of the court denying defendants' motion for a new trial. On August 2d the court signed an "Order to Conform Judgment to Findings", reciting that the conclusions of law appeared to be inconsistent with the findings to such an extent as to materially affect the substantial rights of the plaintiff and entitle him to a different judgment, and accordingly it was ordered that the conclusions be corrected in the manner specified in said order. Conclusion II, in the corrected form, reads as follows:

> "That the purported assignment of the causes of action herein sued upon from Mrs. George Tyler Howe, George Tyler Howe, Jr., Caroline H. Howe, Edgar B. Howe, and John W. Howe to the plaintiff herein are good and valid assignments, and that the claims and causes of action thereby assigned are now vested in and belong to the plaintiff herein."

Conclusion III, as corrected, was to the effect that plaintiff was entitled to recover $3,000 from defendant Coyne. It was further ordered that the judgment for $1,000 be vacated and that plaintiff have and recover the sum of $3,000 with costs, the new judgment to be entered as of June 2, 1939, the date upon which the original judgment was entered. On August 2d an additional order was signed by the trial judge, namely, the new judgment for $3,000.

[1] It will be seen from the foregoing that plaintiff made an earnest effort to secure proper entry of a judgment of $3,000, but, in our opinion, the effort failed, for the findings still stand unchanged upon the record and do not support the amended conclusions or the new judgment. Section 663 of the Code of Civil Procedure, under which plaintiff proceeded after entry of the $1,000 judgment, provides that a judgment may be vacated or a different one entered when the conclusions are inconsistent with the findings. Examination of this record, however, discloses that Conclusion II as originally entered was altogether in accord with and supported by the very findings which were claimed to be contrary, namely, findings XI and XVII. As the record stands at present, the increase of $2,000 in the judgment is based upon and supported by Conclusion II (as corrected) that the assignments by Mrs. Howe and by the Howe children are good and valid assignments, and that the claims and causes of action conveyed thereby belong to the plaintiff, whereas findings XI and XVII declare exactly to the contrary. Section 662 of the Code of Civil Procedure provides that a trial judge in ruling upon a motion for a new trial may change or add to the findings or modify or vacate a judgment. In the instant case, there was an opportunity to take such action, for, as we have seen, the court was called upon to determine upon defendants' motion whether a new trial should be granted, and decided that question adversely on August 2d, without making any change in the findings, although by the same order he reaffirmed his earlier decision to modify the judgment, but recited that such action was taken under sections 663 and 663a of the Code of Civil Procedure. As noted in the opening paragraph of this opinion, the appeal in this case is not alone from the judgments of $1,000 and $3,000, but also from the order granting the motion made under section 663 for a new and different judgment and from the additional order to conform judgment to findings. Section 663a of the Code of Civil Procedure provides that the order granting the motion for a new and different judgment may be reviewed on appeal, and by section 963 of the same code an appeal lies from any special order made after final judgment. The final judgment in this case and the order to conform judgment to findings were signed on the same day, August 2d, but the judgment was docketed on August 7th, one day earlier than the order conforming. It may be that the latter order is one made after final judgment, but if not we consider it supplemental to the other erroneous order by which the conclusions were ordered amended, and we hold that the appeal is well grounded as to both, and that they must be reversed.

[2] We realize that under section 956a of the Code of Civil Procedure appellate courts are authorized in nonjury cases to make findings of fact contrary to or in addition to those made by the trial court, but are not inclined to take such action in this case, since it appears from the state of the original pleadings that a new trial should be ordered.

[3] Respondent argues that a fiduciary relation existed between appellant and respondent, but he failed to allege and the court made no finding that such relationship existed. The appellant was not a party to the contracts under which the interests in question were purchased. His liability for the part he played in the transactions, therefore, must be determined by sections 1709 and 1710 of the Civil Code, rather than by section 1572 of that code, which governs fraud as between contracting parties. Under section 1709 of the Civil Code, recovery may be had from "one who willfully deceives another with intent to induce him to alter his position to his injury or risk", and the elements of fraudulent deceit are itemized in section 1710. They are discussed in 12 Cal.Jur. at page 724, where the following appears:

"When a cause arises out of an alleged false representation, the plaintiff, in order to prevail, must ordinarily show that the representation was as to a material fact; that such fact was false and known to be false by the party making it, or else recklessly made, or without reasonable grounds for believing its truth; that the representation was made with intent to induce the other party to do or refrain from doing some act; that it was relied upon by the other party—in other words, that such other party was actually misled and deceived and induced by it to act or refrain from acting; that in so acting or refraining from acting he was ignorant of the falsity of the representation and reasonably believed it to be true; and that he thereby suffered damage or injury. The absence of any one of these elements is generally fatal to a recovery."

[4] From each of the three causes upon which the judgment for $3,000 rests, certain of these elements were omitted. For example, in causes 3 and 5, involving purchases by Mrs. Howe and by the Howe children, respectively, there is no allegation that the representation claimed to have been made by defendants was made with intent to deceive or that the purchase was made in reliance upon such representation, nor is there in any of the three causes an allegation that appellant did not believe in the truth of the statement attributed to him, or that he asserted as a fact an untruth without having any reasonable ground for believing it to be true. It may be argued that these faults should have been criticized by means of a special demurrer and are not properly raised on appeal. Under the special circumstances of this case, however, where originally the contracting parties were defendants jointly with this appellant, and now by reason of the dismissal filed as to the principals, John Deck and John Deck, Jr., appellant remains as the sole defendant, we believe that the contending parties should be placed in a position where upon redrafted pleadings they can present the issues of their cause. Therefore, on the case being remanded, the plaintiff, if so advised, may amend his complaint to state a cause of action against appellant. If the complaint be not amended, judgment should be entered for the defendant, this appellant.

Since it does not appear that the findings are sufficient to support either judgment, such judgments are and each of them is reversed, together with the order for a new and different judgment and the order entitled "Order to Conform Judgment to Findings." The cause is remanded for further proceedings in accordance with this opinion.

DORAN, Acting P. J., and WHITE, J., concurred.

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46 Cal.App.2d 558

PEOPLE v. BUCK.

Cr. 467.

District Court of Appeal, Fourth District, California.

Aug. 25, 1941.

1. Criminal law 🔑1110(2)

Appellate court has no authority to enlarge or expand the record on appeal except as that process might have taken place when the record was corrected by addition of matters which should have come up with the record.

2. Criminal law 🔑1110(2)

If there is any error in the record on appeal, the application to correct it should be made to the trial court.

3. Criminal law 🔑1110(2)

The trial court has the power to alter the record on appeal so as to make it speak the truth.

4. Criminal law 🔑1110(8)

For the purpose of correcting any error or defect in the transcript of the record on appeal, the appellate court may make its order for diminution of the record, and require production of a certified copy of any paper or record which was before the trial court and make it a part of the record on appeal if it will assist in a determination of the appeal on its merits. Rules for the Supreme Court and District Courts of Appeal, rule 14; Code Civ.Proc. § 953.

5. Criminal law 🔑1110(6)

Motion to add affidavits which were prepared after appeal was taken to the record on appeal, and which dealt with subject which could have been addressed to the trial court upon motion for new trial, was denied.

6. Criminal law 🔑1110(8)

Affidavits showing that in trial of defendant on rape charge trial court ordered bailiff to lock doors while the instructions were being given in order to obviate disturbance did not justify granting motion for diminution of the record on the ground that defendant was not given a fair public trial.

7. Criminal law 🔑635

Where trial court in rape case ordered bailiff to lock doors during giving of instructions in order to obviate disturbance, but ordered no one to leave and opened doors immediately afterward, and defendant made no objection at the time to order of the court closing doors and did not raise matter on motion for new trial, conviction and judgment could not be reversed because defendant did not have a "fair public trial".

See Words and Phrases, Permanent Edition, for all other definitions of "Fair Public Trial".

8. Criminal law ⇨635

The term "public trial" is used in a relative sense and its meaning depends largely upon the circumstances of each particular case.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Trial".

9. Criminal law ⇨1170½(5)

Where, in trial of a rape case, the circumstances as related by prosecutrix were corroborated by other witnesses to extent that there could be no doubt as to truth thereof, and prosecutrix made no flippant reply to any question asked, it was not prejudicially erroneous on ground that prosecutrix' story showed equivocation, for court to sustain objection to defendant's question on cross-examination as to whether or not prosecutrix had told anybody that she had refused to sign complaint against defendant.

10. Criminal law ⇨1122(5)

Where in trial of rape case, defendant asked for certain instructions which were refused, and defendant assigned this refusal as error but presented no argument on appeal and did not set forth any of the instructions refused, defendant had not complied with rules for appeal, and appellate court was justified in belief that instructions were properly refused by trial court. Rules for Supreme Court and District Courts of Appeal, § 3, rule 8.

11. Criminal law ⇨945(1)

Where defendant supported motion for new trial by affidavits from his wife and attorney as to conversations between his wife and prosecutrix, on theory that "jury might have taken note of the situation and given greater credence to the case of defendant" but did not contend that the affidavits if placed before jury would render a different result probable, new trial was properly refused.

12. Criminal law ⇨945(1)

New trial should not be granted on ground of newly discovered evidence unless the showing is such as to render a different result probable.

13. Criminal law ⇨958(3)

Where defendant in rape case supported motion for new trial by affidavits from his wife and attorney as to conversations between defendant's wife and prosecutrix, the facts of which were not disclosed to defendant's counsel until after trial, and defendant made no affidavit denying knowledge of the conversation and wife's affidavit did not specifically deny his knowledge, motion for new trial was properly refused as defendant must have shown by his own affidavit that he did not know of the evidence and could not by diligence have obtained it.

14. Criminal law ⇨1130(2)

Appellate court will not assume burden of searching the transcript to ascertain remarks referred to by appellant's counsel as prejudicial.

15. Criminal law ⇨1171(1)

Question propounded by prosecuting attorney of juror in rape case for purpose of convincing jurors that he was not prosecuting an innocent man, although objectionable was not prejudicial where circumstances clearly pointed to defendant's guilt.

16. Rape ⇨51(1)

Evidence supported conviction for rape.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Duane W. Buck was convicted of the crime of rape, and he appeals.

Affirmed.

George A. Westover and Edward W. Goodman, both of San Diego, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

MUNDO, Justice pro tem.

Defendant was convicted of the crime of rape, and he appeals from the judgment and the order denying his motion for a new trial. He also appeals from an order made after judgment denying his motion to "amplify" the record on appeal. This latter motion was filed five days after the rendition of the judgment and by said motion defendant sought to have certain affidavits, attached to his motion, made a part of the record on appeal in support of his ground on appeal that his constitutional rights were invaded in that he was not accorded a public trial. In addition to these appeals the appellant has moved this court for diminution of the record. In his brief appellant urges that his appeal taken from the order made after judgment be incorporated with his appeal from the judgment of conviction and order denying his motion for a new trial, and that this court direct the lower court to correct its record by incorporating therein the said affidavits and to certify the record as so corrected to this court. We are unable to comply with this request.

[1-5] To amplify is to enlarge or expand in statement or in treatment. Nowhere do we find authority to enlarge or expand the record on appeal except as that process might take place when the record is corrected by the addition of matters which should have come up with the record. If there is any error in the record on appeal the application to correct it should be made to the trial court. Boyd v. Burrel, 60 Cal. 280; In re Johannes, 213 Cal. 125, 1 P.2d 984. That court has the power to alter the record so as to make it speak the truth (Sheldon v. Gunn, 57 Cal. 40; O'Hare v. Peacock Dairies, Inc., 39 Cal.App.2d 506, 103 P.2d 594), and for the purpose of correcting any error or defect in the transcript the appellate court may make its order for diminution of the record. Rule XIV, Rules for the Supreme Court and District Courts of Appeal. The appellate court may also require the production of a certified copy of any paper or record which was before the trial court and make it a part of the record on appeal if it will assist in a determination of the appeal on its merits. Code Civ.Proc., § 953; Shively v. Kochman, 20 Cal.App.2d 688, 68 P.2d 255. But in the instant case we are not called upon nor was the trial court called upon to correct the record or to cure any defect in it or to add any document to perfect the record. What appellant would ask us to do is to add to the record affidavits which were prepared after the appeal from the judgment was taken and which deal with a subject which could have been addressed to the trial court upon the motion for a new trial. No error appears in this connection. People v. Center, 54 Cal. 236; People v. Mayne, 118 Cal. 516, 50 P. 654, 62 Am.St.Rep. 256; Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am.St.Rep. 105; People v. Sonoqui, 1 Cal.2d 364, 35 P.2d 123; In re Johannes, supra; People v. Carkeek, 35 Cal. App.2d 499, 96 P.2d 132; State ex rel. O'Grady et al. v. District Court of Twentieth Judicial District, etc., 61 Mont. 346, 202 P. 575.

[6-8] The motion for diminution of the record is supported by a certified transcript of the proceedings had on the motion to amplify the record, and included in the transcript are the affidavits which appellant requests be ordered up as a part of his record on appeal. These affidavits are to this effect: That prior to the time that the court instructed the jury the court announced, "Anyone desirous of leaving the courtroom please do so at this time as no one will be permitted to leave or enter the courtroom during these instructions. All right, mister bailiff, close the door"; that immediately after this announcement several persons left the audience and went outside; that there were still a number of persons in attendance but there also were a number of vacant seats; that during the instructions the doors of the courtroom were kept locked; that after the instructions had been given the doors were reopened and several persons entered the courtroom; that there was no commotion, disorder, or unusual noise either in the courtroom or which could be noticed from the outside. The declared purpose of these affidavits is to show that the appellant was not given a fair, public trial. Even if the appellant were entitled to diminution of the record we would have to say that we cannot agree with his contention that he did not have a fair, public trial. Defendant made no objection to the order of the court closing the doors during the time the jury was being instructed, nor did he raise the matter on his motion for a new trial. It was presented for the first time in his notice of appeal filed with the trial court on the day following the pronouncement of judgment. It is apparent that the order was made for the convenience of the court and all others present, including the appellant. It was made to facilitate the instructing of the jury and to obviate the disturbance and distraction which is made by spectators entering or leaving while the court is giving its instructions.

This seemingly was the view taken at the time by the appellant and his counsel for no complaint was made during the trial. The court did not order anyone to leave the courtroom. It merely attempted to keep the spectators from moving in or out during the period of instruction. In this particular instance it is to be observed that the court instructed the jury before the argument of counsel and that the doors of the courtroom were opened during the argument. The term "public trial" is used in a relative sense and its meaning depends largely upon the circumstances of each particular case. Here we cannot say that the order in question prejudiced the defendant's rights or that he was thereby deprived of a fair, public trial. We do not deem it proper in the circumstances to grant the motion, and the motion for diminution of the record is denied. Ferguson v. Oildale Mutual Water Co., 78 Cal.App. 74, 248 P. 256; Schelling v. Thomas, 96 Cal.App. 682, 274 P. 755.

At this juncture it is well to state briefly the facts of the case in order to consider appellant's other points on these appeals. The prosecutrix, aged 19 years and married, left her home on the night of March 13, 1941, about 10 p. m., to accompany a girl friend to the corner where the latter would board a street car. The prosecutrix, in returning to her home, passed by an alley and noticed the defendant, a stranger to her, stagger over towards the fence. She became frightened and was getting ready to run when the defendant grabbed her. She screamed. Defendant put her head on the ground and choked her to such an extent that she lost consciousness for a few minutes. It was raining and she carried an umbrella and wore galoshes. Her umbrella caught on a picket fence. With his left arm around her neck, his left hand on her throat, and pulling on her hair on the right-hand side of her head with his right hand, defendant took prosecutrix down the alley. After she had taken about three steps down the alley she lost her shoe and the galosh from the right foot in a big mud hole. Prosecutrix weighed about 112 pounds. While walking along with the defendant in this manner she said to him "Please don't kill me". He told her to "Shut up". He hit her on the head again and said he had killed a man and if she did not do as he said he would kill her. He held her throat so tightly she could not holler and she was so weak she could hardly stand. He took her down the hill to where there was a lot of tall grass and pushed her down on the ground. Defendant then committed an act of sexual intercourse upon her. She did not fight him because she thought he would kill her before anyone arrived. Following the commission of this act she states that he took out his wallet and said: "Here, let me pay you". She said: "I don't want your money". They then came out into the street with defendant holding her arm and prosecutrix walking in front of him a little ways. While so walking he kept mumbling to himself, which she paid no attention to because she was thinking about getting away from him. When they got back to the street and while he was looking for her lost shoe, she went and got her umbrella off the picket fence. He told her that if she told anyone he would "get her". She then ran south towards her home. Upon arriving at her home she was crying and she called her landlady. There was a big bump on her head; her neck was bruised; she had only one shoe which was full of water and mud; and her coat and dress were muddy. The landlady called the police.

Witnesses living near the alley testified that they heard a woman scream and they gave testimony which corroborated prosecutrix in other particulars.

The police officer testified that when he called at prosecutrix's house he found her in a disheveled condition and complaining of an injury to her head. The officer saw a laceration on the top of her head probably about ⅝ of an inch long and bleeding slightly. Her scalp was broken and swollen.

Defendant was apprehended. His shoes and pants up to his waist were all wet and muddy. His hands were also muddy. At first he denied having any girl down the alley and then he said: "All right, I was standing at the alley"; that this girl was walking along and as she came near him he flashed a two-dollar bill toward her and said "How about it, Kid"; that she nodded her head in agreement; that the idea probably struck him and the girl at the same time; and that she went with him. The next morning the defendant changed his story and stated that the former story given was a lie; that he had been drinking; that he met the girl and what happened he didn't really know. He said: "I just saw the girl, fell in step with her, and evidently tried to attack her. I helped her look for her shoe after the assault. I didn't know very much about what I was doing. I was kind of dazed,—didn't know what I was doing, and I think I walked up the street to the Copper Kettle." The officer then asked him if he told his wife what had happened and the defendant said he had told his wife the truth of the matter, that he just got crazy drunk and assaulted the woman. At the time of this particular conversation the defendant's wife was standing close to him.

While the prosecutrix was being cross-examined at the trial, the following took place:

"Q. * * * you first refused to sign the complaint in this case, didn't you?

"Mr. Barbour: I object to that as incompetent, irrelevant and immaterial, not proper cross-examination.

"The Court: Let me have the question, please. The question is read by the reporter.

"The Court: Overruled. A. No.

"By Mr. Westover: Q. You did not? A. No.

"Q. Did you tell anybody that you had refused to sign the complaint in this case?

"Mr. Barbour: I object to that as not proper cross-examination.

"The Court: Sustained.

"A. No.

"The Court: Don't answer when I sustain an objection.

"Mr. Barbour: I move to strike the answer.

"The Court: It may be stricken.

"By Mr. Westover: Q. When did you sign the complaint? A. The next day.

"Mr. Barbour: I object to that—the file speaks for itself.

"The Court: The question has been answered.

"Mr. Westover: That is all."

[9] Appellant contends that the ruling of the trial court was erroneous. He claims that the prosecutrix's story, when taken in conjunction with physical circumstances surrounding the affair, shows equivocation such as is pointed out by the court in the case of People v. Brown, 138 Cal.App. 748, 33 P.2d 460, 462. In that case the trial court sustained an objection to this question asked of the prosecutrix on cross-examination: "Well, Miss Miller, is it not a fact that you immediately after preferring these charges against Mr. Brown, you asked that they be dismissed?" Upon appeal it was held that this was proper cross-examination for the reason that the jury may properly consider the conduct of a prosecutrix towards a defendant after the alleged commission of a crime. The court said: "* * * and where, as here, there was evidence sufficient to support defendant's version of the affair we cannot say that an affirmative answer to the rejected question, taken with the flippant reply of the prosecutrix to the question whether she scratched the defendant, would not have convinced the jury that her story was untrue". In the instant case no flippant reply was made by the prosecutrix to any question propounded to her and the circumstances as related by her testimony were corroborated by other witnesses to such an extent that there was no room for doubt as to the truth thereof. This case differs from the Brown case in these particulars, and it is difficult to see how the result could have been different even if she had given an affirmative answer to the question.

The circumstances here do not disclose a case where a verdict for the defendant would have been fairly supported. The prosecutrix's account of the affair, taken in connection with the physical circumstances, is not equivocal, as in the Brown case. On the other hand, the defendant's version of the affair related by him on the witness stand, was unsupported by any evidence and could easily have been disbelieved by the jury. He admitted to the police officer that "I just got crazy drunk and assaulted the woman". Because of the nature of the charge, the trial court might well have allowed the question in dispute to be answered, but from an analysis of the record we are of the opinion that the court's ruling sustaining the objection thereto was not prejudicially erroneous and did not result in a miscarriage of justice.

[10] Appellant next complains that the trial court erred in refusing to give certain instructions which he states he offered and which he claims under the authorities cited in his brief were pertinent, necessary and material to said cause. But he presents no argument nor does he set forth any of the instructions given by the court bearing upon the subjects covered by the refused instructions. In this respect he has failed to comply with section 3, rule VIII of the

Rules for the Supreme Court and District Courts of Appeal, and we are justified in the belief that the instructions which were offered by appellant and refused were properly refused. People v. Jacobs, 11 Cal.App. 2d 1, 52 P.2d 945.

[11-13] One of the grounds set forth in defendant's motion for a new trial was newly discovered evidence. In support thereof he filed two affidavits, one made by his wife and one by one of his attorneys. He does not contend in his brief that the matters set forth in these affidavits, if placed before the jury, would render a different result probable, but that "a jury might have taken note of the situation and given greater credence to the case of the defendant in this respect". This, of course, does not meet the requirements of the law for a new trial should not be granted on the ground of newly discovered evidence unless the showing is such as to render a different result probable. People v. Urquidas, 96 Cal. 239, 31 P. 52; People v. Paysen, 123 Cal. App. 396, 11 P.2d 431. A reading of the affidavits fails to satisfy us that the evidence therein contained would have rendered a different result probable on a retrial of the cause. We therefore can see no abuse of discretion by the trial court in denying the motion. The "newly discovered evidence" suggested in the affidavits relates to a conversation had between defendant's wife and the prosecutrix the day following the affair of which the prosecutrix complained. The fact of the conversation was not disclosed to defendant's counsel until after the trial was over. The two participants agreed to keep their visit and conversation a secret. There is no affidavit of defendant denying his knowledge of the said conversation nor does the affidavit of the defendant's wife specifically deny that she had told him about her meeting with the prosecutrix. The defendant must show by his own affidavit that he did not know of the evidence and could not by diligence have obtained it. Baker v. Joseph, 16 Cal. 173; Arnold v. Skaggs, 35 Cal. 684; People v. Brown, 28 Cal.App. 261, 152 P. 58.

[14, 15] We are referred by counsel to the transcript in order that remarks of the district attorney which counsel deems are prejudicial may be ascertained. This is a burden which this court will not assume. People v. Barnett, 134 Cal.App. 381, 25 P. 2d 476; People v. Pearson, 11 Cal.App.2d 123, 52 P.2d 971. The instance where counsel has pointed out particular error involves an attempt on the part of the district attorney to convince the prospective jurors that he was not prosecuting an innocent man. The district attorney propounded the following question to a prospective juror: "Q. Now there has been a lot of talk here and discussion about the presumption of innocence in a criminal case and you have been asked repeatedly if you believed this man at the counsel table charged with crime is innocent at this moment and a number of these jurors have properly answered that they thought he was, under the presumption which the law has provided, but now I want here to know what you think about—if you have any idea on the subject of what you think the district attorney's duties are—do you believe while this man is presumed to be innocent it is my job as district attorney to come here and prosecute an innocent man?" Appellant's counsel objected to this question and his objection was sustained. This line of questioning should not have been indulged in and the court properly sustained the objection. It cannot be said, however, that counsel's conduct wrought prejudice. People v. Hanks, 35 Cal.App.2d 290, 95 P.2d 478.

[16] There is an abundance of evidence to support the verdict in this case and we see no prejudicial errors in the record.

The judgment and orders appealed from are affirmed. The motion for diminution of the record is denied.

BARNARD, P. J., and GRIFFIN, J., concurred.

46 Cal.App.2d 542

HOLLINGER v. MEDINA et al.

Civ. 2369.

District Court of Appeal, Fourth District, California.

Aug. 19, 1941.

1. Costs ⚷22

The amount of superior court's judgment in action involving issues not triable in an inferior court is not controlling on allowance of costs. Code Civ.Proc. § 1032.

2. Costs ⚷18

Where part of claim sued on in superior court is barred by rule of law reducing judgment for plaintiff to amount within an inferior court's jurisdiction, plaintiff cannot recover costs. Code Civ.Proc. § 1032.

3. Costs ⚷18

In personal injury suit, where jury found that plaintiff was 90 per cent. negligent and defendant 10 per cent. negligent and that plaintiff was damaged in amount of $10,000, judgment entered by superior court on verdict for $1,000 could have been rendered in municipal court of same county, so that plaintiff was not entitled to recover costs. Code Civ.Proc. § 1032.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Edward P. Hollinger against Joseph M. Medina and others for personal injuries. From an order granting defendant's motion to strike a cross-bill filed by plaintiff after affirmance of a judgment for him, plaintiff appeals.

Affirmed.

Luce, Forward, Lee & Kunzel, by Herbert Kunzel, all of San Diego, for appellant.

Lasher B. Gallagher, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

In an action against the owners of a ship for injuries received on the high seas, the plaintiff recovered a judgment for $1,000 which was affirmed on appeal. Hollinger v. Medina, 39 Cal.App.2d 753, 104 P.2d 91. The plaintiff then filed a cost bill totaling $171.55. The defendant moved to strike the cost bill on the ground that the plaintiff was not entitled to recover costs and the plaintiff has appealed from the order granting this motion.

Section 1032 of the Code of Civil Procedure provides, in respect to an action tried in the superior court, that a plaintiff shall not recover costs when the judgment is one which could have been rendered by a municipal or inferior court within the same county. The appellant admits that there is a municipal court in the county of San Diego, where the action was tried, but contends that the judgment could not have been rendered in that court. The action was one in which the doctrine of comparative negligence was applied and the jury found that this appellant was 90 per cent negligent and these respondents were 10 per cent negligent. Having also found that the appellant had been damaged in the amount of $10,000 the jury accordingly rendered a verdict for $1,000, for which amount, the judgment was entered. The appellant now argues that the jury's finding that the plaintiff was damaged in the sum of $10,000 was equivalent to a finding by the court; that this finding could not have been made in a municipal court since its jurisdiction is limited to $2,000; and that, therefore, the judgment in question could not have been entered in such a court.

[1-3] It may be conceded that in an action involving issues which could not be tried in an inferior court the amount of the judgment rendered in a superior court would not be controlling on the allowance of costs. The action here in question was one for damages on account of personal injuries, there were no other issues, and the judgment rendered was for an amount which was within the jurisdiction of the municipal court. We see no reason why that court could not have made a finding that damages to the amount of $10,000 had been suffered, provided a judgment was not entered in excess of the court's jurisdiction. If damages in excess of an amount within the jurisdiction of the court were waived by a plaintiff no reason appears why a judgment for the remainder could not be entered. Moreover, the issue was as to the amount of damages for which the defendant was liable. If a part of a claim sued upon in the superior court was barred by the statute of limitations, with a resulting judgment for an amount within the jurisdiction of an inferior court, section 1032 of the Code of Civil Procedure would apply. We see no reason why the situation

should be any different where a part of the claim sued upon is barred by another rule of law preventing a recovery thereon, which similarly reduces the judgment to one within the jurisdiction of an inferior court. No matter how much this appellant was damaged his recovery was reduced by the facts and the law applicable thereto to an amount which was within the jurisdiction of the municipal court, and the code section with respect to costs is directly applicable. The judgment was one which could have been rendered in the municipal court and the appellant is not entitled to recover his costs. Beckjord v. Slusher, 22 Cal.App.2d 678, 72 P.2d 563; Leaper v. Gandy, 22 Cal.App.2d 475, 71 P.2d 303.

The order appealed from is affirmed.

GRIFFIN, J., and MUNDO, Justice pro tem., concur.

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46 Cal.App.2d 546

JOHNSON v. HOME OWNERS' LOAN CORPORATION et al.

Civ. 2780.

District Court of Appeal, Fourth District, California.

Aug. 22, 1941.

1. Mortgages 🔑427(1), 435

Generally, a mortgagor who has not disposed of his interest in mortgaged premises is a "necessary party" to a suit for foreclosure and sale, even though no personal claim is asserted against him, but if mortgagor has transferred his interest in property to others and has no interest in or lien or claim upon property or demand secured, mortgagor is a "proper party" but not a necessary party, in foreclosure suit, unless mortgagee wishes a decree over against him for residue.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party" and "Proper Party".

2. Mortgages 🔑427(4)

A grantee of a mortgagor stands in mortgagor's shoes, and a grantee whose deed is duly recorded is a "necessary party", that is, he must be made a party to a suit to foreclose mortgage in order to affect his interest, even though he takes subject to mortgage, and without grantee's presence as party defendant to foreclosure suit, a decree of foreclosure of lien by a sale of his property would be a nullity.

3. Mortgages 🔑427(1)

Where mortgagor, after delivering mortgage on land to mortgagee, executed a grant deed of land to a third party to secure a bail bond, and deed, although intended as a mortgage, was absolute on its face and was recorded before commencement of suit to foreclose mortgage, and mortgagee in foreclosure proceedings did not seek a deficiency judgment against mortgagor, the mortgagor was not a "necessary party" to foreclosure suit unless he retained some interest in or lien or claim upon property or demand secured, and mortgagee had actual notice thereof.

4. Pleading 🔑214(8)

Allegations of plaintiff's complaint would be deemed to be true for purpose of testing trial court's ruling on demurrer.

5. Judgment 🔑460(1)
Mortgages 🔑529(10)

Where complaint in suit against mortgagee, which purchased mortgaged land at foreclosure sale, to set aside sale and foreclosure decree alleged that mortgagor, after delivering mortgage to mortgagee, executed a grant deed of land to a third party to secure a bail bond and that deed, although intended as a mortgage, was absolute on its face and was recorded before commencement of foreclosure suit, and that mortgagee had actual knowledge thereof at all times and that mortgagor and his heirs were not made parties to foreclosure suit, the complaint was not demurrable. Code Civ.Proc. § 726, subd. 4; Civ.Code, § 2950.

6. Judgment 🔑424
Mortgages 🔑529(3)

Where complaint in suit against mortgagee, which purchased mortgaged land at foreclosure sale, to set aside foreclosure decree and sale alleged that mortgagor, after delivering mortgage to mortgagee, executed a grant deed of land to a third party to secure a bail bond and that deed, although intended as a mortgage, was absolute on its face and was recorded before commencement of foreclosure suit, and that mortgagee had actual knowledge thereof at all times, and that mortgagor and his heirs were not made parties to foreclosure suit, wherein mortgagee did not seek a deficiency judgment against mortgagor, the case was governed by statute respecting grants of realty purporting to be absolute conveyances but intended to be defeasible on performance of certain conditions and not by statute respecting parties to foreclosure proceedings. Code Civ. Proc. § 726, subd. 4; Civ.Code, § 2950.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Harold J. Johnson against the Home Owners' Loan Corporation and others to set aside a foreclosure decree and sale thereunder in real estate mortgage foreclosure proceedings. From a judgment dismissing the action after sustaining a demurrer to the second amended complaint without leave to amend, plaintiff appeals.

Reversed, with directions.

G. Roy Garnett, of Los Angeles, for appellant.

J. V. McDermott and Ewell D. Moore, both of Los Angeles, for respondents.

GRIFFIN, Justice.

On April 5, 1934, Louis Johnson delivered a real estate mortgage to respondent Home Owners' Loan Corporation (for brevity hereinafter called H.O.L.C.) in the sum of $1,521.44. On April 13, 1935, Louis Johnson executed a grant deed covering the same real estate to the Angeles Indemnity Corporation (hereinafter called A.I.C.) for the purpose of securing a bail bond. The grant deed, although intended between the parties to be a mortgage, was absolute on its face, and thereafter was recorded in the office of the County Recorder of Los Angeles county prior to the commencement of the foreclosure action. On December 19, 1936, Louis Johnson died intestate while in possession of the property, and his heirs, succeeding to his estate, continued in possession. This fact, as well as the fact that the deed was intended as a mortgage, were alleged as being at all times known to H.O.L.C. On April 16, 1938, respondent H.O.L.C. commenced a foreclosure action in the Superior Court of Los Angeles County against the Angeles Indemnity Corporation as record owner of the real estate and Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as liquidator for A.I.C. in liquidation. Neither appellant nor Louis Johnson's heirs were made parties to that action. Carpenter, for himself alone, filed a disclaimer, and A.I.C. defaulted. The decree of foreclosure was entered May 18, 1938, and the real estate was sold to respondent H.O.L.C. at the Commissioner's sale on June 27, 1938. On June 30, 1939, respondent H.O.L.C. received a Commissioner's deed. June 20, 1939, letters of administration were issued to appellant. June 21, 1939, A.I.C. reconveyed the property to appellant. On the 27th day of June, 1939, this action was commenced to set aside the foreclosure decree and sale thereunder, alleging the above facts.

Appellant contends that the proceedings in the foreclosure suit were absolutely void as to Johnson or his heirs, and they have an absolute legal right, as well as their constitutional right, to insist upon a legal foreclosure against them before their right of redemption can be cut off.

Respondent argues that as the conveyance to the A.I.C. was in the form of a grant deed and any claimed defeasance or interest of appellant in the property was not recorded when the foreclosure proceedings were commenced, it was immaterial whether respondent had actual notice of the grantor's claimed interest or not; and that plaintiff in the foreclosure action was required to make those persons defendants only whose conveyances or interests appeared of record at the time it instituted its foreclosure suit.

[1] The general rule is well established in this state that a mortgagor who has not disposed of his interest in the mortgaged premises is a necessary party to a suit for foreclosure and sale, even though no personal claim be asserted against him; but if he has transferred his interest in the property to others and has no interest in or lien or claim upon the property or demand secured, as where he has absolutely and without warranty sold his interest in the premises, he is a proper, but not a necessary, party, unless the mortgagee wishes a decree over against him for the residue. Hutchison v. Barr, 183 Cal. 182, 190 P. 799; 18 Cal. Jur. § 605, p. 334.

[2, 3] A grantee of a mortgagor stands in the mortgagor's shoes. A grantee whose deed is duly recorded is a necessary party, that is, he must be made a party to the suit in order to affect his interest, even though

he takes subject to the mortgage. Without his presence as party defendant to the action, a decree of foreclosure of the lien by a sale of his property would be a nullity. Jeffers v. Cook, 58 Cal. 147; Tulare County Bank v. Madden, 109 Cal. 312, 41 P. 1092; Filipini et al. v. Trobock et al., 134 Cal. 441, 62 P. 1066, 66 P. 587; Fratessa v. Roffy, 40 Cal.App. 179, 180 P. 830; 18 Cal.Jur. § 608, p. 337. In the foreclosure proceeding here involved, the mortgagee did not seek a deficiency judgment against the mortgagor. Under the above rule, the mortgagor in the instant action was not a necessary party to the foreclosure action unless he retained some interest in or lien or claim upon the property or demand secured and the mortgagee had actual notice thereof.

Appellant alleges that the grant deed to A.I.C. "was in fact only a mortgage, and was intended by both the mortgagor and the grantee therein to be only a mortgage and to stand only as security for said bail bond, and the grantee therein never took possession of said real property, but the grantor therein, Louis Johnson, and his heirs, remained in the continuous possession of said real property, and the defendant, Home Owners' Loan Corporation, had *actual knowledge thereof at all times*." (Italics ours.)

[4, 5] It seems to us that section 2950 of the Civil Code clearly disposes of the remaining question. It provides: "When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, *or persons having actual notice*, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the county recorder of the county where the property is situated." (Italics ours.) As will be noticed from this section, the grant may be defeated or affected as against the grantee, his heirs, or devisees, *or persons having actual notice*. Appellant alleges that respondent "had actual notice." Whether appellant can establish such actual notice cannot be determined at this time as the allegation is deemed to be true for the purpose of testing the ruling on the demurrer. Favorite v. Superior Court of Riverside County, 181 Cal. 261, 184 P. 15, 8 A.L.R. 290.

Respondent, however, claims that the facts in the instant case bring it within the provisions of section 726 of the Code of Civil Procedure, subdivision 4, which provides: "No person holding a conveyance from or under the mortgagor of the property mortgaged, * * * which conveyance * * * does not appear of record in the proper office at the time of the commencement of the action need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance * * * as if he had been a party to the action." He cites Hager v. Astorg, 145 Cal. 548, 79 P. 68, 104 Am.St.Rep. 68; Hawely v. State Assurance Co., 182 Cal. 111, 187 P. 1; Shurtleff v. Kehrer, 163 Cal. 24, 124 P. 724; Filipini et al. v. Trobock, supra; Redondo Improvement Co. v. O'Shaughnessy, 168 Cal. 323, 143 P. 538; and Aldrich v. Stephens, 49 Cal. 676.

[6] As pointed out by appellant, we are not here dealing with a person holding a conveyance *from* or *under* the mortgagor, which conveyance is *not* of record. The grant deed in the instant case was duly recorded. The facts in the cases cited are quite different from the facts of the case at bar. The Hager case deals with an unrecorded deed and comes within section 726 of the Code of Civil Procedure. In the Hawley case the grantor and grantee were both made parties to the action. No question of actual notice of any trust or defeasance was alleged. The Shurtleff case supports the conclusion here reached. It held that Bracken, a grantee, was not the holder of title under an unrecorded deed. He held title under a deed duly recorded but recorded prior to the beginning of the action. The court there held that section 726 of the Code of Civil Procedure had no application. The Filipini case merely held that the recordation of the deed after the maturity of the note made the grantee thereof a proper and necessary party. The main question decided in the Redondo Improvement Company case was that the presence or absence of the subsequent conveyance upon the record, when the foreclosure action was commenced, was the test whether the grantee need or need not be made a party defendant. In the Aldrich case the court assumed the grant deed to be unrecorded. The cases cited, therefore, do not support respondents' contention. We do not believe the facts in the instant case come within the provisions of section 726 of the Code of Civil Procedure.

Therefore section 2950 of the Civil Code applies.

The judgment is reversed with directions to the trial court to overrule the demurrer and allow respondents a reasonable time within which to answer.

BARNARD, P. J., and MUNDO, J. pro tem., concurred.

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46 Cal.App.2d 530

LEE v. SMALL CLAIMS COURT OF JUDICIAL TOWNSHIP NO. 4, IMPERIAL COUNTY et al.

Civil No. 2718.

District Court of Appeal, Fourth District, California.

Aug. 18, 1941.

1. Certiorari 🔑69

In certiorari proceedings to annul judgment for administrator of decedent's estate and execution thereon, where affidavit supporting order for publication of writ as against administrator sufficiently indicated that he was purposely avoiding personal service of petition and showed due diligence of petitioner in attempting to make such service, administrator's default was properly taken.

2. Certiorari 🔑68

The evidence adduced on hearing before inferior tribunal having limited jurisdiction can be brought up to reviewing court on certiorari for sole purpose of determining whether such tribunal's finding of jurisdictional fact is sustainable by evidence before it, and such decision must be annulled, if there be no evidence to sustain it.

3. Courts 🔑175

Where administrator of decedent's estate was never present before Small Claims Court during action instituted therein by his intestate and never moved to be substituted as party plaintiff therein after intestate's death, there was no proper record of administrator's appointment before such court or superior court, superior court's judgment, annulling on certiorari Small Claims Court's judgment for administrator after his unauthorized substitution as plaintiff on his son's request, must be affirmed. Code Civ. Proc. §§ 117g, 385.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Proceeding by E. A. Lee for a writ of certiorari to annul a judgment of the Small Claims Court of Judicial Township No. 4, Imperial County, for P. I. Haddan, as administrator of the estate of Myrtle G. Haddan, deceased, against petitioner, and execution issued thereunder. From an order annulling and vacating the judgment and execution, respondent court and the administrator appeal.

Affirmed.

Kendall B. Perkins, of Beverly Hills, for appellants.

No appearance for respondent.

GRIFFIN, Justice.

Once before this action was before this court for consideration. Lee v. Small Claims Court, 34 Cal.App.2d 1, 92 P.2d 937. The facts are quite fully set forth therein. After a reversal of the judgment, service was attempted to be made on P. I. Haddan, Sr., as administrator, by publication. His default was entered and he made no appearance at the time set for the further hearing of the certiorari proceedings. A similar judgment followed as was rendered in the previous hearing. Appellants filed an opening brief and contend that the judgment should again be reversed and raise many of the points heretofore raised. They cite many of the authorities heretofore cited. After due notice, petitioner and respondent has failed to file any brief in this action.

Appellants now argue (1) that the substituted service of appellant administrator was defective; (2) that the superior court acquired no jurisdiction of the subject matter or of appellant administrator; and (3) that the judgment of the Small Claims Court was a valid and binding judgment.

We will first discuss the record and evidence presented to the superior court in reference to the right of the Small Claims Court to enter a judgment in favor of P. I. Haddan, Sr., as administrator of the estate of Myrtle G. Haddan, deceased, and against petitioner and respondent E. A. Lee. A stenographic transcript of the testimony taken before the Small Claims Court was considered by the trial court as well as the docket entries of that court. This record discloses that the Small Claims Court action was first instituted in the Small Claims Court by affidavit signed by Myrtle G. Haddan, as plaintiff, against E. A. Lee and several others, as defendants. Plaintiff then resided in Los Angeles county but claimed that the cause of action originated in Imperial county. The defendants were ordered to appear before the Small Claims Court on August 9, 1937. Several of them appeared, including petitioner and respondent herein, but plaintiff Myrtle G. Haddan failed to appear. P. I. Hadden, Jr., also known as Phil Haddan, her son, who was not a party to the action, appeared in the court and the justice remarked to him: "She (plaintiff) isn't allowed an attorney, but you appear as a friend of the court," to which remark the son replied: "I want to make a statement for the purpose of the record of this suit. In so far as this case is concerned, I have absolutely no interest in its merit. * * * I only appear here in behalf of my mother. I didn't even know I was going to make a trip to the valley when I came in here to this hearing. * * * I want the court to understand I do not appear here as a plaintiff in the action and I have no interest in the matter." Thereupon, the court swore the witnesses and took certain evidence. Objection was made by the defendant Lee to proceeding in the absence of the plaintiff. After some argument the court continued the matter until the "cooler weather" set in, and on account of the absence of the plaintiff. Defendant Lee objected to any further continuance. On April 19, 1939, Lee received the following notice signed by the justice of the Small Claims Court: "The case of Mrs. P. I. Haddan v. E. A. Lee, et al., has been pending for many months. * * * Meanwhile Mrs. Haddan has died * * * and her son * * * Phil Haddan, appearing at this time, requests that the case be heard at this time of his visit; wherefore the time for service of order is shortened to one day, and you are ordered to appear at 5 p. m. April 20, 1938, at the justice's court for special hearing of said case." April 20, 1938, Lee replied: "* * * the plaintiff has died and my attorney that handled this matter has also died. And I am asking that the case be dismissed, as the plaintiff's testimony is very important in this case. It is impossible for me to appear for a hearing in this case on so short a notice." On April 22, 1938, the following notation appears of record in that court's docket: "It being known to court that the plaintiff Myrtle Haddan is dead and that Phil Haddan is her son and legal heir to her estate, at his request, Phil Haddan is joined in this action, as a plaintiff and P. I. Haddan, father of Phil Haddan and husband of Myrtle Haddan and duly appointed administrator of the said estate of Mrs. Myrtle Haddan (deceased) is substituted for Myrtle Haddan as plaintiff in this action." On April 27, 1938, a further hearing was had. P. I. Haddan, Jr., was allowed, over objection, to appear for his father, P. I. Haddan, Sr., administrator. The matter was then taken under advisement and on or about that date the Small Claims Court entered and signed a written judgment in favor of P. I. Haddan, Sr., as administrator against E. A. Lee, defendant, in the sum of $39.90. According to the docket, notice of the judgment was mailed May 25, 1938. Defendant Lee was barred from an appeal from the judgment as five days from the entry of judgment had expired. § 117j, Code Civ.Proc. The time for appeal had expired long before Lee received notice of its entry. On May 14, 1938, before the notice of entry of judgment was mailed, P. I. Haddan, Jr., obtained an execution on that judgment, and sold thereunder, by constable's sale, two certain judgments belonging to defendant Lee, in the sum of $3,000, for the total sum of $15. Later these two judgments were marked fully satisfied of record.

Lee, upon discovery of the above proceedings, applied to the superior court for a writ of certiorari asking that the judgment and execution issued thereunder be annulled for the reason that the Small Claims Court acted without, and in excess of its jurisdiction; that the judgment was not supported by the evidence nor the record; that the Small Claims Court was not authorized to hear evidence in that action without the personal presence of the plaintiff; that it was not authorized to permit P. I. Haddan, Jr., to appear on behalf of the plaintiff; that P. I. Haddan, Sr., was not properly substituted as a party plaintiff therein; and that the subject matter of the action had been adjudicated in a prior proceeding on a third-party claim in the superior court of that county.

Upon the record and the evidence produced the superior court entered its order annulling and vacating the judgment of the Small Claims Court and the execution issued thereon.

[1] The affidavit supporting the order for publication of the writ of certiorari as against P. I. Haddan, Sr., administrator, sufficiently indicates that the administrator was purposely avoiding personal service of the petition for the writ and also shows due diligence on the part of petitioner and respondent Lee in attempting to make personal service. Appellant Haddan's default thereunder was properly taken.

The right to the writ, after the time for appeal had expired, under the evidence here related, was disposed of in the former opinion.

[2] The question here presented is whether the Small Claims Court exceeded its jurisdiction in entering the judgment complained of. It is a fair summary of the decisions of this state, dealing with the scope of statutory certiorari, to say that the evidence adduced upon the hearing before an inferior tribunal, having limited jurisdiction, may be brought up to the reviewing court upon certiorari for the sole purpose of determining whether or not, from the evidence before it, the findings of a jurisdictional fact by such inferior tribunal is sustainable, and if there be no evidence to sustain such decision, it must be annulled. Garvin v. Chambers, 195 Cal. 212, 221, 232 P. 696.

[3] It is clear that under section 117g of the Code of Civil Procedure, "No attorney at law or other person than the plaintiff and defendant shall take any part in the filing or the prosecution or defense of such litigation in the small claims court". P. I. Haddan, Sr., was never present and apparently made no application to be substituted as party plaintiff. There apparently was no proper record before either court of his appointment as administrator of the estate. Under the above-quoted section, P. I. Haddan, Jr., was not permitted to appear for or represent his father in the action. Lee objected to the absence of plaintiff on several occasions. Section 385 of the Code of Civil Procedure provides that in case of the death of a party to an action the court on motion may allow the action to be continued by a representative or successor in interest. It is apparent that P. I. Haddan, Sr., at no time moved the court to be substituted, and the authority of P. I. Haddan, Jr., to so substitute his father as administrator was not authorized under section 117g of the Code of Civil Procedure.

It was pointed out in the former opinion that where the substituted plaintiff had not been appointed administrator of the estate of the original plaintiff and was not properly substituted, the jurisdiction of the justice of the Small Claims Court to proceed to enter judgment under such circumstances could be properly assailed (citing authorities). The Superior Court found that there was no record or sufficient evidence of the appointment of P. I. Haddan, Sr., as administrator and that there was no proper substitution of parties plaintiff. That finding is supported by the record. The facts and circumstances related fully justify an affirmance of the judgment.

Judgment affirmed.

BARNARD, P. J., and MUNDO, J. pro tem, concurred.

46 Cal.App.2d 568

BERNSTEIN v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civil No. 13217.

District Court of Appeal, Second District, Division 1, California.

Aug. 26, 1941.

Hearing Denied Oct. 23, 1941.

1. Guardian and ward ⚷13(8)

Where wife was appointed guardian of husband's estate on ground that he was an incompetent because of disease and not because of weakness of mind, and husband, while in full possession of his mental faculties and in receipt of the benefit of his estate, waited for almost six years to initiate proceeding to review legality of the appointment of his wife as guardian, husband's conduct amounted to "consent" and his right to writ of certiorari was barred by "laches".

See Words and Phrases, Permanent Edition, for all other definitions of "Consent" and "Laches".

2. Guardian and ward 🔑27

Where wife was appointed guardian of husband's estate on ground that he was incompetent because of disease and not because of weakness of mind and thereafter daughter filed a petition by which she sought to succeed mother as guardian, on hearing of the daughter's petition father could present testimony to effect that he was no longer suffering from any disability by reason of his physical condition.

◆

Certiorari proceeding by Joseph M. Bernstein against the Superior Court of Los Angeles County.

Petition denied.

Joseph M. Bernstein, of Los Angeles, in pro. per. for petitioner.

No appearance for respondent.

DESMOND, Justice pro tem.

Petitioner seeks a writ of certiorari, questioning the legality of proceedings by which his wife was appointed guardian of his California estate upon her petition filed in August, 1935, alleging that he was an incompetent person. Referring to said petition, we find that representations were made therein that petitioner herein was incompetent because of disease, consisting of various physical ailments, and not because of any weakness of mind.

[1] Petitioner fails to show that he did not receive notice of the petition under which his wife was appointed guardian of his estate, and fails to show that he did not have timely knowledge of the action taken on said petition. It appears from a petition of his daughter now pending in the Superior Court of Los Angeles County, in which she seeks to succeed his wife as guardian upon her resigning from that position, that the California estate of petitioner has consisted of a monthly income amounting to $120 per month. This amount has been contributed by various insurance companies, and the income, according to the daughter's representation, not challenged by the petitioner, has been used and is being used to provide for the support and maintenance of his wife and himself. It appears that this petitioner, while in full possession of his mental faculties and in receipt of the benefit of his estate, has waited for almost six years to initiate this proceeding. In this he has been guilty of laches, and his conduct since the making of the order complained of amounts to a consent thereto. See 4 Cal. Jur. page 1061, "Discretion in Granting" (the writ of certiorari), and page 1062, "Laches". The citation furnished by petitioner in support of his petition, namely Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635, is not in point, for two reasons. First, the court in that case failed to order notice sent to the alleged incompetent, and second, it appeared that she had been legally adjudged insane, and in that condition could not be bound by the principles of waiver or estoppel.

[2] In the proceeding now pending in the probate court in which the daughter of petitioner seeks to succeed her mother as guardian of his estate, this petitioner will have an opportunity, if he wishes, to present testimony to the effect that he is no longer suffering from any disability by reason of his condition.

The petition for a writ of certiorari is ordered denied.

YORK, P. J., and DORAN, J., concurred.

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46 Cal.App.2d 526

STATE COMPENSATION INS. FUND v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 2667.

District Court of Appeal, Fourth District, California.

Aug. 18, 1941.

1. Workmen's compensation 🔑352

Under Workmen's Compensation Act, liability for injuries sustained by employee in course of his employment is based upon relationship of employer and employee, and an owner is not liable for injuries sustained by an employee of an independent contractor. St.1937, p. 265, § 3201 et seq.

2. Workmen's compensation 🔑308

An "independent contractor" not entitled to a compensation award is one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work and not in the means whereby it is to be accomplished. St.1937, p. 265, § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

3. **Workmen's compensation** ⚷235

The "master and servant relationship" or "employer and employee relationship" exists for purposes of awarding compensation whenever the employer retains the right to direct how the work shall be done as well as the result to be accomplished, the right to control rather than the amount of control exercised being the determinative factor, and the rule requires that the right to exercise complete or authoritative control rather than mere suggestion concerning detail must be shown. St.1937, p. 265, § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee Relationship" and "Master and Servant Relationship".

4. **Workmen's compensation** ⚷347

Where owner of olive ranch contracted with another to furnish a crew to pick olives at specified rate per ton and thereafter contractor engaged a picker who fell from ladder and broke his arm, and picker testified that he was employed by contractor and that contractor gave all the orders and that he did not know owner had anything to do with the work, picker was an employee of an "independent contractor" and not entitled to compensation for injuries as against owner, and, under the evidence, theory of ostensible agency had no application. St.1937, p. 265, § 3201 et seq.

5. **Workmen's compensation** ⚷11

The purpose of the Workmen's Compensation Act is to place liability for industrial injuries upon industry rather than upon the workmen. St.1937, p. 265, § 3201 et seq.

6. **Constitutional law** ⚷70(1)

Workmen's compensation ⚷352

The Workmen's Compensation Act does not authorize the imposing of liability on an owner for injuries to a person who is not his employee, but the employee of an independent contractor, and any such change in the scope of the law should come from some lawmaking source and not from the courts. St. 1937, p. 265, § 3201 et seq.

Proceeding on a writ of certiorari by the State Compensation Insurance Fund to annul an award of the Industrial Accident Commission in favor of Harold Grashel for injuries.

Award annulled.

Donald Gallagher, W. T. Dunbar, and Edmund J. Thomas, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco (Eldon B. Spofford, of San Francisco, of counsel), for respondents.

BARNARD, Presiding Justice.

In this proceeding in certiorari petitioner seeks to annul an award of the respondent Commission in favor of the respondent Grashel.

The petitioner was the insurance carrier for Mrs. Alice Johnson, the owner of a ranch. She entered into a contract with one J. W. Gilstrap by which Gilstrap agreed to furnish a crew and pick a crop of olives growing on her land. Gilstrap agreed to do a first-class job and not to injure the trees, and Mrs. Johnson agreed to pay him $20 a ton for olives picked on one section of the ranch and $30 a ton for those picked on another section. Gilstrap put a crew of men to work picking these olives, and at the same time he had another crew picking olives on an adjoining ranch. After the work of picking olives had been started on Mrs. Johnson's ranch the respondent Grashel came along and applied to Gilstrap for a job. Gilstrap put him to work picking olives on this ranch at an agreed price per box, and about eight days later he fell from a ladder and broke his arm. The respondent Commission made an award in his favor as against this petitioner, discharging Gilstrap and Mrs. Johnson from liability, and this proceeding followed.

Among other things, the respondent Commission found as follows:

"Harold Grashel, applicant, while employed as an olive picker near Terra Bella, California, on January 20, 1941, by Alice Johnson, the contract of employment by and between the parties being an implied one made through the medium of J. W. Gilstrap, an ostensible agent of Alice Johnson, sustained injury occurring in the course of and arising out of his employment, * * *."

"The defendant, Alice Johnson, owner and operator of the Johnson Ranch upon which the applicant sustained the injury herein, had placed one J. W. Gilstrap in such a position on her ranch property as afforded the applicant reasonable grounds for believing that said J. W. Gilstrap was in fact an agent of the owner of said ranch, to-wit, Alice Johnson, and in undertaking such employment, he, the applicant, was the employee of the owner of said ranch and subsequent to the beginning of said employment the owner of said ranch, to-wit, Alice Johnson, at no time served notice in writing, orally or otherwise, upon the applicant that she was not in fact his employer and that J. W. Gilstrap was an independent contractor and his employer who had contracted to pick the olives on her ranch and that the applicant must look to said J. W. Gilstrap for payment of his wages and for compensation for injury, if any be sustained."

[1-3] The petitioner contends that the respondent Commission exceeded its jurisdiction in making these findings, that they are not supported by the evidence, and that Gilstrap was an independent contractor. Under the constitutional provision (§ 21 of Art. XX) and under the Workmen's Compensation Act, which is now embodied in the Labor Code, St.1937, p. 265, § 3201 et seq., liability in such a case as this is based upon the relationship of employer and employee. It has been consistently held that an owner is not liable where the injured person was the employee of an independent contractor. Western Ind. Co. v. Industrial Acc. Comm., 172 Cal. 766, 158 P. 1033; Sturdivant v. Pillsbury, 172 Cal. 581, 158 P. 222; Carstens v. Pillsbury, 172 Cal. 572, 158 P. 218; S. A. Gerrard Co. v. Industrial Acc. Comm., 17 Cal.2d 411, 110 P.2d 377, 378. In the last case cited, the rules here applicable are thus stated:

"An independent contractor is 'one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work and not in the means whereby it is to be accomplished'. Moody v. Industrial Acc.Comm., 204 Cal. 668, 670, 269 P. 542, 60 A.L.R. 299; Restatement, Agency, § 2. On the other hand, the relationship of master and servant or employer and employee exists whenever the employer retains the right to direct how the work shall be done as well as the result to be accomplished. Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 210 P. 820; Winther v. Industrial Acc. Comm., 16 Cal.App.2d 131, 60 P.2d 342; Restatement, Agency, § 2. But this rule requires that the right to exercise complete or authoritative control, rather than mere suggestion as to detail, must be shown. Moody v. Industrial Acc. Comm., supra; Winther v. Industrial Acc. Comm., supra. Also, the right to control, rather than the amount of control which was exercised, is the determinative factor."

[4] Applying these rules to the facts in the instant case, which are practically undisputed, it must be held that Gilstrap was an independent contractor. Aside from other evidence supporting this conclusion it is confirmed by the testimony of the respondent Grashel. He testified that he was hired by Gilstrap and that he talked to no one else. When asked whether anything was said to him as to whom he was being employed by, he replied: "Well, I understood employed by the contractor, the one that hired me." He further testified that Gilstrap gave all of the orders, that he did not know that Mrs. Johnson had anything to do with the work, that he never saw her directing the work in any way during the time he was there, and that he included her in his application to the Commission because she owned the grove.

The facts in this case bring it squarely within the principles set forth in the case of Winther v. Industrial Acc. Comm., 16 Cal.App.2d 131, 60 P.2d 342, although the evidence in support of the theory of independent contractor is stronger here than in the case cited. Under the circumstances here appearing the theory of ostensible agency not only has no application but is entirely without evidentiary support. The real issue is as to who was the employer of Grashel and it also appears from his own testimony that he was in no way deceived or misled in this connection.

[5, 6] The respondent Commission, in effect, concedes that this case falls within the principle announced in the Winther case, but argues that an adherence to the rule of that case, and others like it, would in many instances nullify the purpose of the compensation law, to place liability for industrial injuries upon industry rather than upon the workmen, since it often happens that an independent contractor is not financially responsible and is not protected by insurance. Whether the legislature would have power, in view of the consti-

tutional provision, to impose liability on an owner for injuries to a person who is not his employee, but the employee of an independent contractor, has been questioned. See Carstens v. Pillsbury, supra; Sturdivant v. Pillsbury, supra. In any event, any such complete change in the scope of the law should come from some law-making source and not from the courts.

For the reason given the award is annulled.

GRIFFIN, J., and MUNDO, J. pro tem., concurred.

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46 Cal.App.2d 869

PETTIFORD v. NELSON.

Civ. 2817.

District Court of Appeal, Fourth District, California.

Aug. 14, 1941.

Appeal and error 🔑787

Where judgment was entered on October 22, 1940, and notice of appeal and request for transcript were served and filed on January 6, 1941, and clerk's transcript and reporter's transcript had not been filed in District Court of Appeal, and proceedings for preparation of record were terminated in the trial court by an order of June 17, 1941, and no briefs had been filed and no appearance had been made on behalf of the appellant in response to notice of motion to dismiss the appeal, the appeal would be dismissed. Rules for Supreme and District Courts of Appeal, rule 5, § 1.

Appeal from Superior Court, San Diego County.

Action by Ralph E. Pettiford against Estelle B. Nelson. From the judgment, the plaintiff appeals.

Appeal dismissed.

No appearance for appellant.

Nottbusch & Nottbusch, of San Diego, and Betts & Garrison, of Los Angeles, for respondent.

BARNARD, Presiding Judge.

The respondent has moved to dismiss this appeal under the provisions of Rule V, Section 1 of the Rules for the Supreme Court and District Courts of Appeal.

It appears from the certificate of the clerk of the trial court that the judgment appealed from was entered on October 22, 1940, and that a notice of appeal and request for transcript were served and filed on January 6, 1941, but neither a clerk's transcript nor a reporter's transcript has been filed in this court. It further appears from the clerk's certificate that proceedings for the preparation of a record were terminated in the trial court by an order entered on June 17, 1941. No briefs have been filed and no appearance has been made on behalf of the appellant in response to the notice of motion to dismiss the appeal.

The appeal is dismissed.

We concur: GRIFFIN, J.; MUNDO, J. pro tem.

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46 Cal.App.2d 435

BREZNIKAR et al. v. T. J. TOPPER CO. et al.

Civ. 11511.

District Court of Appeal, First District, Division 2, California.

Aug. 8, 1941.

1. Malicious prosecution 🔑66

Where purchasers of store, as a result of institution by sellers of unfounded action in claim and delivery, were forced to make assignment for the benefit of creditors, the amount of detriment suffered by purchasers for which sellers, under statute with respect to measure of damages, were liable, constituted the fair market value of the purchasers' property less the portion thereof necessary to pay creditors. Civ.Code, § 3333.

2. Evidence 🔑474(19)

In action by the purchasers of a store for damages resulting from commencement of unfounded action in claim and delivery, one of the purchasers was a competent witness as to the fair market value of the property of the purchasers as bearing upon the measure of damages.

3. Malicious prosecution 🔑62

In action by the purchasers of a store for the loss of business standing, credit, and good will allegedly resulting from the commencement of an unfounded action in claim and delivery against purchasers, testimony by one of the purchasers regarding the cost prices of property lost by purchasers as bearing upon the measure of damages was competent.

4. Malicious prosecution 🔑66

In action by purchasers of a store for a malicious tort allegedly resulting in loss of business standing, credit, and good will, the price received for purchasers' property at public auction by assignee of purchasers for benefit of creditors, although evidence thereof was admissible, was not conclusive as to the fair market value of such property for the purpose of determining measure of damages.

5. Malicious prosecution 🔑69

An award of $4,000 damages for malicious commencement of action in claim and delivery, resulting in closing of plaintiffs' store business and loss of equity therein, was not excessive, where there was evidence that plaintiffs' equity in business, represented by difference between total assets and liabilities thereof, amounted to from approximately $3,300 to over $6,500. Civ.Code, § 3333.

6. Malicious prosecution 🔑55

Where plaintiffs in action for malicious commencement of action in claim and delivery, as a result of which plaintiffs were forced to make an assignment for the benefit of creditors, based their claim for damages on the loss of their assets both tangible and intangible, whether plaintiffs were previously insolvent, as alleged by defendants, was immaterial, since the question of loss of profits or loss of trade was not involved.

7. Appeal and error 🔑1194(3)

Where appellate court, in reversing judgment for plaintiffs in action for malicious tort, examined question of proximate cause, and remanded case for retrial solely upon the issue of damages, defendants could not contend that appellate court did not hold that allegedly malicious acts of defendants were the proximate cause of damage to plaintiffs.

8. Appeal and error 🔑1198

Where judgment in favor of plaintiffs in action for malicious tort was remanded for retrial solely upon the issue of damages, it became the duty of the trial court to follow explicitly the directions of the higher court.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by John E. Breznikar and others against T. J. Topper Company and others, for damages for malicious commencement of action in claim and delivery allegedly resulting in a loss of plaintiffs' business standing, credit, and good will. From a judgment in favor of plaintiffs, defendants appeal.

Affirmed.

Erwin C. Easton, of San Francisco, and Elliott Johnson and George M. Mason, both of Oakland, for appellants.

Nichols & Richard, of Oakland, and Clarence E. Todd, of San Francisco, for respondents.

STURTEVANT, Justice.

This is an appeal from a judgment awarding the plaintiffs $4,000 as damages for a malicious tort. The action was tried before the court sitting without a jury. The trial court made findings in favor of the plaintiffs and the appeal is from the judgment entered on those findings. It is the second appeal. Breznikar v. T. J. Topper Co., 23 Cal.App.2d 298, 72 P.2d 895. In the cited case the facts showing the wrongful acts of the defendants are fully set forth and need not be repeated. As shown by said decision the first judgment was reversed and the cause was remanded to retry the issue of damages only. The defendants have brought up typewritten transcripts including by stipulation the reporter's transcript on the first trial.

In the plaintiffs' fourth amended complaint they inserted three different causes of action. The second count is based on the wrongs inflicted on them by the acts of the defendants in maintaining an action in claim and delivery against the plaintiffs. In paragraph four they alleged: "That the business standing, credit and good will of these plaintiffs, due to said wilful and malicious acts of said defendants as aforesaid, was utterly broken up, destroyed and lost, and by reason thereof plaintiffs were compelled to go out of business, lost their stock in trade, assets and good will, all to the damage of plaintiffs in the sum of Twenty-five Thousand ($25,000) Dollars." After the second trial of the action the trial court made a finding as follows: "The court finds that it is true that the business standing, credit and good will of plaintiffs due to the wilful and malicious acts of defendants T. J. Topper and T. J. Topper Company, a corporation, as alleged was utterly broken up, destroyed and lost and by reason thereof, plaintiffs have lost their stock in trade, assets and good will of their said business and have been damaged thereby in the sum of $4000." The defendants contend that plaintiffs had no business standing, credit or good will. The contention was not specifically presented in the trial court. The plaintiffs' theory was that the acts of the defendants had resulted in a wrongful conversion of their equity in an established business. The business had been organized by the defendants and operated as their Oakland branch. During the same period of time the defendants had operated a similar place of business in San Francisco. In November, 1931, defendants sold the business to the plaintiffs. The plaintiffs offered evidence showing that they had built the business up. That the business had some good will is shown by the contract of sale executed by the parties when the defendants sold the property to the plaintiffs. The document recites the sale of the property "* * * together with the good will and title thereto * * *". True it is that during the trial the plaintiffs did not offer to prove a specific value of the good will as an element of their damage. The record discloses two different valuations of the equity of the plaintiffs. By the acts of the defendants the plaintiffs were compelled to make an assignment for the benefit of their creditors. They assigned to the Oakland Credit Men's Association. By the records of that association it was shown that when it took over the property the assets amounted to $9,380.74 and the liabilities were listed at $6,511. The latter sum included taxes for the year 1934 which were not due on December 28, 1933, when defendants committed their alleged torts. The list also included $200, being rent for January and February, 1934, but which was not due or payable. It also included the fees of the association, $303.06. That item, of course, was not due. The total of the items not due was $587.36 which deducted from the list of liabilities above mentioned leaves $5,923.64. Deducting the liabilities from the assets the equity of the plaintiffs would be $3,379.10. Mr. Breznikar testified as to values showing total assets in the sum of $12,454.60. Deducting liabilities that were due, $5,923.64, the value of the plaintiffs' equity was $6,530.96.

[1-5] It is statutory that: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Civ.Code, sec. 3333. And see 17 C.J., Damages, sections 109 and 182, 25 C.J.S., Damages, §§ 41 and 83. In the instant case detriment suffered by the plaintiffs was the fair market value of their property less that portion thereof necessary to pay their creditors. As to the fair market value of the properties of the plaintiffs Mr. Breznikar was a competent witness. Kirstein v. Bekins Van, etc., Co., 27 Cal.App. 586, 589, 150 P. 999. He testified regarding the cost prices and such testimony was competent. Union Hollywood Water Co. v. City of Los Angeles, 184 Cal. 535, 195 P. 55. The defendants point to the price received for the property at public auction by Oakland Credit Men's Association and claim said price was its value. Conceding evidence of said sales price was admissible, it was not conclusive. 23 C.J., Evidence, sec. 1799, p. 57; In re Alldred's Estate, 229 Pa. 632, 79 A. 143; Strothers v. McFarland, Mo.App., 194 S.W. 881. Applying each of these rules, we think it is obvious that the defendants may not complain of the amount of the judgment. Keller v. Cleaver, 12 Cal.App.2d 546, 55 P.2d 1262.

[6] The defendants also contend that the plaintiffs were at all times insolvent. That question was not an issue on trial before the court. The sole issue on trial was damages. If we understand the defendants correctly it is their contention that being insolvent there were no profits and therefore there should be no recovery. In making that contention the defendants are confusing two different propositions. The plaintiffs were not claiming loss of profits or loss of trade. They were contending that their assets, both tangible and intangible, were wrongfully taken from them.

[7,8] The defendants further contend that "This appellate court, in its previous decision on appeal, did not hold that the alleged acts of appellants were the proximate cause of any damage to respondents". We think they are mistaken. The transcript of proceedings on the first trial shows that the sequence of the acts of the defendants, of the Thayer Realty Company, the landlord, and of Oakland Credit Men's Association, were fully gone into. The decision (Breznikar v. T. J. Topper Co., 23 Cal.App.2d 298, 72 P.2d 895) shows that the proximate cause was also carefully considered. Having so considered all of the issues the action was remanded for retrial solely upon the issue of damages. "It became the duty of the trial court to follow explicitly the directions of the higher" court. 1 Hayne New Trial and Appeal 13; 3 Am.Jur. 730, Appeal and Error, sec. 1234; Cowdery v. London, etc., Bank, 139 Cal. 298, 306, 307, 73 P. 196, 96 Am.St.Rep. 115.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

46 Cal.App.2d 545

SCHWALEN et al. v. RETAIL FOOD CLERKS UNION LOCAL 870 et al.

Civ. 11695.

District Court of Appeal, First District, Division 1, California.

Aug. 20, 1941.

1. Courts ⇨91(1)

Where, subsequent to the filing of defendants' opening brief, identical points urged therein against a preliminary injunction were brought before the Supreme Court in another case which was decided against the preliminary injunction, and afterwards a petition for certiorari was denied by the Supreme Court of the United States, and plaintiffs expressly conceded that the decision rendered therein was controlling, the order granting the preliminary injunction was reversed.

2. Appeal and error ⇨102

An order overruling a demurrer is not appealable.

◆

Action by W. H. Schwalen and others against Retail Food Clerks Union Local 870 and others, to enjoin defendants from picketing plaintiff's grocery store and from maintaining other forms of boycott against plaintiffs and their place of business. From order granting preliminary injunction and from order overruling demurrer to the complaint, defendants appeal.

Order granting preliminary injunction reversed, and appeal from order overruling demurrer, dismissed.

James F. Galliano, of Oakland, for appellants.

Breed, Burpee & Robinson, of Oakland, for respondents.

KNIGHT, Justice.

Defendants appeal from an order granting a preliminary injunction, and from an order overruling their demurrer to the complaint, in an action brought to enjoin defendants from picketing plaintiffs' grocery store, and from maintaining other forms of boycott against plaintiffs and their place of business.

[1,2] Subsequent to filing of defendants' opening brief, the identical points urged therein against the validity of the preliminary injunction were brought before the supreme court in another case which has since been decided (McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373), and afterwards a petition for a writ of certiorari was denied by the Supreme Court of the United States (61 S.Ct. 939, 85 L. Ed. 1525). Plaintiffs expressly concede that the decision rendered therein is here controlling, and that accordingly the *order granting* the *preliminary injunction* herein must be *reversed.* It is so ordered; and the *appeal taken from the order overruling the demurrer is dismissed* for the reason that it is not appealable.

PETERS, P. J., and WARD, J., concur.

46 Cal.App.2d 514

LAWRENCE v. TYE et al.

Civ. 12451.

District Court of Appeal, Second District, Division 1, California.

Aug. 18, 1941.

1. Brokers 🔑38(4)

In action against real estate broker and his salesman for fraud, evidence *held* sufficient to justify jury's verdict for plaintiff on findings that defendants conspired, while they were plaintiff's agents, to obtain plaintiff's property at low price to their own advantage and plaintiff's proportionate disadvantage, and that defendants' false representations as to values and fraudulent concealment of facts, which defendants, in good faith, were bound to disclose to plaintiff, enabled them to accomplish such purpose.

2. Principal and agent 🔑48

The rules defining agent's responsibility to his principal are closely akin to those binding on trustee toward his beneficiary.

3. Principal and agent 🔑69(4)

To validate agent's purchase of property from his principal, agent must show that he acted in perfect good faith, revealed all material facts, and paid adequate consideration, and sale will be set aside if agent concealed any facts within his knowledge which might have influenced principal's judgment as to price or value.

4. Brokers 🔑34

A real estate broker, participating equally with his salesman in profits of salesman's fraudulent exchange of principal's property for other property and acting personally in connection therewith, is jointly liable with salesman to principal in compensatory damages.

◆

Appeal from Superior Court, Los Angeles County; A. F. Bray, Judge pro tem.

Action by Nellie J. Lawrence against B. W. Tye and another for fraud. From a judgment awarding plaintiff both compensatory and exemplary damages, defendants appeal.

Affirmed.

Warren E. Libby and Fred G. Conrad, both of Los Angeles, for appellant O. H. Parkening.

H. C. Millsap, of Los Angeles, for appellant B. W. Tye.

Howard F. Shepherd, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This is an appeal from a judgment entered upon a jury's verdict in a fraud action whereby compensatory damages were awarded against both appellants jointly and exemplary damages in differing amounts against them severally. It is claimed, as the sole ground of appeal, that the evidence adduced was insufficient to justify the verdict.

Defendant Tye, at the time of the transactions involved, was engaged in the business of real estate broker, employing a number of salesmen including his codefendant, Parkening. On June 9, 1937, Mrs. Lawrence, plaintiff and respondent, widowed and more than 70 years of age, signed a listing appointing B. W. Tye Co. her exclusive agents for 90 days to sell her property, the Aventine Apartments, for $50,000, subject to a trust deed originally written in the amount of $10,000, but reduced during the year 1937 to $9,400. This listing was secured by defendant Parkening and provided for payment of an agent's commission in the event of sale or exchange. The property was not disposed of in the 90-day period and on September 30, 1937, a second exclusive listing was signed by Mrs. Lawrence similar in all respects to the first, except that the period was fixed at 60 days. After approximately a month had elapsed Mrs. Lawrence wrote the following letter:

"Los Angeles, Calif.
"November 2, 1937.

"Mr. O. H. Parkening
"City

"Dear Sir:

"As your firm has had the exclusive listing on The Aventine Apts. for five months and no sale has been made, kindly grant me a release in full—in writing—so that I may get busy with others and make disposition, if possible.

"Thanking you for your interest and efforts in my behalf and trusting that we may be able to do some business in the future, I am

"Resp. yours,
"(Mrs.) Nellie J. Lawrence
"10518 Wellworth Ave."

Next day Mr. Parkening answered as follows:

"November 3, 1937

"Mrs. Nellie J. Lawrence
"10518 Wellworth Ave.
"Los Angeles, California

"Dear Mrs. Lawrence:

"In accordance with your wishes, we hereby release our exclusive listing on your property known as 10541 Wilshire Boulevard.

"We are sorry that we were unable to make a deal for you but we will keep on trying and trust that everything will work out satisfactorily.

"Very truly yours,
"B. W. Tye Co.
"By
"O. H. Parkening,
"General Sales Manager"

Thereafter, Mr. Parkening continued to show his interest in Mrs. Lawrence's property, and on one occasion, November 27th, drove her to Riverside county to inspect an orange grove which he had listed for exchange. Respondent declined to trade for that ranch, but expressed some interest in another grove located in Orange county upon which defendants held a listing. This was known, and in this opinion will be referred to, as the Pagel grove, and on the return trip from Riverside county Mrs. Lawrence and Parkening stopped to inspect it. Shortly thereafter, the Tye Co. placed this ranch in escrow, as agent for Mr. Pagel, in an exchange for apartment property belonging to a Mrs. Crickelair, and on December 29, 1937, the escrow was closed, about $9,000 cash going to Mrs. Crickelair and title to each parcel passing to the new owner, the grove being subject to a trust deed payable five years from December 23, 1937, in the sum of $8,000. In this deal defendant Tye received $1,500 commission, another broker, L. L. Hullet, receiving the same amount, as Mrs. Crickelair's agent.

Meantime, according to Mr. Parkening's testimony, he and Mrs. Lawrence had discussed, on several occasions, the possibility of her obtaining the Pagel ranch in exchange for her property, but he explained that could not be done "unless we got it into someone's hands other than Nancy Smith Crickelair, because Nancy Smith Crickelair did not want another apartment house". However, Mr. Parkening told Mrs. Lawrence that she could make an offer for the ranch even while it was in escrow and accordingly, on December 20th, prepared, on a letterhead or form of B. W. Tye Co., an exchange agreement whereby Mrs. Lawrence offered, to no one in particular, to exchange the Aventine apartment house for the Pagel orange grove, the lien against each being recited. In this offer, signed by respondent, B. W. Tye Co. was appointed her agent, the closing paragraph reading, "This is a net deal and no commission to be paid by the undersigned." The instrument was witnessed by Parkening acting for B. W. Tye Co., and on a subjoined form of "Acceptance" appear the signatures "F. E. Eades" and "O. H. Parkening", attached, according to the latter, "after Jan. 8, 1938". It is proper to note, however, that the offer to exchange was by its terms to become null and void unless accepted within ten days after its date. F. E. Eades was employed as secretary of the B. W. Tye Co., and in that capacity, being a single woman, frequently acted as dummy in real estate transactions. She was called upon to play that part in the instant case; in fact, two days after her "blind" offer to exchange was made, Mrs. Lawrence on December 22d signed escrow instructions with Seaboard National Bank in which she undertook to deposit a deed to F. E. Eades of her real property, subject to the $9,400 lien, and a bill of sale to Miss Eades of furniture in two of the apartments therein; F. E. Eades, on her part, agreeing, in the same escrow instructions, to furnish a deed to Mrs. Lawrence of the orange grove, subject to the trust deed for $8,000. The instructions called for internal revenue stamps in the sum of $22 to be attached to each deed, indicating an equity in each parcel of $22,000.

However, the orange grove which Mrs. Crickelair acquired on December 29th passed almost immediately, by deed dated January 4, 1938, to one Tustin and wife, in exchange for business property in Los Angeles, and subject to the $8,000 lien, was transferred while in escrow, by deed dated January 8, 1938, from Tustin to Eades, for $14,500, indicating an actual equity in the grove not exceeding that amount, and probably less, since Mr. Tustin received only $12,500, due to payment to Hullet of $1,000 as commission, and the same amount to Tye, either in cash, or in an amount credited on Miss Eades' ostensible purchase of the grove. The grove was passed in escrow to Mrs. Lawrence from Miss Eades, who dated and acknowledged her deed January 8, 1938. This deed, however, was not recorded by the escrow clerk until two weeks later, January 22, 1938. Meantime, title to the Lawrence property which had passed in escrow to Miss Eades was conveyed by her in escrow to O. H. Parkening and wife, by deed of January 3, 1938, five days earlier than January 8th, date of the deed by which Miss Eades acquired from Tustin title to the orange grove, and also date of the deed by which she passed title to the grove to Mrs. Lawrence. Everything being held in escrow, Mrs. Lawrence eventually received her deed to the grove. During these escrow days, Mr. Parkening filed an application dated January 6, 1938, for a loan of $30,000 on the Aventine Apartments, representing the value of the property as $60,000. Acting upon this application the Prudential Insurance Company granted a loan of $26,000 on the security of a trust deed in that amount, executed by Mr. and Mrs. Parkening upon the Aventine Apartments. The reverse side of the application for this loan under "Report to be made by Representative" presents typewritten answers to various inquiries, including an affirmative to the final query, "Do you fully recommend the approval of this application?" This is followed by the printed statement, "The security herein described has been personally inspected by a representative of this office and the facts as set forth in this application and appraisal are correct." The only signature to this statement is typewritten as follows: "The Thomas Mortgage Co. by ——— Vice-President Dated January 10, 1938." Introduced at the trial was a letter written upon stationery of Thomas Mortgage Company of Los Angeles, reading as follows:

"December 28th, 1937

"The Thomas Mortgage Company
"Los Angeles, California

"Gentlemen:

"In connection with my application for the proposed loan to be placed on property located at 10541 Wilshire Blvd. L. A., California, it is my understanding that the following requirements will be made a part of the loan:

"Conditional assignment of rents.

"First chattel mortgage covering furniture, (if furnished) and fixtures, including electric refrigeration, all of which must be fully paid for.

"Fire insurance with mortgagee clause in favor of the Prudential Insurance Company.

"Occupancy required by the insurance company.

"LK/ "(Signed) O. H. Parkening"

Asked if the signature appearing on this letter were his, Mr. Parkening answered, "Yes, but that letter was signed after January 8."

The inquiry then continues, "Q. You mean that it was prepared by the mortgage company prior to that date? A. It perhaps was. There was nothing signed on this deal until after January 8.

"Q. Had you made some application to the Thomas Mortgage Company prior to December 28, 1937, with reference to this loan? A. Mr. Tye handled that. I don't know.

"Q. Then you, personally, did not have any negotiations with the Thomas Mortgage Company as early as December 28, 1937? A. No, sir."

When the letter was shown Mr. Tye he testified as follows: "A. That was signed by Mr. Parkening either after January 8, or on January 8, or after January 8.

"Q. Now, Mr. Tye, why do you fix the date on or about January 8? A. There was no wheel turned, nothing in the world was done towards acquiring this ranch, towards buying this property, towards getting a loan, towards anything, until Mrs. Lawrence signed that statement. That's why I can fix it positively.

"Q. Mr. Tye, were you present when Mr. Parkening signed these documents? A. Yes, sir.

"Q. Mr. Tye, when did you first know of the Lawrence property, this exchange of the Aventine Apartment for the Pagel Ranch; when did you first know of it, not when it was made, but when did you first know about it? A. Sometime the latter part of December.

"Q. 1937? A. 1937.

"Q. When was the first time it was suggested to you that you individually put up money for this property; do you have any recollection of that? A. I think it was sometime right around January 6.

"Q. Did you know of the Lawrence escrow of December 22, at the bank being open at the time it was opened? A. Oh, I would say, I guess, that I did. I know in a general way about what is going on in the office."

The statement which Mrs. Lawrence signed, referred to in this testimony, is as follows:

"Los Angeles, Calif., January 8, 1938
"Mr. B. W. Tye
"5050 Wilshire Boulevard
"Los Angeles, Cailifornia
"Dear Sir:

"With reference to the exchange of properties, between myself as First Party and F. E. Eades, as Second Party, being handled through Escrow No. 2472, at the Wilshire Dunsmuir Branch of the Bank of America, N. T. & S. A., wherein, the property being conveyed by me is described as Parcel I (Legal description of Aventine Apartment property), and the property being acquired by me is described as Parcel II (legal description of Pagel orange grove), this is to approve, and affirm, that in said transaction I am not paying you a commission, and you are not acting as broker or agent, but that you are acting as a principal, and that the above-mentioned property described as Parcel I is being conveyed by me to, and acquired by, you or your nominee, as such principal, and that any and all profit, that may be derived by you or your nominee from said property through the sale, resale or exchange thereof, or otherwise, is to be retained by you, or your nominee, and I have no title or interest therein.

"Further, as to the property being acquired by me in said exchange, and referred to above at Parcel II, I have inspected said property, and have satisfied myself as to the value and condition thereof, and am making this exchange of properties entirely on my own inspection, and no warranty or representation as to the value or condition of said Parcel II, or otherwise, has been made to me by yourself, or your nominee, or your agents.

"(Signed) Nellie J. Lawrence."

On January 21, 1938, Mr. and Mrs. Parkening signed the trust deed in favor of the Prudential Insurance Company, approval of the loan being received on that day, and on the same date Tye put in escrow his check for $13,536, a sufficient amount, allowing for his $1,000 commission to acquire the grove from Tustin. Within a few days thereafter there was available in the escrow the sum of $16,117.73 in the form of a check payable to Mr. and Mrs. Parkening, proceeds of the $26,000 loan after payment of the prior loan of $9,400 and expenses. This check the payees endorsed to Mr. Tye. It will be seen, therefore, that in effect the increased loan on the Aventine Apartments, Mrs. Lawrence's property, provided the money to buy the Pagel ranch from Tustin. If the deal had been negotiated by respondent personally she might have had title after it was closed to the two parcels, one subject to a lien of $8,000, the other to a lien of $26,000, with a substantial equity above that amount, as appears from the fact that Mr. Parkening sold the Aventine Apartments within a month after the escrow closed, for $10,000 cash above the encumbrance. The profit on the transaction he and Mr. Tye divided equally. This is the profit which Mrs. Lawrence, in her letter of January 8th, stated was to be retained by Mr. Tye, on the theory, expressed in that letter, that he was acting not as broker or agent, but as a principal. But when, several months later, Mrs. Lawrence learned what had transpired, she promptly served a notice of rescission of the agreement of January 8th upon appellants, "on the ground that the consent of the undersigned to the execution and the making of the said agreement and such other agreements, was obtained by fraud and false representations, by fraudulent concealments, or by undue influence exercised upon the undersigned, and the undersigned hereby offers to return anything of value which she may have received in connection with the making and entering into of such purported agreements and consents."

Appellants did not accept the offer made by respondent in this notice, the present suit was brought and a jury assessed plaintiff's compensatory damages in the sum of $13,500, adding exemplary damages against appellant Tye in the sum of $500; against appellant Parkening in the sum of $250.

Appellant Tye states in his brief that "as a result of said exchange, loan and sale a profit of $10,013.32 was made". The expense account has not been tabulated, but respondent calls our attention to the gross profit as being the sum of $13,100. It would seem that the orange grove was actually worth not more than $22,500, the sum of the $8,000 lien plus the amount of cash which Tustin received, namely, $14,500. By the same system of reckoning the Aventine Apartment building was worth $36,000, the sum of the new loan, $26,000, plus the cash for which the equity was sold, $10,000. The difference between the two figures $36,000 and $22,500, equals $13,500, the amount of the jury's verdict.

Appellants contend that the verdict was not justified by the evidence, in that the relation of principal and agent having been dissolved, Messrs. Tye and Parkening were thereafter relieved of any fiduciary relationship to Mrs. Lawrence. It will have been noticed that both appellants in their testimony referred with particularity to January 8, 1938, as an important date in their dealings with respondent and her property. They seem to believe, judging from their respective briefs, that because on that date respondent signed the statement which that morning Mr. Tye dictated in the escrow office, recognizing him as a principal and entitled to retain any profit which he might make from the transaction, that matters which transpired at an earlier date have no bearing upon the issues of this case. At the same time considerable effort is made to show that as a matter of fact the agency between the parties expired before January 8th, to-wit, on November 3, 1937, the date of Mr. Parkening's letter to Mrs. Lawrence. But, in that letter, he said "We are sorry that we were unable to make a deal for you, but we will keep on trying". We have alluded to the effort made in late November by appellant Parkening to effect an exchange between Mrs. Lawrence and the owner of the Riverside ranch and the jury heard testimony from a Mrs. Conrad, employed by Mr. Tye as a saleswoman, upon a commission basis, that she was placed by defendants as a "hostess" in the Aventine Apartments August 2, 1937, and remained there in that capacity continuously every day until December 7th, when she left to accept another position. Mrs. Conrad stated that during that period she telephoned the office of B. W. Tye Co. the names of any "prospects" inspecting the apartments. It appeared also that a "For Sale" sign of the Tye Co. remained on the Aventine Apartments during all the time Mrs. Conrad was there. The jury also heard and may have credited Mrs. Conrad's testimony that about two weeks before she quit she had a conversation with Mr. Parkening in the office in which she "told him that Mrs. Lawrence was getting discouraged and disgusted with the property and he said that would be perfectly all right, because if she got disgusted enough, why, they could get it at their own price".

In addition to the matters already mentioned the jury may have noticed that Parkening prepared the offer of December 20th which Mrs. Lawrence signed appointing B. W. Tye Co. "my agents irrevocably within the time limited * * * to negotiate an acceptance," etc., even though no commission was to be paid by the terms of that offer. The jurors were aware that this offer was followed in two days by an escrow agreement also providing for no commission. They knew also that Mr. Tye prepared the letter dated December 28th signed by Mr. Parkening and addressed to Thomas Mortgage Co. concerning the loan which was approved in January by the Prudential Insurance Co. They were aware from Mr. Tye's own admissions that he first knew about the proposed exchange of the Lawrence property for the Pagel ranch in the latter part of December, and that he knew of the Lawrence escrow of December 22d when it was opened.

With all these and a number of other facts in mind it is obvious that the jurors declined to accept the statement of Mr. Parkening that "There was nothing signed on this deal until after January 8th", or the assurance of Mr. Tye that "There was no wheel turned, nothing in the world was done toward acquiring this ranch, towards getting a loan, towards anything, until Mrs. Lawrence signed that statement".

The complaint in this case charged:

"That the plaintiff's consent to permit the defendants B. W. Tye and O. H. Parkening to withdraw as her agents, to act as principals in the exchange and to the said agreement of exchange, to the execution of said escrow instructions and to the delivery of the deed to her apartment property to said F. E. Eades, was obtained by fraud in that the defendants made false representations and fraudulently concealed matters in and during the negotiations leading up to the execution of the several instruments and agreements above mentioned and the closing of said third escrow, particularly as follows:

"1. Represented that plaintiff's apartment property was unsaleable and an undesirable property; that same had no fair market value in excess of $28,000;

"2. Represented that the orange ranch on December 20th, 1937, was fairly worth the sum of $30,000; * * *

"7. Represented that no mortgage company would loan any more on plaintiff's apartment property than the loan of $9,400 which was then a lien thereon;

"8. Represented that the defendant B. W. Tye was paying $28,000 for the orange ranch;

"9. Represented that if the plaintiff would take the ranch the defendants B. W. Tye and O. H. Parkening would put the Nancy Crickelair ranch trade deal through, make a commission on said transaction, that such commission represented their total profit in the whole transaction;

"10. Represented to plaintiff that B. W. Tye was acting as principal in the transaction, but explained to plaintiff that the reason B. W. Tye was a principal was that he was not charging the plaintiff any commission in the proposed exchange.

"Concealed from the plaintiff what plaintiff alleges to be the true facts respecting the exchange transaction to-wit:

"(a) That at some time during the period from August 1st, 1937, to December 1st, 1937, the defendants Tye and O. H. Parkening planned to obtain for themselves the above mentioned apartment property; * * *

"(c) That the defendants had knowledge prior to December 20th, 1937, that the orange ranch could be purchased subject to said $8,000 trust deed, for the sum of $14,500; that on December 20th, 1937, when the defendants procured from the plaintiff said offer to exchange her apartment house property for the said orange ranch, the defendants planned to themselves acquire the orange ranch and exchange the same to the plaintiff for her said apartment property; that at the same time the defendants planned to procure a loan upon the plaintiff's apartment property to pay the purchase price of $14,500 for the said orange ranch, and to appropriate to themselves any excess moneys from said loan over and above the amount necessary to pay for the said ranch, that they knew that with reasonable efforts plaintiff's apartment property could be sold for a price to net the defendants in excess of $10,000 over and above the cost to them of said orange ranch;

"(d) That as early as January 4th, 1938, the defendants had made and entered into an agreement with said R. T. Tustin, Jr., and Nancy Crickelair, by the terms of which it was provided that they could acquire the said orange ranch at a purchase price of $14,500; * * *."

[1-3] It will be noticed that all the transactions thus complained of took place prior to January 8th, and we must conclude from the jurors' verdict that they decided that appellants conspired while agents of respondent and before January 8th to obtain her property at a low price to their own advantage, and to her proportionate disadvantage; further, that in reaching this decision they found that false representations as to values and fraudulent concealment of facts which defendants in good faith were bound to disclose to their principal enabled them to accomplish their purpose. Having all the evidence in mind, particularly that relating to the opening of the escrow of December 22nd, the obtaining of the loan of $26,000, and the sale of the Aventine Apartments for $36,000 at a profit of $10,000 within a few weeks thereafter, we see no reason for disturbing the verdict. The rules defining an agent's responsibility to his principal are closely akin to those binding upon a trustee toward his beneficiary and are briefly stated in our Civil Code. An exhaustive discussion of the subject appears in 1 Cal.Jur. in the article on "Agency", paragraph VI thereof. Sections 82 and 85 are of special interest. In a footnote to section 87 authorities are cited for the following statement: "To validate an agent's purchase from his principal, the agent must show that he acted in perfect good faith, revealed all material facts and paid an adequate consideration. The agent must conceal no facts within his knowledge which might influence the judgment of his principal as to the price or value and if he does the sale will be set aside."

[4] The jury in this case may have found, on the evidence, a failure upon the part of appellants to meet all or any of the requirements necessary to validate the exchange to Parkening; and since Tye participated equally with him in the profits of the transaction and acted personally in connection with it he is jointly liable in compensatory damages. The difference in the amounts assessed against the defendants respectively as exemplary damage may be accounted for by the difference in their wealth as shown by the evidence.

Judgment affirmed.

DORAN, Acting P. J., and WHITE J., concurred.

46 Cal.App.2d Supp. 877

ARGANBRIGHT v. GOOD et al.

No. 104320.

Appellate Department, Superior Court,
San Diego County, California.
Aug. 12, 1941.

Courts ⚷190(2)

An appeal from municipal court's order denying motion to transfer cause for trial to Superior Court under the statute dealing with transfer of actions generally was not authorized by the statute providing that an appeal may be taken from a municipal court on questions of law alone from an order changing or refusing to change the "place of trial", since the terms "place of trial" and "venue" are synonymous. Code Civ.Proc. § 396; § 983, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Place of Trial" and "Venue".

◆

Appeal from Municipal Court of San Diego; Dean Sherry, Judge.

Action in the Municipal Court by E. E. Arganbright against O. L. Good, also known as Orin L. Good, and others, to recover certain rental alleged to be due under a lease, wherein the defendants filed a cross-complaint asking for declaratory relief and for certain damages. Thereupon, the defendants moved the court, on the basis of their cross-complaint, to transfer the cause for trial to the Superior Court. From an order denying the motion, the defendants appeal.

Appeal dismissed.

Dempster McKee and O. A. Thorpe, both of San Diego, for appellants.

Liggett & Liggett, of San Diego, for appellee.

PER CURIAM.

In the instant case, an action by the assignee of a landlord having been filed against the assignee of a tenant to recover certain rental alleged to be due under a lease, the tenant's assignee undertook to file a cross complaint asking both for declaratory relief and for certain damages exceeding the amount within the jurisdiction of the Municipal Court. Thereupon the defendant moved that Court, on the basis of his cross complaint, to transfer the cause for trial to the Superior Court under the provisions of Section 396 of the Code of Civil Procedure. The motion was denied.

The defendant undertook to take an appeal from the order of denial. Authority for such appeal does not exist unless it can be said to result from Subdivision 4 of Section 983 of the Code of Civil Procedure authorizing an appeal from an order changing or refusing to change the place of trial. We are of the opinion that this section has no application. The terms "place of trial" and "venue" are ordinarily regarded as synonymous. 25 Cal.Juris., 851.

It is laid down in 67 Corpus Juris., pp. 11 and 12, that: "The distinction between 'jurisdiction' and 'venue' has been said to be plainly established and has frequently been recognized. Jurisdiction connotes the power to decide a case on the merits, while venue connotes locality, the place where the suit should be heard."

In note 17, under "(a)" the text writer cites authority as follows: "Distinction stated.—(1) 'Jurisdiction implies or imports the power of the court, venue the place of action.' Shaffer v. Bank, 201 N.C. 415, 417, 160 S.E. 481, 482. (2) 'By jurisdiction is meant the inherent power to decide a case, while venue designated the particular county or city in which a court having such jurisdiction may in the first instance properly hear and determine the case.' Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Co., 145 Va. 317, 133 S.E. 812, 813. (3) 'Jurisdiction is a term of comprehensive import. It concerns and defines the power of judicatories and courts. It embraces every kind of judicial action touching the subject of the action, suit, petition, complaint, indictment or other proceeding. It includes power to inquire into facts, to apply the law, to make decision and to declare judgment * * *. Venue in its modern and municipal sense relates to and defines the particular county or territorial area within the state or district in which the cause of prosecution must be brought or tried. It commonly has to do with geographical subdivisions, relates to practice or procedure, may be waived, and does not refer to jurisdiction at all.' Paige v. Sinclair, 237 Mass. 482, 130 N.E. 177, 178."

A late and succinct determination of the question appears in State ex rel Elsman v. Second Judicial District Court, 52 Nev. 379, 287 P. 957, 961, where it is, inter alia, said:

"It must be apparent to the most casual investigator that changes of venue relate solely to changes of the place of trial and in no logical sense to a mere change of judges. Therefore, in the true sense in which we are here compelled to consider the statute, the phrase 'place of trial' as used therein does not mean the judge or the court. 'It is a misnomer to speak of a proceeding to change the trial judge in a case as a change of venue, which means a change in the place of trial.' State ex rel. McAllister v. Slate, 278 Mo. 570, 214 S.W. 85, 8 A.L.R. 1226."

The appeal is dismissed.

HAINES, P. J., and MUNDO, J., concur.

THOMPSON, J., not participating.

18 Cal.2d 530

EASTON v. ASH et al.

L. A. 17249.

Supreme Court of California.
Aug. 28, 1941.
Rehearing Denied Sept. 25, 1941.

1. Limitation of actions 🔑145(5)

A renewal agreement reciting that it was the wish of the parties to renew and extend mortgage and note, which represented indebtedness barred by four-year limitations, and that the mortgagors renewed the mortgage and note and agreed to the terms thereof and the extension thereof, was supported by consideration consisting of the original indebtedness. Code Civ.Proc. § 337.

2. Limitation of actions 🔑145(5)

A pre-existing debt, although barred by a statute of limitations, is sufficient consideration to support a new acknowledgment of or promise to pay the indebtedness.

3. Mortgages 🔑307

The acceptance by holder of mortgage and note of a new note and mortgage as a renewal of original note and mortgage did not itself operate to extinguish or discharge the original obligation.

4. Limitation of actions 🔑151(2)

The rule that a note is not paid by the execution of another note is not affected by the running of a statute of limitations on the original indebtedness, and if the statute has run when the new agreement is made, the action is on the new promise, but the creditor is not required to sue on the promise made nearest to the time of the running of the statute.

5. Limitation of actions 🔑151(2)

If, after a statute of limitations has run, the debtor has made several acknowledgments of the debt sufficient in law to sustain an action, the creditor may elect to sue on any of them.

6. Limitation of actions 🔑151(2)

Suit on an acknowledgment of a mortgage note, on which four-year statute of limitations has run, is not precluded by the existence of earlier acknowledgments or promises. Code Civ.Proc. § 337.

7. Limitation of actions 🔑145(5)

Where agreement to renew note on which four-year statute of limitations had run, referred to deceased mortgagee's widow as the duly appointed, qualified and acting executrix of the deceased mortgagee's estate, agreement showed that promise of mortgagors was made to widow in her capacity as executrix, and that hence there was consideration for the agreement. Code Civ.Proc. § 337.

8. Limitation of actions 🔑142

An acknowledgment of or promise to pay an existing indebtedness may properly be made to the administrator or executor of the payee's estate.

9. Limitation of actions 🔑145(1)

Agreement for renewal of mortgage and note was a sufficient acknowledgment of or promise to pay mortgage debt to remove the bar of the four-year statute of limitations, since no particular form for such an acknowledgment or promise is prescribed. Code Civ.Proc. §§ 337, 360.

10. Limitation of actions 🔑146(1)

The purpose of the statute requiring that the acknowledgment of or promise to pay a debt be in writing in order to remove the bar of the statute of limitations is to establish a rule, not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence necessary to prove the promise or acknowledgment. Code Civ.Proc. § 360.

11. Limitation of actions 🔑151(2)

Agreement for renewal of mortgage and note after the four-year statute of limitations had run was sufficient not only to revive the indebtedness but to renew the original mortgage as well. Code Civ.Proc. §§ 337, 360.

12. Limitation of actions 🔑151(2)

Though a new promise to pay a debt after statute of limitations has run does not itself revive a mortgage barred by the running of the four-year statute of limitations on the original debt, the mortgage may be renewed by a compliance with the statute providing that a mortgage can be created, renewed or extended, only by writing, executed with the formalities required in the case of a grant of realty. Civ.Code, § 2922; Code Civ.Proc. § 337.

13. Limitation of actions 🔑151(4)

Where agreement for renewal of mortgage and note extended the mortgage and note for a period of 40 months from and after February 1, 1931, an action on the note and mortgage was not barred by four-year limitation statute before June 1, 1938, and hence a complaint filed in May, 1937 was well within the statutory period. Code Civ.Proc. § 337.

14. Limitation of actions ⚿151(1)

The fact that agreement for renewal of mortgage and note barred by limitations bore the same date of execution as new note and mortgage could not operate to bind the three instruments into a single inseparable transaction, and hence it was immaterial whether the holder of the notes waived his right to recover on the new note and mortgage. Code Civ.Proc. § 337.

15. Principal and agent ⚿136(2)

Agent incurred no liability by reason of her execution, as attorney-in-fact for her principals, of renewal of mortgage and note barred by four-year statute of limitations, where she acted, not in her individual capacity, but as agent for her principals, and her acts were lawful and within the scope of her authority. Code Civ.Proc. § 337.

16. Limitation of actions ⚿143(1)

Acts by a principal obligor cannot toll a statute of limitations as to the guarantor, in absence of a provision in the contract of guaranty to that effect.

17. Trial ⚿165

On a motion for nonsuit, the court must assume that all the evidence favorable to the plaintiff is true and must construe all presumptions, inferences, and doubtful questions in a manner most favorable to the plaintiff.

18. Trial ⚿165

On motion for nonsuit, conflicting or contradictory evidence must be disregarded.

19. Trial ⚿139(1), 143

If there is evidence to sustain the plaintiff's action, or if the evidence is conflicting, a nonsuit should be denied.

20. Mortgages ⚿217

Where holder of mortgage testified that he objected to the cutting of trees on mortgaged realty and insisted that such action be stopped, and there was testimony of a licensed real estate broker that after the cutting, realty was worth much less than amount of the mortgage indebtedness, the granting of nonsuit as to the other defendants in action for damages for cutting the trees, against mortgagors and other defendants was error.

21. Mortgages ⚿216, 217

A mortgagee has a right of action for damages against his mortgagor and third persons who have cut and removed timber from the mortgaged land, when those acts have rendered the mortgage insufficient security for the debt.

22. Judgment ⚿642

Orders of the Supreme Court denying motions of certain of the respondents to dismiss appeal as to them would be deemed "final orders".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

◆

In Bank.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

Action by Charles M. Easton against Kenneth K. Ash and others to foreclose a mortgage and to recover damages for the cutting of trees on the mortgaged property. Judgments of nonsuit were rendered in favor of some defendants, and judgment on the merits in favor of the other defendants, and the plaintiff appeals, and certain defendants move to dismiss the appeal.

Judgment on the merits reversed, with instructions to enter judgment for plaintiff, and judgments of nonsuit reversed.

For prior opinion, see 108 P.2d 955.

Ray Howard and Chas. M. Easton, both of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson and Leo E. Anderson, all of Los Angeles, for respondents Ash and Cross.

James A. Hall, of Hemet, for respondents Scott and Holbrook.

TRAYNOR, Justice.

On June 28, 1924, defendants Ash, acting through defendant Cross, to whom they had given a power of attorney, executed a note for $1,000 payable six months after date and a mortgage upon certain real property in Riverside County to Henry Hileman. Defendant Cross subsequently agreed to pay all the interest due or to become due on the mortgage and note. The interest was paid to June 29, 1930. In 1930 Henry Hileman died and his widow Rena was appointed executrix of his estate. On December 10, 1930, defendants Ash, acting through defendant Cross, executed a note and mortgage in favor of Rena Hileman for the sum of $1,000 payable in monthly installments. This mortgage was never recorded because plaintiff had instructed the title company, to whom the mortgage and a release of the first mortgage had been delivered, not to record it until it would appear as a first lien upon the property.

Defendants Ash, through defendant Cross, also entered into the following written agreement with Rena Hileman "as of" December 10, 1930:

"Renewal and Extension of
Note and Mortgage"

"Know All Men by These Presents: That whereas, heretofore, to-wit: on the 28th day of June, 1924, a certain mortgage was executed by Kenneth K. Ash and Ada Gertrude Ash, husband and wife, by and through their Attorney-in-Fact, Margaret Cross, a single woman, mortgagors, to Henry Hileman, mortgagee, securing a note of even (date?) therewith in the sum of $1000.00, which mortgage is now of record in the office of the County Recorder of Riverside County, California, in Book 237, Page 430 of mortgages of said County; and Whereas, said note and mortgage has heretofore been extended by the holder thereof, and Whereas, Henry Hileman is now deceased and Rena Hileman was appointed executrix of his estate in and by the Superior Court of Los Angeles County, California, said probate proceedings being numbered 112775, and Whereas, said Rena Hileman, the widow of said deceased is the duly appointed, qualified and acting executrix of said estate, and Whereas, it is mutually desired by all parties thereto and hereto that said note and mortgage be renewed and extended and that the terms and conditions of said mortgage remain the same and that it is mutually understood and agreed that such renewal and extension is for the best interests of said estate and parties hereto.

"Now Therefore, in consideration of one dollar in hand paid by the mortgagors to the mortgagee and holder of said mortgage and note, the receipt whereof is hereby acknowledged, the said Rena Hileman hereby renews and extends the said mortgage and note and the maturity thereof for a period of forty (40) months from and after February 1st, 1931, and the said mortgagors hereby renew said mortgage and note and promise and agree to the terms thereof and the extension of the same and undertake and bind their heirs and assigns to the further condition that said mortgage shall be and remain a first and prior lien on and against said property.

"Witness the hands of the mortgagee and mortgagors, by and through their Attorney-in-Fact Margaret Cross, this 10th day of December, 1930.

Kenneth K. Ash
Rena Hileman Ada Gertrude Ash
Mortgagee Mortgagors
By Margaret Cross
Their Attorney-in-Fact."

An acknowledgment dated August 9, 1934, appears at the end of this agreement.

On April 7, 1936, the note and mortgage of 1924, the note and mortgage of December 10, 1930, and the renewal agreement set forth above were distributed to Rena Hileman and she thereafter assigned them to the plaintiff, the present owner and holder. No part of the principal sum of either of the notes has been paid, and plaintiff brought this action asking for foreclosure of the original mortgage based on the last renewal agreement, and for damages against defendants George F. Scott and Warren L. Holbrook as well as defendants Ash and defendant Cross for allegedly cutting down eucalyptus trees growing upon the land.

The trial court found that the renewal agreement was without consideration and of no force and effect, that the 1924 note and defendant Cross's guaranty were barred by the provisions of subdivision one of section 337 of the Code of Civil Procedure, that the 1930 note was cancelled by waiver in open court, and that the liens of both mortgages were extinguished. Judgment was given in favor of the Ashes and a non-suit was granted in favor of defendants Scott, Holbrook and Cross. Plaintiff has appealed.

[1, 2] The finding of the trial court that the renewal agreement was without consideration is not supported by the evidence nor is it a correct conclusion of law. The agreement recites that it was the wish of the parties to renew and extend the mortgage and note of June, 1924, and that the mortgagors "renew said mortgage and note" and "promise and agree to the terms thereof and the extension of the same". It is well settled in California that a pre-existing debt, although barred by the statute of limitations, is sufficient consideration to support a new acknowledgment of

or promise to pay the indebtedness (Concannon v. Smith, 134 Cal. 14, 66 P. 40; Ferguson v. Fonner, 87 Cal.App. 590, 262 P. 337; see Estate of McConnell, 6 Cal. 2d 493, 58 P.2d 639) or the execution of a deed (Ferguson v. Larson, 139 Cal.App. 133, 33 P.2d 1061; see Chichester v. Mason, 43 Cal.App.2d 577, 111 P.2d 362) or mortgage. Foster v. Warren, 39 Cal.App.2d 470, 103 P.2d 591. The original indebtedness was therefore ample consideration for the execution of the renewal agreement.

[3] The original indebtedness was not extinguished by the execution of the note and mortgage of December 10, 1930. At the time the 1930 note and mortgage were executed, the statute of limitations had run upon the original note and mortgage. When the new note and mortgage were executed it is undisputed that the parties intended them as a renewal of the original obligation and lien. It has been held in this state that the acceptance by a mortgagee of a new note and mortgage as a renewal of or substitution for an existing note and mortgage does not itself operate to extinguish or discharge the original obligation. White v. Stevenson, 144 Cal. 104, 77 P. 828; Pacific Nat. Agr. Credit Corp. v. Wilbur, 2 Cal.2d 576, 42 P.2d 314; Tolman v. Smith, 85 Cal. 280, 24 P. 743; Palmer v. Emanuel, 77 Cal.App. 766, 247 P. 609; see Newman v. Nickell, 50 Cal. App. 138, 140, 194 P. 710; College Nat. Bank v. Morrison, 100 Cal.App. 403, 407, 208 P. 218. "One executory agreement is not extinguished by the execution of another between the same parties; nor is a security for an obligation merged in another security of the same degree which is accepted for the same obligation. It is a well-settled rule that, in the absence of an agreement to that effect, a promissory note is not paid by the execution of another note, but that the time for its payment is thereby merely suspended until the maturity of the new note." White v. Stevenson, supra, 144 Cal. at page 108, 77 P. at page 830. See, also, Copp v. Millen, 11 Cal.2d 122, 77 P. 2d 1093.

[4-6] This principle is not affected by the running of the statute of limitations upon the original indebtedness. If the statute has run when the new agreement is made, the action is upon the new promise, but the creditor is not required to sue upon the promise made nearest to the time of the running of the statute. If, after the statute has run, the debtor has made several acknowledgments of the debt sufficient in law to sustain an action, the creditor may elect to sue upon any of them. Suit upon an acknowledgment is not precluded by the existence of earlier acknowledgments or promises.

In the present case, the 1930 note was an executory agreement taken by the plaintiff's assignor in renewal of a pre-existing and unperformed executory agreement. There is no evidence, nor do defendants contend, that the 1930 note was intended by either of the parties as payment of the debt. In the absence of such an agreement, the 1930 note and mortgage served to renew the original note and mortgage, not to extinguish them.

[7, 8] Defendants contend that the moral obligation to pay the original debt was not consideration in the instant case because the 1930 note and mortgage and the renewal agreement were not made in favor of the estate of Henry Hileman, the owner of the 1924 note and mortgage, but in favor of Rena Hileman, who, it is contended, owned no claim against the defendants. The renewal agreement upon which plaintiff bases his right to recover, however, refers to Rena Hileman as the duly appointed, qualified and acting executrix of the estate of Henry Hileman. An acknowledgment of or promise to pay an existing indebtedness may properly be made to the administrator or executor of the payee's estate. Farrell v. Palmer, 36 Cal. 187; see cases cited in 117 A.L.R. 228; see, also, Wilcox v. Gregory, 135 Cal. 217, 67 P. 139; Moore v. Gould, 151 Cal. 723, 91 P. 616; Altube v. Aguirre, 59 Cal.App. 762, 766, 212 P. 217. The language of the renewal agreement shows that the promise of defendants was made to Rena Hileman in her capacity as executrix of the estate of Henry Hileman.

[9, 10] Defendants contend further that the renewal agreement was not a sufficient acknowledgment of or promise to pay the debt to remove the bar of the statute of limitations. No particular form for such an acknowledgment or promise is prescribed. Searles v. Gonzalez, 191 Cal. 426, 216 P. 1003, 28 A.L.R. 78. Section 360 of the Code of Civil Procedure requires only that the acknowledgment or promise be in a writing signed by the party to be charged. Its purpose is to establish a rule, not with respect to the character of the promise or

acknowledgment from which a promise may be inferred, but with respect to the kind of evidence necessary to prove the promise or acknowledgment. Shirley v. Shirley, 83 Cal.App. 386, 256 P. 823; Lehman v. Newcomer, 118 Cal.App. 145, 4 P.2d 994. In the instant case the renewal agreement, signed by defendants Ash through their attorney in fact, provides that the said mortgagors "hereby renew said mortgage and note and promise and agree to the terms thereof and the extension of the same." Here is a clear promise to pay the note.

[11, 12] The renewal agreement was sufficient not only to revive the indebtedness but to renew the original mortgage as well. Although a new promise to pay a debt made after the statute has run does not itself revive a mortgage barred by the running of the statute on the original debt (Weinberger v. Weidman, 134 Cal. 599, 66 P. 869; Sanford v. Bergin, 156 Cal. 43, 103 P. 333; Kern Valley Bank v. Koehn, 157 Cal. 237, 107 P. 111; Fontana Land Co. v. Laughlin, 199 Cal. 625, 250 P. 669, 48 A. L.R. 1308), the mortgage may be renewed by a compliance with the provisions of section 2922 of the Civil Code, which provides that: "A mortgage can be created, renewed, or extended, only by writing, executed with the formalities required in the case of a grant of real property." See Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145; Conway v. Supreme Council C. K. of A., 137 Cal. 384, 389, 70 P. 223; Sanford v. Bergin, supra. The renewal agreement in the present case was executed with the formalities required by section 2922 and contains an acknowledgment of the 1924 mortgage and debt sufficient to renew both and to start a new period of limitation. See Moore v. Gould, supra.

[13] This new period of limitation began on the new maturity date set forth in the renewal agreement, namely, forty months from and after February 1, 1931, or June 1, 1934. Steiner v. Davis, 24 Cal. App.2d 692, 695, 76 P.2d 157. An action thereon could thus not be barred before June 1, 1938. The complaint was filed in May, 1937, well within the statutory period, and it is immaterial whether the renewal agreement was executed on the date it bears, December 10, 1930, or on the date of the acknowledgment thereon, August 9, 1934.

[14] It is also immaterial whether or not plaintiff waived his right to recover under the 1930 note and mortgage. The action was brought upon the 1924 note and mortgage and the agreement specifically renewing them, and these instruments constituted a sufficient cause of action in themselves. The fact that the renewal agreement bears the same date of execution as the new note and mortgage cannot operate to bind the three instruments into a single inseparable transaction. The trial court did not find that the renewal agreement was executed on December 10, 1930, but that it was executed "as of" that date. Taken with the evidence that it was actually executed in 1934 on the date of its acknowledgment, and the finding of the court that "said renewal agreement was intended and it was the agreement of the parties thereto that it did not and would not change the provisions of said note and mortgage of 1930", the finding of the court was not that it was executed on December 10, 1930, but that it was merely so dated. The plaintiff evidently believed that a subsequent renewal in the form of the renewal agreement would operate to preserve the original lien of the first mortgage and give it priority over any intervening lien upon the property.

[15, 16] Defendant Cross incurred no liability by reason of the renewals executed by her as attorney in fact for the defendants Ash since she was acting not in her individual capacity but as agent for them and her acts were lawful and within the scope of her authority. Moore v. Gould, supra. The statute of limitations had run against her agreement to pay the interest on the mortgage, and there was no showing that this agreement was renewed. Acts by a principal obligor cannot toll the statute as to his guarantor in the absence of a provision in the contract of guaranty to that effect. Purdy v. Maree, 31 Cal.App. 2d 125, 87 P.2d 390.

[17-20] Plaintiff also appeals from judgments of nonsuit in favor of defendants Scott, Holbrook and Cross. Upon a motion for nonsuit the court must assume that all the evidence favorable to the plaintiff is true and must construe all presumptions, inferences, and doubtful questions in a manner most favorable to the plaintiff. Richardes v. Richardes, 211 Cal. 392, 295 P. 816; Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077; Henley v. Bui-

sell, 61 Cal.App. 511, 215 P. 114. Conflicting or contradictory evidence must be disregarded. Rabe v. Western Union Tel. Co., supra; Henley v. Bursell, supra; Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529. If there is evidence to sustain the plaintiff's action, or if the evidence is conflicting, a nonsuit should be denied. In the light of these rules, it is apparent that the granting of a nonsuit as to these defendants was error. The plaintiff testified that he objected to the cutting of trees on the land and insisted that such action be stopped. There was also testimony by a licensed real estate broker that the land was not worth over $200, that when it is covered by a stand of timber the trees constitute its principal value, that there is no firewood value to the trees now standing on the property, and that the value of the land was the same in 1934 as in 1937.

[21] A mortgagee has a right of action for damages against his mortgagor and third persons who have cut and removed timber from the mortgaged land when these acts have rendered the mortgage insufficient security for the debt. Robinson v. Russell, 24 Cal. 467, 473; Buckout v. Swift, 27 Cal. 433, 87 Am.Dec. 90; Lavenson v. Standard Soap Co., 80 Cal. 245, 22 P. 184, 13 Am. St.Rep. 147; Van Pelt v. McGraw, 4 N.Y. 110. See cases cited in 19 Ruling Case Law 326. The principal amount of the debt owed to the plaintiff was $1,000, and since the value of the land lay chiefly in its timber, it is clear that the cutting of the trees materially impaired the value of the security. There is no evidence that the executrix, Rena Hileman, the owner of the mortgage at the time of the cutting, had any personal knowledge of or ever assented to the cutting of the trees.

[22] The contention of defendants Scott, Holbrook and Cross that the notice of appeal was filed too late was settled by the orders of this court on December 5, 1939, and January 16, 1940, denying the motions of these defendants to dismiss the appeal as to them. These rulings must be deemed final. Edwards v. Brockway, 16 Cal.App. 626, 631, 117 P. 787. See White v. Fresno Nat. Bank, 98 Cal. 166, 167, 32 P. 979.

The judgment in favor of defendants Ash is reversed with instructions to enter judgment for the foreclosure of the mortgage upon the property. The judgments of nonsuit as to defendants Scott, Holbrook and Cross are reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., and PULLEN, J. pro tem., concurred.

18 Cal.2d 512

In re JANES' ESTATE.

VROOM v. CURTISS.

L. A. 17219.

Supreme Court of California.

Aug. 27, 1941.

1. Wills 🔑334

In proceedings for probate of a document as decedent's last will, proponent could not object because of asserted failure of trial court to make findings of fact when the court's order denied the petition for probate upon the ground that from the evidence, instrument was not last will of decedent, as findings of fact may be included in a judgment or order and the court's finding was the ultimate fact in issue.

2. Wills 🔑298

Where a holographic will was found with a slip of paper clipped to it saying "This is a copy of my last will, the original is in my safe deposit box", the slip of paper was admissible in evidence not as part of the will but upon issue of testamentary intent.

3. Wills 🔑93

Evidence outside the will may be introduced, not to alter the provisions, but to show that it was not intended by testator to be effective as a will.

4. Wills 🔑384

Where a holographic will was found with a slip of paper clipped to it, saying "This is a copy of my last will, the original is in my safe deposit box", and there was no extrinsic evidence as to meaning attached to word "copy" by decedent, the proper interpretation of the notation was a "question of law" and might be reviewed on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

5. Wills 🔑98

Where a holographic will was found with a slip of paper clipped to it, saying "This is a copy of my last will, the original is in my safe deposit box" and there was no extrinsic evidence as to meaning attached to word "copy" by decedent, the effect of the notation should have been determined in light of other circumstances of the case and the policy of the law favoring testacy rather than intestacy.

6. Wills 🔑446, 448

An interpretation of a will that prevents intestacy is preferred, as is a construction favoring validity in determining whether a will has been executed in conformity with statutory requirements. Probate Code, § 102.

7. Wills 🔑439

When a man of sound mind and memory by his own hand and signature has plainly made a disposition of his property through a will, the courts should carry out his intention if it can be done without violating the mandates of the law.

8. Wills 🔑302(1)

A will that is complete and valid on its face should not be denied probate except upon convincing proof that it was executed without testamentary intent.

9. Wills 🔑72

The designation of an instrument purporting to be a will as a "copy" is not alone sufficient to establish that the decedent lacked testamentary intent in executing the instrument, as "copy" implies that instrument so labeled is identical with another instrument and if it is properly executed, the copy of a will is in effect the same as a duplicate which may be admitted to probate.

See Words and Phrases, Permanent Edition, for all other definitions of "Copy".

10. Wills 🔑93

Where a will was on its face a complete and valid holographic will and in it the testator stated it was his last will, and existence of testamentary intent was borne out by decedent's deathbed declaration that he had made a testamentary disposition of property in accord with provisions of the instrument, by statement that a suitcase contained instructions as to what should be done after his death, by the presence in the suitcase of all documents dealing with distribution of his property and affairs after his death, and by the fact that no other will was found, a notation clipped to the will and designating it as a "copy" was not sufficient to establish lack of "testamentary intent" in executing the instrument.

See Words and Phrases, Permanent Edition, for all other definitions of "Testamentary Intent".

11. Wills 🔑290

If a will last seen or known to have been in decedent's possession cannot be found after his death, it is presumed that he destroyed it in his lifetime with intent to revoke it, and revocation of one instrument revokes all duplicates. Probate Code, § 76.

12. Wills 🔑206

Where a holographic will was found with a slip of paper clipped to it, saying "This is a copy of my last will, the original is in my safe deposit box" but there was no evidence that anyone had ever seen the "original" will and the only evidence of its existence was decedent's statement in the notation, there was no evidence of a revocation and the failure to find the so-called original will did not prevent probate of the will in question.

13. Wills 🔑290

When a missing will was a duplicate of one in decedent's possession, all facts bearing upon possibility of revocation, including the intent to revoke which was essential, must have been considered in determining whether a presumption of revocation should arise, not solely the circumstance that one of the duplicates could not be found. Probate Code, § 74(2).

14. Wills 🔑290

Where a copy or duplicate of a will had been found but the other copy was never found, and the decedent made statements not inconsistent with the will only a few hours before his death, and had the opportunity if he had desired to revoke the will to have destroyed the instrument produced, these circumstances showing that decedent did not intend to revoke the will prevented any presumption of revocation from arising. Probate Code, § 74(2).

15. Wills 🔑207

Where a copy or duplicate of a will had been found but the other copy or duplicate had not, the copy found may be probated if there is no evidence indicating that missing copy was destroyed with intent to revoke, and the statute relating to lost or destroyed wills has no application, as it is the complete valid will that is sought to be probated and not the lost copy.

16. Wills ⚷302(8)

Stringent requirements for proof of lost or destroyed wills are imposed to avoid fraud.

17. Wills ⚷302(8)

Where existence of fraud in proving a will is precluded by production of a valid will executed by testator, together with evidence that it contained disposition that he wished to make of his property, and that it was in his possession until time of death and could have been destroyed by him had he wished to revoke it, the stringent requirements for proof of lost or destroyed wills are not necessary.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge, pro tem.

Proceedings in the matter of the estate of Harry C. Janes, deceased. From an order denying the petition of Dorothy Lee Janes Curtiss for probate of a document alleged to be the will of Harry C. Janes, Iva A. Vroom, a legatee, appeals. Reversed.

For prior opinion, see 107 P.2d 99.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant.

Leo V. Youngworth and J. H. Decker, both of Los Angeles, for respondent.

TRAYNOR, Justice.

This appeal is from an order of the Superior Court denying a petition for the probate of a document alleged to be the last will and testament of Harry C. Janes. The decedent died on December 9, 1938, in the county of Los Angeles at the age of 66 years. After his death appellant, a chiropractor who had been attending him professionally for several years, found the purported will in a suitcase belonging to him. The instrument on its face is a valid holographic will. Attached to the instrument, however, is a slip of paper, unsigned and undated, on which appears in decedent's handwriting: "This is a copy of my last will, the original is in my safe deposit box." No other will was found in decedent's safe deposit box or among his effects.

The will offered for probate is dated November 1, 1938, and contains a bequest of $5,000 and two automobiles to the appellant. The residue of the estate is left to Dorothy Lee Janes Curtiss, the decedent's daughter, who is named executrix. There is evidence that the night before decedent died he told appellant that he was leaving her $5,000 and his two cars, and that he insisted that appellant go to his apartment for a suitcase containing the ownership certificates to the automobiles and instructions as to what should be done after his death. Appellant found in the suitcase the purported will, as well as decedent's life insurance policy, a draft for $250 to be filled out and sent to his daughter, the ownership certificates to the automobiles, instructions concerning his funeral and the disposition of his body, and an authorization to appellant to take charge of his personal effects.

The trial court, finding that the purported will was not decedent's last will and testament and that he died intestate, denied the petition for probate.

[1] Appellant objects to the asserted failure of the trial court to make findings of fact. The court's order, however, included the following: "* * * and the court being satisfied from said evidence that the instrument offered for probate in connection with said petition for probate of will is not the last will and testament of the said decedent, and that the said deceased died intestate. * * *" Findings of fact may be included in a judgment or order. Hopkins v. Warner, 109 Cal. 133, 139, 41 P. 868; Hibernia Savings & Loan Society v. Clarke, 110 Cal. 27, 32, 42 P. 425; In re Bensfield, 102 Cal.App. 445, 448, 283 P. 112; see Estate of Exterstein, 2 Cal.2d 13, 15, 38 P.2d 151. The court's finding was upon the ultimate fact in issue and was therefore sufficient. See cases cited in 24 Cal.Jur. 975.

[2, 3] Appellant contends that the notation attached to the will is not admissible in evidence and cannot affect the operation of the document as a will because it was not incorporated by reference therein. It is not necessary, however, for the

notation to be incorporated by reference since it is admissible, not as part of the will, but upon the issue of testamentary intent. Appellant maintains that the parol evidence rule as applied to wills does not permit the introduction of extrinsic evidence to show that a testator did not intend as his last will and testament an instrument that purports to be such on its face. It is clear, however, that evidence outside the will may be introduced not to alter its provisions, but to show that it was not intended by the testator to be effective as a will. Wigmore, Evidence, 3d Ed., § 2421, 2413; Clark v. Hugo, 130 Va. 99, 107 S.E. 730; In re William's Estate, Tex.Civ.App., 135 S.W.2d 1078.

[4] The question therefore is whether the decedent's designation of the instrument in question as a "copy" is sufficient, standing alone, to justify the trial court's implied finding that the testamentary intent necessary to make the instrument a valid will was lacking. Since there was no extrinsic evidence as to the meaning attached to the word "copy" by the decedent, the proper interpretation of the notation is a question of law (See 9 Wigmore, Evidence, 3d Ed., 522; and cases cited in 6 Cal.Jur. 328) which may be reviewed on appeal. Texas Co. v. Todd, 19 Cal.App.2d 174, 185, 64 P.2d 1180; Wall v. Equitable Life Assur. Soc., 33 Cal.App.2d 112, 117, 118, 91 P.2d 145.

[5-8] The effect of the notation should be determined in the light of the other circumstances of the case and the policy of the law favoring testacy rather than intestacy. Estate of Spitzer, 196 Cal. 301, 306, 237 P. 739. An interpretation of a will that prevents intestacy is preferred (Probate Code § 102; Estate of Northcutt, 16 Cal.2d 683, 107 P.2d 607; Estate of Fay, 145 Cal. 82, 78 P. 340, 104 Am.St.Rep. 17) as is a construction favoring validity in determining whether a will has been executed in conformity with statutory requirements. Estate of Wilkinson, 113 Cal.App. 645, 298 P. 1037; Estate of Durlewanger, 41 Cal.App.2d 750, 107 P.2d 477. "When a man of sound mind and memory, by his own hand and signature, has plainly made a disposition of his property, the courts should carry out his intention if it can be done without violating the mandates of the law." Estate of Fay, supra, 145 Cal. at page 87, 78 P. at page 342, 104 Am.St.Rep. 17. A will that is complete and valid on its face should not be denied probate except upon the presentation of convincing proof that it was executed without testamentary intent.

[9] The designation of an instrument as a "copy" is not alone sufficient to establish that the decedent lacked testamentary intent in executing the instrument. The word "copy" implies that the instrument so labeled is identical with another instrument. It does not indicate that the "copy" was intended to be less effective as a will than the instrument which preceded it. There is no reason why a testator may not execute two valid wills with identical provisions to insure the execution of his wishes should one of them be accidentally lost or destroyed. If it is properly executed, a copy of a will is in effect the same as a duplicate (In re Dawson's Estate, 277 Pa. 168, 120 A. 828; see Great Western Power Co. v. Oakland, 196 Cal. 131, 136, 137, 236 P. 307; 1 Burrill's Law Dictionary, 2d Ed., 526), and it is clear that a properly executed duplicate may be admitted to probate. See 1 Alexander, Commentaries on Wills, 137.

[10] In the present case the instrument presented to the court for probate is on its face a complete and valid holographic will. It states that it is the testator's "last Will and Testament". Cf. Major's Estate, 89 Cal.App. 238, 264 P. 542. The existence of testamentary intent is borne out by the decedent's declaration on his deathbed that he had made a testamentary disposition of his property in accord with the provisions of the instrument in question, by his statement that the suitcase contained instructions as to what should be done after his death, by the presence in the suitcase of all the documents dealing with the disposition of his property and affairs after his death, and by the fact that no other will could be found. The notation designating the will as a "copy" is not sufficient, in the absence of other evidence as to the decedent's meaning, to establish a lack of testamentary intent in executing the instrument as a will.

The decision in Estate of Harris, 3 Cal.App.2d 606, 40 P.2d 566, cited by respondent, must be confined to the facts of that case. There, two inconsistent holographic wills were found each dated the same day and each marked "copy" upon the face of the document itself. One was found after decedent's death among letters and receipts in a drawer of her desk, and the other with duplicate income tax reports. There was evidence that at least one original will had existed, and no evidence of continued testamentary intent. Insofar as the opinion in that case is inconsistent with the principles here stated, it is disapproved.

[11, 12] The failure to find the so-called original will after decedent's death does not prevent the probate of the will in question. If a will last seen or known to have been in decedent's possession cannot be found after his death, it is presumed that he destroyed it in his lifetime with intent to revoke it (Estate of Ross, 199 Cal. 641, 250 P. 676), and the revocation of one instrument revokes all duplicates. Probate Code, § 76. In the instant case, however, there was no evidence that anyone had ever seen the "original" will and the only evidence of its existence was decedent's statement in the notation. The decedent might have intended to execute another copy of his will to be kept in his safe deposit box and failed to do so; but this would not prevent the probate of the will produced. Parrott v. Parrott's Adm'x, 270 Ky. 544, 110 S.W.2d 272; 1 Page on Wills, Lifetime Ed., 132; see In re Zell's Estate, 329 Pa. 312, 198 A. 76. Under these circumstances, there is no evidence to support the theory of a revocation.

[13, 14] Moreover, when the missing will was a duplicate in decedent's possession, all the facts bearing upon the possibility of revocation must be considered in determining whether a presumption of revocation arises, not solely the circumstance that one of the duplicates cannot be found. See 35 Harv.L.Rev. 626; 1 Alexander, supra, 140. In the instant case, decedent's statement regarding his bequest to appellant was made only a few hours before his death. Had he desired to revoke his will, he could easily have destroyed the instrument produced. See Estate of Thompson, 44 Cal.App.2d 774, 112 P.2d 937; Glockner v. Glockner, 263 Pa. 393, 106 A. 731. Since intent is essential to revocation (Prob.Code § 74 [2d]; 1 Page, supra, 764; 1 Alexander, supra, 140), these circumstances showing that decedent did not intend to revoke the will, prevent any presumption of revocation from arising.

[15-17] The statute relating to lost or destroyed wills has no application because the petition did not seek to probate a lost or destroyed will, but a complete, valid holographic will. If valid duplicate wills are executed, either may be probated if there is no evidence indicating that the missing copy was destroyed with intent to revoke, and if there is no basis in its disappearance for a presumption of revocation. The stringent requirements for proof of lost or destroyed wills are imposed to avoid fraud. In the instant case the existence of fraud is precluded by the production of a valid will executed by the testator, together with evidence that it contained the disposition that he wished to make of his property, and that it was in his possession until the time of his death and could have been destroyed by him had he wished to revoke it.

For these reasons, the finding of the trial court was not supported by the evidence and its order denying probate is therefore reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.

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18 Cal.2d 518

FLEMING et al. v. BENNETT et al.

Sac. 5447–5420.

Supreme Court of California.

Aug. 27, 1941.

Rehearing Denied Sept. 25, 1941.

1. Pleading 🔑76

Generally, pleadings on part of a defendant are for purpose of narrowing the issues and thus saving time of the court.

2. Waters and water courses 🔑152(10)

Under Water Commission Act authorizing court in action involving conflicting water rights to make reference to state division of water resources, as referee, the court is given a broad discretion as to when and how much of the investigation or of conducting hearings and taking testimony should be referred to the division, as referee. St.1913, p. 1027, § 24, as amended by St.1931, p. 2421.

3. Waters and water courses 🔑152(10)

Under Water Commission Act authorizing court in action involving conflicting water rights to make reference to state division of water resources, as referee, court was acting within its lawful authority when it referred investigation to the division immediately after complaint was filed and before any issues tendered by the complaint were joined by filing of pleadings by defendants. St.1913, p. 1027, § 24, as amended by St.1931, p. 2421.

4. Constitutional law 🔑80(2)
Waters and water courses 🔑128

The provision of Water Commission Act authorizing court in action involving conflicting water rights to make a reference to state division of water resources, as referee, is not unconstitutional on ground that it vests judicial power in the division, but rather the division operates merely in an advisory capacity to the court, and the court itself performs the judicial function of finally determining the issues and rendering the decision and judgment. St.1913, p. 1027, § 24, as amended by St.1931, p. 2421; Const. art. 6, § 1.

5. Constitutional law 🔑55

The legislature, in enacting provision of Water Commission Act authorizing court in action involving conflicting water rights to make a reference to state division of water resources, as referee, had power to prescribe that report of referee should be prima facie evidence of the facts reported. St.1913, p. 1027, § 24, as amended by St.1931, p. 2421.

6. Constitutional law 🔑305

In action to quiet title to asserted rights in and to use of waters of certain river, wherein trial court made an order of reference to state division of water resources pursuant to Water Commission Act, defendants were not deprived of any constitutional right by admitting report of the division in evidence, where defendants had opportunity to be heard in opposition to the report as evidence, and to introduce evidence contrary to the facts appearing therein. St.1913, p. 1027, § 24, as amended by St.1931, p. 2421.

7. Waters and water courses 🔑152(10)

In action to quiet title to asserted rights in and to use of waters of certain river, wherein trial court made an order of reference to state division of water resources pursuant to Water Commission Act, trial court had jurisdiction to enter interlocutory order, after case was tried before court and submitted for decision, approving and adopting the division's report for purpose of supervising distribution of water, through offices of a water master, pending final decree defining rights of parties, and providing for apportionment of cost of supervision ratably among users in accordance with the Act. St.1913, p. 1027, § 24, as amended by St.1931, p. 2421; St.1921, p. 543, §§ 37, 37a; St.1927, p. 1024, § 37f; Code Civ.Proc. § 187.

8. Waters and water courses 🔑152(10)

In action to quiet title to asserted rights in and to use of waters of certain river, wherein trial court made an order of reference to state division of water resources pursuant to Water Commission Act, trial court, after making final decree defining rights of parties, had right to make supplemental order appointing the division to supervise through agency of a water master the distribution of the irrigation waters in accordance with provisions of the final decree. St. 1913, p. 1027, § 24, as amended by St.1931, p. 2421; St.1921, p. 543, §§ 37, 37a; St.1927, p. 1024, § 37f; Code Civ.Proc. § 187; Const. art. 14, § 3.

In Bank.

Appeal from Superior Court, Lassen County; J. O. Moncur, Judge.

Action by J. J. Fleming and others against J. R. Bennett, A. C. Barham and others, to quiet title to plaintiffs' asserted rights in and to the use of waters of the Susan river, wherein the Superior Court made an order of reference to the Division of Water Resources, Department of Public Works. From a final decree and a supplemental order, the defendant A. C. Barham and others appeal.

Affirmed.

See, also, Cal.Sup., 116 P.2d 448.

Williamson & Wallace, Charles E. Greenfield, Jr., and Willard F. Williamson, all of San Francisco, for appellants.

Grover C. Julian, J. A. Pardee, and Hardin Barry, all of Susanville, H. P. Dechant, of San Francisco, Herbert W. Whitten, of Chico, James A. Nutting and Arthur J. Anderson, both of Susanville, George E. Farrand and Edward E. Tuttle, both of Los Angeles, and R. H. Cross, of San Francisco, in pro. per., for respondents.

C. C. Carleton and Spencer Burroughs, both of Sacramento, and C. T. Waldo, of Pasadena, for respondent Division Water Resources.

Orrick, Dahlquist, Neff & Herrington and Garret McEnerney, all of San Francisco, for respondent California-Pacific Utilities Co.

SHENK, Justice.

In July, 1934, the plaintiffs commenced an action in the superior court of Lassen county against some two hundred defendants to quiet title to their asserted rights in and to the use of the waters of the Susan river. On August 21, 1934, the court made an order of reference to the division of water resources, department of public works. On April 18, 1940, the court rendered its final decree based in the main on the report filed by the referee. Subsequently, on the same day, the court made a supplemental order providing for water master supervision by said division of water resources of the water distribution on the Susan river and its tributaries during the 1940 irrigation season in accordance with the provisions of the final decree. Twelve of the defendants have appealed from the final decree and from the supplemental order.

The appeal from the final decree will first be considered.

The Susan river rises on the eastern slopes of the Sierra Nevada in the southwest portion of Lassen county at an elevation of 7900 feet. It follows a general easterly direction, passes through the city of Susanville which lies at an elevation of 4,200 feet, and carries its waters and the waters of its tributaries to Honey Lake, which is at an elevation of about 3,900 feet. The total area embraced in the Susan river stream system is approximately 850 square miles, exclusive of 115 square miles in Horse Lake watershed which is now a part of the system. The area riparian to or watered by the Susan river and its tributaries comprises about 33,000 acres. Less than five per cent of the total irrigated area lies in mountain valleys above Susanville. There are eleven storage reservoirs in the Susan river watershed having a combined capacity of about 38,500 acre feet. The plaintiffs are owners of lands in the delta region of the river, which divides itself into three main channels or sloughs.

The plaintiffs and the defendants are or represent all of the users of the water in the Susan river watershed. Controversial activity and piecemeal litigation had prevailed among the users for about fifty years. The present action was instituted pursuant to a written agreement, signed by ninety per cent of the users of the waters involved, to settle their respective rights by the commencement of an action and a reference to the water commission pursuant to the provisions of section 24 of the Water Commission Act. Stats.1913, p. 1012, as amended, Stats.1931, p. 2421. Shortly after the complaint was filed and before the filing of any further pleadings, the court made the order of reference. In the order as modified the division of water resources was directed to make its investigation concerning the physical facts involved without the necessity of hearings or the taking of testimony.

Section 24 of the Water Commission Act provides that in case suit be brought in any court of competent jurisdiction for determination of rights to water or the use of water, the court in its discretion, may order a reference to the state water commission, or division of water resources, as it is now called, as referee; that the reference may include any issue or any number of issues or all of the issues involved; that "the court may, in its discretion, refer such suit to the state water commission for investigation of and report upon any one or more or all of the physical facts involved, in which event, said commission may, in its discretion, base its report solely upon its own investigation or investigations or in addition thereto may hold a hearing or hearings and take testimony and the report filed by the commission upon such a reference for investigation by it shall be prima facie evidence of the physical facts therein found; provided, however, that the court shall hear such evidence as may be offered by any party to rebut such report of the state water commission or such prima facie evidence". Provision is made in said section for notice to the parties and an opportunity to file objections to the draft of the report, the same to be considered by the commission before filing its report as referee. After filing the report with the clerk of the court notice is provided to be given to the parties. The section then reads: "The report of the state water commission as referee shall be subject to review by the court upon exceptions thereto filed with the clerk of the court within thirty days after date of the filing thereof, provided that no exception shall be considered except in the court's discretion, or for good cause shown, unless it shall appear that the matter of the exception had theretofore been presented to the commission in the form of an objection."

[1-3] The appellants' first contention is that the court had no authority to make an order of reference pursuant to section 24 of the act until the issues in the case had been joined by the filing of answers. The legis-

lature was apparently of the view that the salutary provisions of the act and an endeavor to expedite hearings and decisions in controversies involving conflicting water rights would be defeated unless some means were provided to overcome the delays which usually occur before and during the trial of the actions. Pleadings on the part of a defendant generally are for the purpose of narrowing the issues and thus saving the time of the court. In actions involving numerous conflicting water rights it has been deemed expedient, both by the legislature and by this court (see Wood v. Pendola, 1 Cal.2d 435, 35 P.2d 526; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972, 1014; City of Lodi v. East Bay Municipal Utility Dist., 7 Cal.2d 316, 341, 60 P.2d 439; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 559, 81 P.2d 533; Meridian, Ltd. v. City and County of San Francisco, 13 Cal.2d 424, 90 P.2d 537, 91 P.2d 105), that in the discretion of the trial court the investigation of the facts be confided to the division of water resources of the department of public works as referee. In such actions the delays incident to the joining of issues by the defendants' pleadings may not be necessary in order that the court be in position to determine whether expert investigation is required or desirable. It is the statute, and not the defendants' pleadings, which confers jurisdiction upon the court to appoint the referee, and when appointed the referee has the power to enter upon the investigation immediately. Thus, in the present case, the application for the appointment of the referee was made upon the filing of the complaint and on the request of about ninety per cent of the users of the waters involved in the action. No good reason has been suggested why the court should have delayed the appointment of the referee until after the filing of formal pleadings by the defendant users. A controversy on this point arose in the trial court which modified its order so as to refer to the division the investigation of the "physical facts" as distinguished from the "issues". Nevertheless the section clearly indicates that the phrase "issues involved" is not to be narrowed in meaning to apply only to issues "joined" or "framed" by the pleadings. The court is given a broad discretion as to when and how much of the investigation or of conducting hearings and taking testimony should be referred to the referee. We conclude that the court was acting within lawful authority conferred by the statute when it referred the investigation to the division of water resources immediately after the complaint was filed and before any issues tendered by the complaint were joined by the filing of pleadings by the defendants.

[4] The appellants next contend that section 24 vests judicial power in the division of water resources in violation of the state Constitution. The appellants say: "If the section is to be read as empowering the superior court to delegate to the division of water resources the authority to decide the case or determine the rights of the parties to water or the use of water, the section is unconstitutional as violative of section 1 of Article VI of the Constitution of California vesting all judicial powers in the courts therein named, and the legislature had no authority to create other judicial tribunals or to vest them with judicial power." Neither the section nor the order of the trial court may be construed as vesting in or delegating to the division of water resources any judicial power. The division operates merely in an advisory capacity to the court, and the court itself performs the judicial function of finally determining the issues and rendering the decision and judgment. It must be taken as settled that the division does not exercise judicial functions. Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874; Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076; Mojave River Irr. Dist. v. Superior Court, 202 Cal. 717, 262 P. 724.

In Tulare Water Co. v. State Water Commission, supra, it was pointed out that the water commission, in the matter of granting permits, and in investigating and ascertaining pursuant to section 10 of the act whether the waters of streams were appropriated waters, exercised some degree of discretion, but that it was not granted and it did not have the power to determine judicially any controversies concerning unappropriated waters or conflicting claims thereto and that it exercised only a supervisorial direction in the matter of granting permits. It was held that the powers conferred upon that body were administrative only.

In Department of Public Works v. Superior Court, supra, this court ordered the issuance of a writ prohibiting the superior court from entertaining a review of the action of the division of water resources, under section 12 of the water commission act, on the ground that the division was not exercising a judicial function in determining and prescribing pursuant to the statute the time within which the full amount of the water appropriated should be applied to a useful or beneficial purpose. It was pointed out that the section did not provide for notice, hearing or procedure "looking to the adjudication of the rights of any one" [197 Cal. 215, 239 P. 1079]; that the action of the division under the section did not constitute a hearing and a determination of a controversy in a judicial sense.

Likewise in the Mojave River Irr. Dist. Co. case, involving section 1b of the act as it then read, this court issued a writ prohibiting the superior court from entertaining a review of the action of the division of water rights in granting to the irrigation district a permit to appropriate water. The court followed its prior decisions on the question of whether the division was exercising judicial functions, holding that the matter before the division of water resources was administrative and not judicial in character.

In the case of Wood v. Pendola, supra, and the other cases above cited, the court suggested consideration of the plan and procedure provided by the act of reference to the division of water resources for investigation of the facts and a recommendation of a physical solution of the problems presented. There was no intimation by this court in those cases that the division would be exercising other than an administrative function. In the entire proceeding the only body exercising a judicial function is the trial court to which the report is made.

[5, 6] On the hearing before the trial court the appellants objected to the report on the ground that it was hearsay and incompetent. They also now claim that the report was inadmissible as evidence because it was compiled from ex parte investigations conducted by the division of water resources without hearings or the taking of testimony and without the presence of any of the parties to the suit.

The report of the division is comprehensive. It consists of 195 pages of findings and conclusions and as many or more pages of schedules, tables and plates. It deals with and recommends findings with respect to 259 claimed rights of water users in the Susan river watershed. These suggested findings, conclusions and tables treat of the physical facts investigated by the referee. There is also included a general description of the watershed, a report on climate, soil classification, crops, run-off records, the various uses of the water and descriptions of 259 diversion systems and measurements, tabulation and report on supplemental springs and reservoirs, description of methods of irrigation, a discussion and report on losses and accretions in channels and ditches, a chapter devoted to the duty of water, or general irrigation and domestic requirements in the various sections, and a discussion of certain of the allotments compiled in the schedules or tables. Table 1, comprising 41 closely tabulated sheets, contains specific descriptions of the areas irrigated from the Susan river and its tributaries and the names of the respective owners of such areas. Table 2, comprising 12 sheets, gives a summary of the systems diverting water from the Susan river and its tributaries, the names of the diverters and of the diversions, the acreage irrigated under each diversion, and the total acreage irrigated on each parcel. Other tables give the monthly and seasonal precipitation in the seasons 1900–01 to and including 1934–35, the records of temperatures, dates of killing frosts and snowfalls at Susanville, and the continuous records of daily and monthly discharges and releases in cubic feet per second of Susan river and its tributaries at designated points in various years. Similar tables give estimated daily consumptions, diversions, and rediversions, accretions, and daily water supply. Table 86 gives the estimated crop yields on about 50 typical lands irrigated from the Susan river and its tributaries. Table 87 reports the gross use of water for acreage irrigated from the Susan river and its tributaries during the period of investigation in 1935. Many maps and graphs are included. The report also contains a copy of an agreement entered into by all the ranch owners with the exception of three, two of whom are appellants herein. The agreement, dated March 18, 1935 supplemented by an agreement dated June 4, 1935, provided for a tentative allocation of waters of the stream system for the 1935 irrigation season and for the distribution of the waters in accordance with the allocation which would be administered by the division of water resources through the offices of a water master. The agreement contained schedules of priorities and allotments, and acreages to be served. The signers gave consent to the advancement of funds by the division to defray the expenses of investigation, supervision, and preparation of its report, and for later proportionate allotment of the expenses among the signatory users, with the reservation that nothing in the agreement should be construed as admissions against the signers, and that the distribution of water as agreed should not prejudice the rights of any of the signers. Six of the appellants had filed with the referee objections to the draft of the report. The other six made no objection before the report was filed with the court. Five of the appellants filed with the court objections and exceptions to the report. On the hearing the court admitted the report in evidence over the objections. No evidence was offered by the appellants in rebuttal or at all. The court based its decree on the report and additional evidence introduced at the hearing in open court. The appellants do not question the power of the legislature to prescribe that the report of the referee shall be prima facie evidence of the facts reported. Indeed, that power may not be denied. See People v. Buckley, 143 Cal. 375, 393, 77 P. 169; Miller & Lux, Inc. v. Secara, 193 Cal. 755, 766, 227 P. 171; Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 36 S.Ct. 637, 60 L.Ed. 1084. The parties were not deprived of any constitutional right. They were afforded full opportunity to be heard in opposition to the report as evidence, and to introduce evidence contrary to the facts appearing therein. Constitutional mandates are observed where such facts are not made incontrovertible and opportunity is given to refute them in court. Pacific Live Stock v. Lewis, supra; see also, Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L. Ed. 772. The appellants have had that opportunity and have chosen not to take advantage of it, but to rest their case on objections to the competency of the report as evidence. They do not contend that the facts with reference to their rights and claims have not been fully and correctly reported to the court by the division of water resources or that all of the rights and claims of all the users of the waters involved in the action have not been determined by the decree, or that appellants have been deprived by the decree of the use of any water to which they are justly entitled. The report appears to be definite, comprehensive, and an expeditious solution of the numerous rights to the use of waters in this extensive area. As indicated by the cases hereinbefore cited, this court has heretofore commended and approved the prescribed plan for expediting the determination of conflicting water rights in this state by reference to the division of water resources. Counsel representing defendants owning or controlling more than one half of the area affected has pointed out the disadvantages and excessive cost of piecemeal litigation on the Susan river for over fifty years and the satisfaction generally felt in having a comprehensive solution of all of the water rights on the stream in this one proceeding. Here all of the material issues and the rights of all the users in the watershed were settled by the facts found by the court based on the report of the referee and additional evidence which necessitated only a short hearing. The appellants have apparently been unable to discover any error or improper ruling of the court on the merits with respect to the rights determined by the decree, for none is asserted.

The case presents no special procedure differing from the ordinary practice and procedure of superior courts in original actions, such as was considered in the case of Mojave River Irr. Dist. v. Superior Court, 202 Cal. 717, 262 P. 724. As we have noted, the legislature has power to provide for reference in special classes of cases of which the present case is one.

It follows that all of the pertinent constitutional safeguards were observed by the legislature in enacting the provisions of section 24 and by the court in the trial of the action. The evidence fully supports the judgment, and the order denying the appellants' motion for a nonsuit was proper.

[7] The foregoing discussion and conclusions answer all of the appellants' objections urged on the appeal from the final decree of April 18, 1940. One additional contention, however, will be noted. It is asserted that an interlocutory order of the court made on March 24, 1939, was in excess of the court's jurisdiction and therefore void. The interlocutory order was made after the case was tried before the court and submitted for decision. The order recited that the court required additional time to review the evidence, including the report of the referee; that the court took judicial notice of the subnormal precipitation in the area in the 1939 season; and that supervision of distribution of water by the court, through the offices of a water master, during that irrigation season was necessary to preserve the public peace, convenience and welfare, and to prevent waste or unreasonable use or meth-

od of use of the waters; that pending the preparation and adoption of findings of fact and conclusions of law the report of the referee fully and fairly defined the rights of the parties for the purpose of the order. The court approved and adopted the referee's report for the purpose of the order, and directed the division of water resources, through the agency of a water master, to supervise the distribution of water for the 1939 irrigation season, in accordance with the provisions of the report. It provided for apportionment of the cost of the supervision ratably among the users in accordance with section 37f, St.1927, p. 1024, of the act, subject to objection and settlement by the court. On January 29, 1940, the court entered its decree apportioning the cost of the supervision for the 1939 irrigation season among the users of the waters. The appellants base their claim of illegality of those orders on the same grounds urged in support of the claim of illegality in respect to the final decree. Such claims have been found to be without merit. The division of water resources had general power under the act, §§ 37 and 37a, St.1921, p. 543, to supervise the distribution of water in accordance with the decree of the court. The court had the power to adopt the necessary means to make its orders effective. § 187, Code Civ.Proc. The order on its face discloses the necessity for the means adopted. Courts have heretofore approved the execution of similar determinations and apportionment of costs pending final adjudication by the court. In re Water Rights in Humboldt River Stream System, 49 Nev. 357, 246 P. 692; Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 36 S.Ct. 637, 60 L.Ed. 1084.

[8] The foregoing observations also dispose of the appellants' contentions in respect to their appeal from the supplemental order of April 18, 1940, appointing the division of water resources to supervise through the agency of a water master, the distribution of the 1940 irrigation waters in accordance with the provisions of the final decree. The order also provided for apportionment of the cost of such water master service with opportunity to file objections and to be heard thereon. The appellants contend that the court, having entered a final decree in the action, was without jurisdiction to make any further order. The evidence produced before the court supports the finding contained in the order that supervision of the distribution of waters in accordance with the provisions of the decree during the 1940 irrigation season was necessary in order to preserve the public peace, convenience and welfare and to prevent waste or unreasonable use or method of use of the waters of the Susan river and its tributaries in accordance with the provisions of section 3, article XIV of the Constitution. Furthermore, the record shows that the waters of the Susan river watershed have been distributed through the services of a water master each year since the season of 1935, and that the users are receiving water master supervision in the current irrigation season. Here again the appellants do not claim that they have been deprived of the use of any water to which they are justly entitled.

The final decree and the supplemental order, dated April 18, 1940, are and each is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, JJ., and MOORE, J. pro tem., concurred.

18 Cal.2d 888

FLEMING et al. v. BENNETT et al.

Sac. 5447.

Supreme Court of California.

Aug. 27, 1941.

Rehearing Denied Sept. 25, 1941.

Appeal and error ⚷790(3)

Application of appealing defendants for modification of writ of supersedeas staying execution for costs provided for in the judgment pending appeals so as to prevent enforcement of the judgment in all respects pending a determination of the appeals became "moot" and would be dismissed upon appeals being decided on the merits.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot".

In Bank.

Action by J. J. Fleming and others against J. R. Bennett, A. C. Barham and others, to quiet title to asserted rights in and to the use of waters of a certain river. From the final decree and a supplemental order entered, A. C. Barham and others appealed, and applied for a writ of supersedeas to stay execution for costs provided for in the final decree. On application of appealing defendants for a modification and enlargement of temporary stay to prevent the enforcement of the final decree in all respects pending a determination of the appeals.

Application dismissed.

See, also, Cal.Sup., 116 P.2d 442.

Williamson & Wallace and W. F. Williamson, all of San Francisco, for appellants.

C. C. Carleton and Spencer Burroughs, both of Sacramento, and C. T. Waldo, of Pasadena, for respondent Division Water Resources.

J. A. Pardee and Harden Barry, both of Susanville, for respondents.

PER CURIAM.

The appeals in the above entitled action have been determined this day by an affirmance of the judgment and of the supplemental order. Cal.Sup., 116 P.2d 442. Pending said appeals, the appealing defendants applied for a writ of supersedeas to stay execution for costs provided for in said judgment. On January 20, 1941, this court issued an order to show cause why the writ applied for should not be issued, with a temporary stay of all proceedings on the judgment until the final determination of the application. On April 2, 1941, the court modified the temporary stay by restricting the operation thereof to the execution on the judgment only as to the costs. Thereafter the appellants applied to the court for a further modification and enlargement of the temporary stay to prevent the enforcement of the judgment in all respects pending a determination of the appeals. When the application for such further modification came on for hearing, the importance of an early decision on the merits of said appeals was stressed by counsel for all parties. The hearing on the appeals was accordingly advanced, with the result above indicated.

From the determination of said appeals on the merits it is apparent that the application for a modification of the temporary stay presents a question which has become moot. Said application is therefore dismissed.

18 Cal.2d 889

BARHAM v. SUPERIOR COURT OF LASSEN COUNTY.

S. F. 16613.

Supreme Court of California.

Aug. 27, 1941.

Prohibition ⚿24

Application for a writ of prohibition to prevent superior court from enforcing the judgment and supplemental order in a case in the files of such court presented a matter which had become "moot" and would be dismissed, where appeals in the case had been decided in favor of and upholding jurisdiction of superior court.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot".

◆

Original proceeding by A. C. Barham against the Superior Court of Lassen County for a writ of prohibition to prevent the respondent court from enforcing the judgment and supplemental order in the case of J. J. Fleming and others against J. R. Bennett and others in the files of such court.

Application dismissed.

Williamson & Wallace, of San Francisco, for appellant.

PER CURIAM.

This is an application for a writ of prohibition to prevent the respondent Superior Court from enforcing the judgment and supplemental order in the case of J. J. Fleming et al. v. J. R. Bennett et al., No. 4573 in the files of said Superior Court. The appeals in said cause having been decided in favor of and upholding the jurisdiction of the court (Cal.Sup., 116 P.2d 442, this day filed), the application herein presents a matter which has become moot, and said application is therefore dismissed.

O'BRIEN v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 11600.

District Court of Appeal, First District, Division 1, California.

Aug. 27, 1941.

Rehearing Denied Sept. 26, 1941.

Hearing Granted Oct. 23, 1941.

1. Municipal corporations 🔑741(1)

The provision of San Francisco Charter requiring filing of claims for damages against the city and county, within 60 days after the occurrence from which it is claimed the damages have arisen, applies to claims against the city based on negligence of its employees when engaged in proprietary functions. St.1935, p. 2421, § 87.

2. Municipal corporations 🔑741(1, 2)

The statutes requiring a statement of demand to be presented to a municipal officer before an action is instituted for damages for personal injuries are "mandatory", and there must be at least a substantial compliance with them.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

3. Constitutional law 🔑70(1)

The limitation on time for giving notice or filing claim against a municipality is matter for legislative control, and where law makes compliance therewith mandatory and provides no exception, the court may provide no exceptions under guise of interpretation, or construction.

4. Street railroads 🔑105

Failure to present claim against city of San Francisco for injuries sustained when struck by a street car alleged to have been negligently operated by city in its proprietary capacity, within 60-day period prescribed by charter, precluded recovery for injuries as against contention that claimant was not required to file claim within time limit on ground that due to her injury and pain and suffering incident to it, her mental faculties were continuously impaired until after the expiration of the 60-day period. St.1935, p. 2421, § 87.

5. Municipal corporations 🔑1021

Officers of a governmental agency cannot by their actions "waive" compliance with a claims statute.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

6. Estoppel 🔑62(5)
Municipal corporations 🔑741(1)

That municipal officers have actual knowledge of facts out of which a claim for damages might arise does not "estop" municipality from setting up defense of failure to file claim nor relieve injured party from filing claim.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

7. Street railroads 🔑105

Failure to present claim against city of San Francisco for injuries sustained when struck by street car alleged to have been negligently operated by the city in its proprietary capacity, within 60 days prescribed by charter provision precluded recovery for injuries, as against contention that literal compliance with the provision was not necessary where the officers of the city including the controller had full knowledge of the accident. St.1935, p. 2421, § 87.

8. Constitutional law 🔑70(3)

That charter provision for filing of claims against city might operate harshly against one mentally or physically incapacitated because of accident is a problem of legislative policy with which the court cannot interfere. St.1935, p. 2421, § 87.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Theresa O'Brien against the City and County of San Francisco for injuries sustained when struck by a street car alleged to have been negligently operated by defendant in its proprietary capacity. From a judgment for defendant entered after the sustaining of a demurrer to her complaint without leave to amend, the plaintiff appeals.

Affirmed.

Russell P. Tyler, of San Francisco, for appellant.

John J. O'Toole, City Atty., Henry Heidelberg, Deputy City Atty., and Walter E. Trefts, Jr., all of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment for defendant entered after the sustaining of a demurrer to her complaint without leave to amend.

The complaint alleges that on September 9, 1931, plaintiff received personal injuries necessitating the amputation of a leg when she was struck by a streetcar negligently operated by the defendant city in its proprietary capacity. The complaint shows on its face that plaintiff did not file a claim with the city and county until November 24, 1939, which was more than the sixty-day period provided by section 87 of the San Francisco Charter. St.1935, p. 2421. In the claim, attached to the complaint as an exhibit, she averred that due to her injury, and the pain and suffering incident to it, her mental faculties were continuously impaired until after the expiration of the sixty-day period; that it was not until November 20, 1939, that she learned she was required to file her claim, on which date she first consulted an attorney.

On this appeal plaintiff contends that under the facts of this case, as set forth in her claim, she was not required to comply with the charter section; that the section would be unconstitutional if it deprived plaintiff of a right of action in the circumstances here disclosed; that the officers of the city and county had full knowledge of the facts of the accident; that the section should not be construed as requiring a claim to be filed in such circumstances.

[1, 2] There can be no doubt that the city charter provision applies to claims against the city based on negligence of its employees when engaged in a proprietary function. Cathey v. San Francisco, 37 Cal.App.2d 575, 99 P.2d 1109. This is conceded by appellant. In interpreting claim statutes the courts of this state have adopted the rule that such statutes are mandatory and that there must be at least substantial compliance with them. Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320; Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185; Farmers, etc., Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795; Coen v. City of Los Angeles, 70 Cal. App. 752, 234 P. 426; Continental Ins. Co. v. City of Los Angeles, 92 Cal.App. 585, 268 P. 920; Wicklund v. Plymouth E. School Dist., 37 Cal.App.2d 252, 99 P.2d 314; Wilkes v. City and County of San Francisco, 44 Cal.App.2d 393, 112 P.2d 759.

[3] The contention made by appellant in the instant case has been passed on adversely to her in prior decisions. In Johnson v. City of Glendale, 12 Cal.App. 2d 389, 55 P.2d 580, it was urged that physical injury arising from the accident for which recovery was sought dispensed with compliance with the provisions of the claims statute there involved. Stats. 1931, p. 2475. This contention was rejected. In so holding the court stated (12 Cal.App.2d at page 393, 55 P.2d at page 581): "The allegation of incapacity and inability to file a claim presents a question which has not been directly decided in this state and one as to which the authorities elsewhere are in irreconcilable conflict. In one line of cases it is held that the requirements of statutes, charter provisions, or ordinances for the giving of notice of injuries or for the presentation of claims for damages need not be strictly met, and that substantial compliance only is demanded. In so holding, the courts have supplied conditions not expressed or attempted to be expressed in the laws. This is held justified by assuming that it could not have been the intention in enacting the legislation to bar the claims of those who might be unable to present them on time by reason of physical or mental incapacity, and this assumption again is held justified under the maxim that the law does not require impossibilities. The contrary, and we think the more satisfactory, rule is that the giving of notice or the filing of claims within the limited period allowed therefor is purely a matter for legislative control, and that where a law makes compliance mandatory and no exceptions are provided in the law itself, the courts may provide none under the guise of interpretation or construction. [Citing fifteen cases.]"

The holding in the Johnson case was followed in Wicklund v. Plymouth E. School Dist., 37 Cal.App.2d 252, 99 P.2d 314. In that case, in interpreting the claims statute contained in section 2.801 of the School Code, the court stated (37 Cal.App.2d at page 254, 99 P.2d at page 315): "The statute makes no exception whatever, based upon the physical incapacity of the claimant during the said period. Whether the injury is continuous or not, is immaterial.

The claim must be filed within ninety days from the date of the 'accident', irrespective of the nature of the injuries received. This does not mean ninety days from the date when the full result of the injuries were ascertained, or from the date of recovery from such injuries. It is a familiar rule that where a right of recovery is purely statutory and is granted upon conditions, one who seeks to enforce the right must by allegation and proof bring himself clearly within the conditions. Johnson case, supra.

"It is true, as pointed out by appellant, this holding may, in some cases, work a real hardship. If it does result in an injustice and is too onerous, that is a matter of legislative concern, and not judicial interpretation. The complaint shows that appellant failed to file her claim within the time provided by the School Code, and hence it did not state a cause of action."

It has also been held that the claims statute involved in the Johnson case is applicable even though the injured person is a minor. Phillips v. County of Los Angeles, 140 Cal.App. 78, 35 P.2d 187; Myers v. Hopland U. E. School Dist., 6 Cal. App.2d 590, 44 P.2d 654.

These cases establish the rule that the claims statute contained in the general state law does not impliedly except disability, whether that disability be physical, or because of minority.

[4] It is true that all of the above cases dealt with claims against public agencies for torts committed by employees while performing a governmental function. The liability was therefore purely statutory. Appellant urges that where the liability for injuries would exist at common law for torts of a public agency committed by employees while acting in a proprietary capacity, as in the instant case, and the liability is not purely statutory, the claims provision should be applied less strictly. Appellant concedes, however, as already pointed out, that the charter provision is applicable to claims arising out of torts committed by governmental employees while performing a proprietary function. If a city has power to pass such a charter provision, and it must be and is conceded that it has, then no legal reason has been suggested why such charter provision should be interpreted differently from the general state statute applicable to governmental agencies for torts committed in a governmental capacity.

[5-7] The second contention of appellant is that literal compliance with the charter provision should not be exacted where, as alleged here, the officers of the city, including the controller, with whom the claim must be filed, had full knowledge of the accident. It is now well-settled law that officers of a governmental agency cannot, by their actions, waive compliance with a claims statute, nor can they estop the governmental agency from setting up the defense of failure to file a claim. Their actual knowledge does not estop the governmental agency, or relieve the injured person from filing a claim. Kline v. San Francisco U. School Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; Cooper v. County of Butte, 17 Cal. App.2d 43, 61 P.2d 516; Johnson v. City of Glendale, supra.

[8] The rule requiring the filing of a claim even where the plaintiff is, because of the accident, mentally or physically incapacitated, is undoubtedly a harsh one. However, once it is conceded that a governmental agency has power to pass such a statute with or without exceptions to its operation, then the matter becomes a problem of legislative policy with which the courts may not interfere.

The judgment appealed from is affirmed.

KNIGHT, and WARD, JJ., concurred.

46 Cal.App.2d 605

Ex parte CARBONI.

Cr. 2198.

District Court of Appeal, First District, Division 1, California.

Aug. 27, 1941.

1. Habeas corpus 🔑92(3)

In habeas corpus proceeding for release from custody under order adjudging petitioner in contempt for willfully refusing to comply with order requiring petitioner to partially reimburse county for support of her minor child, a ward of juvenile court, adjudication of petitioner's ability to comply with order to reimburse in order adjudging petitioner in contempt was conclusive, and sufficiency of evidence could not be considered. St.1937, pp. 1048, 1049, §§ 860, 862–864.

2. Infants 🔑16

Where minor of whom custody had been awarded to father in divorce action was declared ward of the juvenile court, and county assumed cost of child's support, court could direct mother to partially reimburse county, notwithstanding that she might have been deprived of custody of child in previous divorce action. Civ.Code, § 196; St.1921, p. 803, § 11; St.1937, pp. 1048, 1049, §§ 860, 862–864.

3. Infants 🔑16

Under Welfare and Institutions Code, juvenile court is empowered to investigate each case on its merits and to determine whether father or mother, or estate of a minor who is declared a ward of the court, or any two or all of them are able financially to reimburse county in whole or in part for ward's support. St.1937, pp. 1048, 1049, §§ 860, 862–864.

4. Infants 🔑16

That no express finding was made that father was unable to reimburse county for support of a minor, who was declared a ward of the juvenile court, did not relieve mother from her obligation, imposed by provisions of Welfare and Institutions Code, to support minor, notwithstanding that custody of minor had been awarded to father in a previous divorce action. St.1937, pp. 1048, 1049, §§ 860, 862–864.

5. Parent and child 🔑3(1, 2)

The primary duty to support a minor rests upon parents, and estate of minor can only be resorted to where parents are unable to fulfill the obligation in whole or in part. Probate Code, §§ 1502, 1504.

6. Infants 🔑16

Under provisions of Welfare and Institutions Code authorizing juvenile court to require parents of a minor who is declared a ward of the court to reimburse county for minor's support if financially able to do so, court had jurisdiction to order mother to partially reimburse county to extent of her ability, without making a finding that father, as guardian of estate of minor, was not able to fully reimburse county out of minor's estate. Probate Code, §§ 1502, 1504; St.1937, pp. 1048, 1049, §§ 860, 862–864.

7. Action 🔑35

The remedies provided by provision of Welfare and Institutions Code authorizing juvenile court to punish disobedience of court order requiring parent of a minor, who was declared a ward of court, to reimburse county for minor's support, and by the provision authorizing enforcement of a reimbursement order by execution, are not mutually exclusive, but are cumulative. St.1937, pp. 1022, 1049, §§ 579, 867.

8. Contempt 🔑25

Under Welfare and Institutions Code authorizing juvenile court to require a parent of a minor who has been declared a ward of court to reimburse county for minor's support if financially able to do so, juvenile court had authority to punish disobedience of a reimbursement order by contempt proceedings, as against contention that sole method of enforcement was by execution. St.1937, pp. 1022, 1049, §§ 579, 867.

9. Habeas corpus 🔑92(3)

In habeas corpus proceeding for release from custody under order adjudging petitioner in contempt for willfully refusing to comply with order requiring petitioner to partially reimburse county for support of her minor child, a ward of juvenile court, reasonableness of fine imposed on petitioner in contempt proceedings could not be passed on. St.1937, pp. 1022, 1048, 1049, §§ 579, 860, 862–864.

◆

Stella Carboni was adjudged in contempt for willfully refusing to comply with an order of the juvenile court, Alameda county, requiring her to partially reimburse the county for the support of her minor child, a ward of the juvenile court, and she petitions for a writ of habeas corpus.

Writ discharged and petitioner remanded.

Ben B. Jones, of Oakland, for petitioner.

Ralph E. Hoyt, Dist. Atty., and J. F. Coakley, and Cecil Mosbacher, Deputy Dist. Attys., all of Oakland, for respondent.

PETERS, Presiding Judge.

Petition for a writ of habeas corpus. Petitioner has been adjudged in contempt and sentenced to one day in jail and a $500 fine for wilfully refusing to comply with an order of the juvenile court requiring her to partially reimburse the county for the support of her minor child, a ward of the juvenile court.

The facts as disclosed by the petition and return thereto are as follows: In 1932 the husband of petitioner secured a divorce from her on the ground of cruelty. The custody of three minor children of the marriage was awarded the father. One of these children was Jenny Carboni. In 1936 the child, Jenny, was declared a ward of the juvenile court on the ground that she was in danger of leading an immoral life. By this determination, custody of Jenny was taken from the father and she was committed to the custody of the probation officer. In September of 1940 the father was appointed guardian of the person and estate of Jenny. The child continued, however, to live in a foster home as the ward of the juvenile court. The child, in 1939, received a legacy of $1,000 from her maternal grandfather. In October of 1940 the juvenile court made an order directed against both parents for the reimbursement of the county for its expenditures. This order required the father to pay $15 a month as guardian of Jenny's estate, and $2.50 per month from his own earnings, and also required petitioner to pay $2.50 per month to the county, for the purpose of reimbursing the county. This order recited that, "the attorneys for said Stella Carboni in this matter, have consented to abide by any reimbursement order that the court may order", and further found that, "the father and mother are each able to reimburse in part for the support and maintenance of said ward to the extent of $2.50 per month reimbursement from each parent". Thereafter, on the 8th day of November, 1940, the juvenile court made another order directed solely to petitioner, again requiring her to partially reimburse the county for the support of Jenny by paying $2.50 each month. Again the court found that, "the mother of said ward is able to reimburse in part for the support and maintenance of said ward". Apparently this second order was made necessary because petitioner repudiated the agreement of her counsel, and she was apparently not present at the hearing when the October order was made. At the hearing on the present contempt proceeding, she likewise denied that she was present when the order of November 8, 1940, was made, but the recitals in that order, as well as the evidence of the court attaches and juvenile court officials, support the finding that she was present. The record shows that the county has expended approximately $1,200 for the support and maintenance of Jenny, and that it has been reimbursed only to the extent of $117.50, entirely from the father and from the estate of the ward.

Petitioner did not comply with the order of November 8, 1940. In April of 1941 the deputy probation officer filed an affidavit for an order to show cause why petitioner should not be punished for contempt. The order to show cause duly issued, and on May 6, 1941, after a hearing, the juvenile court found petitioner guilty of contempt. By its order the court found that petitioner has an income of $50 per month from a trust created by the will of her father; that she has a life estate in the home where she is living; that she has a legacy payable to her in October, 1943, of $4,600, contingent only upon her living to that date; that she is able-bodied and capable of earning a reasonable amount; that petitioner refused and failed to comply with the order of reimbursement heretofore referred to; that she "has been at all times since the said order was made and now is able to comply with said order"; that "Stella Carboni has now, and since the 8th day of November, 1940, has had the ability to reimburse the County of Alameda in the sum of $2.50 per month"; that no sufficient reason has been shown to excuse the failure. The court therefore found petitioner to be in contempt and ordered that she be imprisoned in the county jail for one day, and fined her the sum of $500.

Petitioner urges five contentions in support of her position that the juvenile court was without jurisdiction to adjudicate her in contempt.

[1] 1. She first urges that the court was without jurisdiction because the evidence does not show ability to pay. Both the order requiring petitioner to reimburse the county and the order of commitment contain a finding that she has the ability to pay $2.50 a month. Under such circumstances, this court has no power on habeas corpus to consider the state of the evidence. This precise point has been recently considered by this court in the case of In re Carpenter, 36 Cal.App.2d 274, 97 P.2d 476. There the petitioner was adjudged guilty of contempt for failing to pay $20 per month towards the partial support of her five minor children, all wards of the juvenile court, as ordered by the juvenile court. The order recited that Mrs. Carpenter was financially able to comply therewith. She refused to comply with the order and was adjudged in contempt. The commitment recited her ability to pay. On habeas corpus it was urged that these findings were totally unsupported by the evidence. It was held that in support cases of this nature, on habeas corpus, the adjudication of ability to pay is conclusive, and the sufficiency of the evidence cannot be considered. See, also, Ex parte Levin, 190 Cal. 207, 215 P. 908; In re Wilson, 123 Cal.App. 601, 11 P.2d 652; Ex parte Von Gerzabek, 63 Cal.App. 657, 219 P. 479; In re Gutierrez, 46 Cal.App. 94, 188 P. 1004. These cases are decisive on the point under discussion.

[2] 2. Petitioner next contends that, inasmuch as she was legally deprived of the custody of Jenny by the divorce decree, and by the order of the juvenile court making Jenny a ward of that court, there is no legal obligation on her part to support her child. This contention, if approved, would mean that a mother who had been deprived of the custody of her child because of her wrongful conduct, could not be compelled to assist the county in supporting the child, even though able to pay for such support. Petitioner relies on the general principle declared in section 196 of the Civil Code that: "The parent entitled to the custody of a child must give him support and education suitable to his circumstances. * * *" This rule has been applied in a variety of situations, some of which appear in the several cases cited by petitioner. Ex parte Miller, 109 Cal. 643, 42 P. 428; Selfridge v. Paxton, 145 Cal. 713, 79 P. 425; Pacific G. D. Co. v. Industrial Acc. Comm., 184 Cal. 462, 194 P. 1, 13 A.L.R. 725; Matter of Ross, 6 Cal.App. 597, 92 P. 671; McKay v. McKay, 125 Cal. 65, 57 P. 677; Matter of McMullin, 164 Cal. 504, 129 P. 773. These cases hold that a parent who is awarded the care and custody of the minor children in a divorce action, in the absence of an order for support, may not maintain an action against the other parent for money expended in the caring for the children, and, further that a third person who furnishes necessities to minors awarded to one parent cannot, in the absence of an order for support, hold the other parent legally responsible for the cost of the necessities. These cases are not in point in this proceeding. None of them passed on the interpretation of the provisions of the juvenile court law. The question here presented is whether, under that act, not the provisions of the Civil Code, a parent deprived of custody can be compelled, by the juvenile court, to contribute to the support of such child. This precise question has been passed upon by the Supreme Court in Svoboda v. Superior Court, 190 Cal. 727, 214 P. 440. In that case, custody of a minor child had been awarded the mother by a divorce decree which made no provision that the father contribute to the support of the child. Thereafter, the minor was declared a ward of the juvenile court and committed to the Preston School of Industry. Thereafter, the father was directed to reimburse the county in the amount of $20 per month. He sought annulment of this order on certiorari. He contended, as does petitioner here, that, since he had no legal right to custody, and, since no support order had been made in the divorce proceedings, he could not be compelled to reimburse the county. He, as does petitioner here, relied upon the provisions of section 196 of the Civil Code. The Supreme Court held that the provisions of the juvenile court law (Stats. of 1921, p. 798), and particularly section 11 thereof, superseded section 196 of the Civil Code as to juvenile court proceedings, and that under section 11 either parent could be compelled to reimburse the county even though not entitled to the custody of the

child. Section 11 of the act is now substantially section 860, et seq., of the Welfare and Institutions Code, St.1937, p. 1048. Section 860 of that code provides that if it is necessary to provide for the support and maintenance of a ward of the juvenile court the order shall direct that the whole of such expense up to $20 per month (and not to exceed $35 per month) shall be paid from the county treasury. Section 862 reads as follows:

"If it is found that thirty-five dollars a month is insufficient to pay the whole expense of support and maintenance of such ward or other minor person, * * * the court may order and direct that such additional amount as is necessary shall be paid out of the earnings, property, or estate of such ward or such other minor person, *or by the parents or guardian of such ward or such other minor person,* or by any other person liable for his support and maintenance, to the probation officer, who shall in turn pay it to the person, association, or institution that under court order is caring for and maintaining such ward or other minor person." (Italics added.)

Section 863 provides: "At the time of making any order providing for the support and maintenance of a ward of the juvenile court or such other minor person, the court shall inquire into the earnings, property, or estate of such ward or other minor person, *and into the ability of the parents* or guardian of such ward or other minor person, or of any other person liable for his support and maintenance, to pay for the expense of his support and maintenance." (Italics added.)

Section 864 provides: "If the court finds that there are earnings, property, or estate of such ward or other minor person, sufficient therefor, *or that the parents or guardian of such ward or other minor person, or other person liable for the support of such ward, or other minor person is able to pay, either in whole or in part, for the expense of his support and maintenance,* the court shall further order, and direct that the county be reimbursed, in whole or in part, for its expense of support and maintenance of him *from his earnings, property, or estate, or by his parents, guardian, or other person liable for his support.* For the purpose of such reimbursement the court may order payments to be made to the probation officer *from such earnings, property, or estate, or by such parents, guardian, or other person.* The amount of these payments shall be determined by the court and the probation officer shall, in turn, pay them over to the county treasurer on account of such reimbursement." (Italics added.)

In the Svoboda case, supra, after analyzing substantially the same provisions found in section 11 of the old statute, the court held that, where a minor has been declared a ward of the juvenile court and the county has assumed the cost of such child's support, by proper order "the court may direct the parent, or parents, of such ward, financially able to do so, to reimburse the county, regardless of whether or not he, she or they may have been deprived of the custody of the child in any previous divorce proceeding. The words in the section, 'or other person liable for the support and maintenance of said ward,' do not modify or relate back to the words 'parent, parents, guardian of such ward.' They relate to a class of persons, such as those who stand in loco parentis to the ward, as trustees of a fund for the support of the minor, or persons who may have adopted the child. It follows, therefore, that the respondent did not act in excess of its jurisdiction in requiring the petitioner to reimburse the county of Alameda for the expense of the support and maintenance of his minor child at the Preston School of Industry." 190 Cal. at page 731, 214 P. at page 442. The rule of this case is decisive of the contention under discussion.

[3,4] 3. The next contention of petitioner is somewhat related to the point last discussed. It is urged that the primary duty of support is on the father who was awarded custody by the divorce decree; that the mother, who has been deprived of custody, is not liable for the child's support in the absence of a finding that the father of the ward is not able to reimburse the county for the support of the ward; that no such finding was made in the present case.

It should be noted that the father of Jenny was not overlooked by the juvenile court. In the reimbursement order of October 11, 1940, it is found "that the father and the mother are each able to reimburse in part for the support and maintenance of said ward to the extent of $2.50 per month reimbursement from each parent". By the same order the father, as guardian of the estate of the ward, was required to reimburse the county to the extent of $15 a month from the estate of the ward. Whatever may be the general law on such matters, the present case is not governed by the general provisions of the Civil Code, but by the specific provisions of the Welfare and Institutions Code. The sections of that code, above-quoted, confer upon the juvenile court broad powers of discretion. That court is required to investigate into the ability of the parents of the ward to reimburse the county. No distinction is made between the duty of the father or the mother to reimburse the county. Under those sections, the juvenile court is empowered to investigate each case on its merits, and to determine whether the father or the mother, or the estate of the ward, or any two or all of them are able financially to reimburse the county in whole or in part. The court is empowered to compel the father, or the mother, or the estate of the ward, or any two or all three of them, to contribute. The mere fact one may be better able to pay than the others does not prohibit the court from compelling the others to pay to the extent of their ability. Obviously, the relative financial abilities of the persons involved is a factor that should be, and in this case was, considered by the juvenile court in making its order. But the mere fact that no express finding is made that the father is unable to reimburse the county does not relieve the mother from her obligation, imposed by the provisions of the Welfare and Institutions Code, to support her child. That is the only reasonable conclusion that can be drawn from the code sections as interpreted in Svoboda v. Superior Court, supra.

[5, 6] 4. The fourth contention of petitioner is somewhat similar to the point last-discussed. It is urged that the court was without jurisdiction to order the mother to partially reimburse the county to the extent of her ability in the absence of a finding that the father of the child, as guardian of the estate of the ward, was not able to fully reimburse the county out of the estate of the ward. The record shows that in December of 1939 Jenny received a cash legacy in the sum of $1,000. How much remains of that legacy does not appear.

Petitioner places her main reliance on two sections of the Probate Code. Section 1502 provides that every guardian must apply the income of the ward's estate to the suitable support and maintenance of the ward. Section 1504 provides that if a minor, having a father living, has property, the income of which is sufficient for his support and maintenance in a manner more expensive than the father can afford, the expenses of such minor may be defrayed out of the income of the property.

These sections have no application to the present case. The law is well settled that the primary duty to support a minor rests upon his parents, and that the estate of the minor can only be resorted to where the parents are unable to fulfill the obligation in whole or in part. In re Keck, 100 Cal.App. 513, 280 P. 387; Fagan v. Fagan, 43 Cal.App.2d 189, 110 P.2d 520. Moreover, as already pointed out, the controlling statutory law is to be found in the Welfare and Institutions Code, and not in the Probate or Civil Codes. The Welfare and Institutions Code sections, referred to above, confer upon the juvenile court discretionary power to determine what share of the expense of his support should be borne by the parents, or either of them, and what share should be borne by the estate of the ward. Everything that was said in discussing point three is equally applicable to the point now under discussion. The point is without merit.

[7, 8] 5. The last major point urged by petitioner is that the court was without jurisdiction to punish disobedience of the reimbursement order by contempt proceedings. It is contended that the sole method of enforcement is by execution. Section 579 of the Welfare and Institutions Code provides that: "Any disobedience or interference with any order of the juvenile court or of the judge thereof constitutes a contempt of court." Petitioner contends, however, that that section has no application to the enforcement of reimbursement orders because section 867 of the Code permits such orders to be enforced by execution. Obviously, the two remedies are not mutually exclusive, but are cumulative. Similar statutes have uniformly been interpreted as creating cumulative remedies. Ex parte Karlson, 160 Cal. 378, 117 P. 447, Ann.Cas.1912D, 1334; In re Wilson, 123 Cal.App. 601, 11 P.2d 652.

[9] The petitioner also argues that the juvenile court abused its discretion in imposing fine of $500. Even if it were the fact that the size of the fine was out of

proportion to the seriousness of the offense, the court had jurisdiction to impose a fine, and the reasonableness of that fine cannot be passed on in a habeas corpus proceeding.

The writ is discharged and the prisoner remanded.

KNIGHT and WARD, JJ., concurred.

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46 Cal.App.2d 636

BAYLE-LACOSTE & CO., Inc., v. SUPERIOR COURT OF ALAMEDA COUNTY et al.

Civ. 11788.

District Court of Appeal, First District,
Division 1, California.
Aug. 29, 1941.

1. Dismissal and nonsuit 🔑60(1)

The statute providing for dismissal of actions unless brought to trial within five years after filing of complaint is applicable to an action in which the state is a plaintiff. Code Civ.Proc. § 583.

2. Eminent domain 🔑197

The statute providing for dismissal of actions unless brought to trial within five years after filing of complaint may be invoked in a condemnation proceeding. Code Civ.Proc. § 583.

3. Dismissal and nonsuit 🔑60(1)

The statute providing for dismissal of actions unless brought to trial within five years after filing of complaint is "mandatory" that action shall be dismissed as to parties served, if not brought to trial within five years after filing thereof, except where parties have stipulated in writing that time may be extended. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

4. Dismissal and nonsuit 🔑50

The rule embodied in statute providing for dismissal of actions unless brought to trial within five years after filing of complaint is not so rigid that under certain circumstances, notwithstanding defendant's failure to appear before expiration of five-year period, a party as plaintiff, cross-complainant or intervener may not have benefit of a "waiver" by his opponent. Code Civ. Proc. § 583.

5. Appearance 🔑22
Dismissal and nonsuit 🔑50

A party who, notwithstanding absence of service of summons upon him, makes a general appearance, filing, after the five-year period following filing of complaint, an answer in which he seeks affirmative relief in damages, thus voluntarily becoming a party to litigation, thereby impliedly "waives" objection to jurisdiction of trial court and to right of dismissal based upon record date of commencement of action. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

6. Dismissal and nonsuit 🔑60(1)

The purpose of statute providing for dismissal of actions unless brought to trial within five years after filing of complaint is to prevent avoidable delay for too long a period. Code Civ.Proc. § 583.

7. Dismissal and nonsuit 🔑60(1)

The statute providing for dismissal of actions unless brought to trial within five years after filing of complaint is not designed arbitrarily to close the proceeding at all events in five years, since it permits parties to extend the period without limitation, by written stipulation, and, despite mandatory language of statute, implied exceptions to statute are recognized. Code Civ.Proc. § 583.

8. Mandamus 🔑174

A determination of question involved on proceeding in mandamus to compel superior court to dismiss a condemnation proceeding pending therein for failure to bring it to trial within five years after filing of complaint could not ignore principles of law and equity as they bore upon actions of parties. Code Civ.Proc. § 583.

9. Dismissal and nonsuit 🔑60(1)

The statute providing for dismissal of actions unless brought to trial within five years after filing of complaint is not inflexible. Code Civ.Proc. § 583.

10. Dismissal and nonsuit 🔑80

The dismissal of an original complaint and answer under mandatory provisions of statute providing for dismissal of actions unless brought to trial within five years after filing of complaint does not necessarily require dismissal of a cross-complaint and answer where issues joined are separate, distinct and severable. Code Civ.Proc. § 583.

11. Dismissal and nonsuit 🔑60(6)

A partial trial within five years and a continuance by consent of parties is not within statute providing for dismissal of actions unless brought to trial within five years after filing of complaint. Code Civ.Proc. § 583.

12. Dismissal and nonsuit 🔑50

The statute providing for dismissal of actions unless brought to trial within five years after filing of complaint may be waived by estoppel if there is a written stipulation. Code Civ.Proc. § 583.

13. Appeal and error 🔑1008(3)
Dismissal and nonsuit 🔑60(6)

Under statute providing for dismissal of actions unless brought to trial within five years after filing of complaint, except where parties have stipulated in writing that the time may be extended, a written stipulation may be in form of a letter, and if it is uncertain in effect the trial court's interpretation on a motion to dismiss is binding on a reviewing court. Code Civ.Proc. § 583.

14. Dismissal and nonsuit 🔑60(2)

Time consumed by appeal is not counted within the five-year period in statute providing for dismissal of actions unless brought to trial within five years after filing of complaint. Code Civ.Proc. § 583.

15. Dismissal and nonsuit 🔑50

When it definitely appears from any written document that a waiver of the five-year period mentioned in statute providing for dismissal of actions unless brought to trial within five years after filing of complaint is intended, it is sufficient. Code Civ. Proc. § 583.

16. Dismissal and nonsuit 🔑50

The voluntary appearance of a party after five years have elapsed may indicate a "waiver" of statute providing for dismissal of actions unless brought to trial within five years after filing of complaint. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

17. Eminent domain 🔑166

A "condemnation action" is a "proceeding in rem".

See Words and Phrases, Permanent Edition, for all other definitions of "Condemnation Action" and "Proceeding in Rem".

18. Eminent domain 🔑172

In condemnation proceedings, the filing of complaint, and not the issuance of summons, vests the court with jurisdiction of subject matter.

19. Courts 🔑24

Jurisdiction of the subject-matter in condemnation proceedings is not conferred by consent of parties, its origin being in provisions of constitution, to be exercised in manner provided by statute. Code Civ.Proc. § 1237 et seq.; Const. art. 1, § 14; art. 12, § 8.

20. Appearance 🔑19(1)
Courts 🔑21, 25, 37(1)

Jurisdiction over the person may be acquired by service of process, by consent, general appearance, or by waiver through a failure to seasonably object.

21. Dismissal and nonsuit 🔑60(2)

All actions must be dismissed if summons has been served and no answer filed, plaintiff having failed to have judgment entered within three years after service of summons. Code Civ.Proc. § 581a.

22. Dismissal and nonsuit 🔑60(2)

An action may in discretion of trial court be dismissed for want of prosecution when there has been a failure to bring it to trial within two years after its filing. Code Civ.Proc. § 583.

23. Appearance 🔑12

All actions may be prosecuted in same manner as if summons had been issued and served, if appearance is voluntarily made within three years. Code Civ.Proc. § 581a.

24. Appearance 🔑20, 24(5)

A voluntary appearance generally of a defendant is a "waiver" of service of summons and of any defect therein. Code Civ. Proc. § 416.

25. Appearance 🔑9(4)

The filing of an answer is a "general appearance". Code Civ.Proc. § 1014.

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance".

26. Appearance ⚷2

A party may appear though he is not named in complaint.

27. Corporations ⚷508

Where a corporation which was not specifically named as defendant in complaint in condemnation proceedings, although sued under a fictitious name, was not served with summons but filed an answer in the proceedings over five years after commencement thereof seeking affirmative relief in damages, the corporation, by filing answer, accepted the trial court's jurisdiction and where corporation subsequently filed amended answers raising no jurisdictional question and manifesting an intent to submit issues on merits, the corporation "waived" such question by failure to seasonably object. Code Civ.Proc. § 1246.

28. Eminent domain ⚷197

Whether the document filed by defendant in a condemnation proceeding is designated an answer or a cross-complaint, if it asks for affirmative relief in damages, the general rule is that the proceeding may not be dismissed without consent of party from whom damages are sought. Code Civ.Proc. § 1246.

29. Eminent domain ⚷177
Parties ⚷76(1)

In condemnation proceedings, plaintiff had the privilege, by service of summons, to identify parties designated under fictitious names, and if any party appeared improperly, plaintiff had a right to move to strike such party's pleading from file.

30. Parties ⚷76(1)

Where a corporation which was not specifically named as defendant in complaint in condemnation proceedings, although sued under a fictitious name, was not served with summons, and corporation filed an answer in proceedings over five years after commencement thereof seeking affirmative relief in damages, plaintiff's failure within a reasonable period to move to strike answer from file was an admission that corporation, sued under a fictitious name, was a party to proceedings from their commencement and an acquiescence in appearance of corporation in such capacity, and conduct of plaintiff and corporation manifested a "waiver" of any question of propriety of appearance of corporation. Code Civ.Proc. § 1246.

31. Courts ⚷30

The statute providing for dismissal of actions unless brought to trial within five years after filing of complaint does not deprive trial court of jurisdiction upon mere lapse of five years. Code Civ.Proc. § 583.

32. Parties ⚷51(1)

Where trial court finds, or record indisputably shows, that a complete determination of controversy cannot be had without presence of other parties, such parties become "necessary parties" and "indispensable parties", and statute respecting when trial court shall order other parties to be brought in is "mandatory", and question becomes one of jurisdiction in that the court may not proceed without bringing them in. Code Civ.Proc. § 389.

See Words and Phrases, Permanent Edition, for all other definitions of "Indispensable Party" and "Necessary Party".

33. Courts ⚷21

Where a corporation which was not specifically named as defendant in complaint in condemnation proceedings, although sued under a fictitious name, was not served with summons, jurisdiction over corporation was not obtained until it appeared voluntarily in the proceedings and filed an answer.

34. Eminent domain ⚷197

Where it is legally impossible to bring condemnation proceedings to trial within statutory period designated in statute providing for dismissal of actions unless brought to trial within five years after filing of complaint, the voluntary appearance of a defendant, subsequent to the five-year period as fixed by filing of complaint, "waives" provisions of statute. Code Civ.Proc. § 583.

35. Eminent domain ⚷177, 197

Where a corporation which was not specifically named as defendant in complaint in condemnation proceedings, although sued under a fictitious name, was not served with summons but filed an answer over five years after commencement of proceedings seeking affirmative relief in damages, and, if allegations of answer were true, a judgment for plaintiff would have affected rights of corporation, and plaintiff acquiesced in appearance of corporation, the corporation was a "necessary party" and "indispensable party" to proceedings and could not demand that proceedings be dismissed for failure to bring them to trial within five years after filing of complaint. Code Civ.Proc. §§ 389, 583, 1246, 1250.

36. Dismissal and nonsuit ⚷60(1)

The filing of an amended complaint may not prolong the period provided for by statute respecting dismissal of actions unless brought to trial within five years after filing of complaint. Code Civ.Proc. § 583.

37. Eminent domain ⚷197

Where a corporation which was not specifically named as defendant in complaint in condemnation proceedings, although sued under a fictitious name, was not served with summons but filed an answer over five years after commencement of proceedings seeking affirmative relief in damages, and plaintiff acquiesced in appearance of corporation, the answer was binding upon corporation as a stipulation "waiving" provisions of statute providing for dismissal of actions unless brought to trial within five years after filing of complaint. Code Civ.Proc. §§ 583, 1246, 1250.

Proceeding in mandamus by Bayle-Lacoste & Company, Inc., against the Superior Court of Alameda County and others, to compel respondent court to dismiss an action for failure to bring it to trial within five years after filing of the complaint.

Demurrer to answer to petition overruled, demurrer to petition sustained, alternative writ discharged and peremptory writ denied.

George J. LaCoste, Weinmann, Quayle & Berry, and George P. Tobin, all of Oakland, and Harry A. Encell, of San Francisco, for petitioner.

Clifford D. Good, George C. Hadley, Holloway Jones, and Lincoln V. Johnson, all of San Francisco, and Francis J. Carr, of Redding, for respondents.

WARD, Justice.

This is a proceeding in mandamus to compel the respondent court to dismiss an action pending therein for failure to bring it to trial within five years after the filing of the complaint. Code Civ.Proc., § 583.

The action, brought by the people of the state of California by and through the Department of Public Works to condemn a right of way for highway purposes, was filed and summons issued on December 27, 1933. There were named as defendants approximately six individuals, ten corporations, five John Does and four fictitiously named corporations. Petitioner herein was not designated as a defendant under the name of Bayle-Lacoste & Co., Inc., a corporation. There is an allegation in the complaint that "Parcel No. 4 (Described as Parcel No. 5 in resolution of condemnation in plaintiff's complaint) is owned by defendant John Lacoste." An answer and subsequent amended answer were filed by the executors of the estate of John Lacoste, also known as John B. Lacoste. Over five years and ten months later, as petitioner alleges: "* * * on October 2, 1939, petitioner, sued in said action numbered civil 130405 under the fictitious name of Black-White Company, a corporation, appeared in said action by filing its answer therein." A fourth amended answer of Bayle-Lacoste & Co., Inc., petitioner herein, prays the judgment and decree of the superior court as follows: "That this court ascertain and assess and award damages to this defendant in the sum of Sixty-five thousand seven hundred and seventeen and 97/100 Dollars ($65,717.97), together with interest" etc. It is averred by petitioner that no stipulation was entered into in the condemnation proceeding between it and plaintiff waving the provisions of Code of Civil Procedure, section 583.

Respondents appeared herein by demurrer and answer, one of the grounds of demurrer being "That it cannot be ascertained from the allegations contained in said petition whether or not there was an implied waiver of the provisions of section 583 of the Code of Civil Procedure, State of California, as between said petitioner and the plaintiff in the proceeding referred to in Paragraph II thereof".

[1-7] Section 583 is applicable in a suit in which the state is a party plaintiff (Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 56 P.2d 950) and may be invoked in a condemnation proceeding. City of Bell v. American States W. S. Co., 10 Cal.App.2d 604, 52 P.2d 503. The section is mandatory that the action shall be dismissed as to parties served, if not brought to trial within five years after the filing thereof, except where the parties have stipulated in writing that the time may be extended (City of Bell v. American States W. S. Co., supra; Superior Oil Co. v. Superior Court, supra; Andersen v. Superior Court, 187 Cal. 95, 200 P. 963), but the rule is not so rigid that under certain circumstances, notwithstanding defendant's failure to appear before the expiration of the five-year period, a party as plaintiff, cross-complainant or intervenor may not have the benefit of a "waiv-

er" by his opponent. A party who, notwithstanding the absence of service of summons upon him, makes a general appearance, filing, after the five-year period, an answer in which he seeks affirmative relief in damages, as in the present case, thus voluntarily becoming a party to the litigation, thereby impliedly waives objection to the jurisdiction of the court and to the right of dismissal based upon the record date of the "commencement" of the action. In Christin v. Superior Court, 9 Cal.2d 526, 532, 71 P.2d 205, 208, 112 A.L.R. 1153, the court said: "The purpose of the statute is plain: to prevent avoidable delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years, for it permits the parties to extend the period without limitation, by written stipulation. And, as we have already pointed out, despite the mandatory language implied exceptions are recognized." Johnston v. Baker, 167 Cal. 260, 139 P. 86.

[8-10] The determination of the question herein cannot ignore principles of law and equity as they bear upon the actions of the parties. Lake v. Superior Court, 39 Cal.App.2d 247, 102 P.2d 1107. The statute is not inflexible. Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann.Cas. 1917D, 670. It has been held that the dismissal of an original complaint and answer under the mandatory provisions of section 583, does not necessarily require the dismissal of a cross-complaint and answer where the issues joined are separate, distinct and severable. Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 25 P.2d 983, 90 A.L.R. 384.

[11-14] Further exceptions appear as follows: A partial trial within five years and a continuance by consent of the parties is not within the statute (City of Los Angeles v. Superior Court, 15 Cal.2d 16, 98 P.2d 207); there is a possibility of a waiver by estoppel if there is a written stipulation (Miller & Lux, Inc. v. Superior Court, 192 Cal. 333, 219 P. 1006); a written stipulation may be in the form of a letter, and if it is uncertain in effect the trial court's interpretation on a motion to dismiss is binding on a reviewing court (Bank of America, etc. v. Superior Court, 22 Cal.App.2d 450, 71 P.2d 296); time consumed by appeal is not counted within the five year period. Christin v. Superior Court, supra.

[15] Section 583 provides that a stipulation must be in writing (Miller & Lux, Inc. v. Superior Court, supra), but there is no provision that the writing must be in any particular form. When it definitely appears from any written document or documents that a waiver of the five-year period is intended, it is sufficient. Bank of America, etc. v. Superior Court, supra, citing Miller & Lux, Inc. v. Superior Court, supra; Rio Vista Min. Co. v. Superior Court, 187 Cal. 1, 200 P. 616.

[16] If the stipulation may be in the form of a letter, and the conduct and intent of the parties may be considered, it seems reasonable to conclude that the voluntary appearance of a party after five years has elapsed may indicate a waiver of the provisions of the section.

[17-20] A condemnation action is a proceeding in rem. The filing of the complaint, and not the issuance of summons, vests the court with jurisdiction. Jurisdiction of the subject matter is not conferred by consent of the parties. Its origin is in the provisions of the Constitution (Const., Art. I, § 14; Art. XII, § 8), to be exercised in the manner provided in Part III, Title VII of the Code of Civil Procedure, § 1237 et seq. "* * * jurisdiction over the person may be acquired by service of process, by consent, by general appearance, or by waiver through a failure to seasonably object." Harrington v. Superior Court, 194 Cal. 185, 191, 228 P. 15, 17. In the same case, at page 192 of 194 Cal., at page 18 of 228 P., the court said: "From the foregoing it appears that differing from an ordinary action (section 405, Code of Civ.Proc.) it is prescribed that a proceeding in condemnation must be commenced by filing a complaint and issuing a summons. The question to be first decided is whether the requirement of section 1243 that a summons be issued is necessary to the vesting of jurisdiction of the subject-matter. In other words, is the court without jurisdiction to act at all if the summons is not issued, or is the requirement to be confined, as in other forms of action, to jurisdiction over the person? If the alternative is to be accepted, then the court had complete jurisdiction of the subject-matter by the filing of the complaint and over the person by the appearance of petitioner. At common law process was necessary before jurisdiction of the subject-matter attached, but, since the whole system of common law writs is abolished and only one form of action is now permitted, the issuance of the writ does not

determine jurisdiction; it is the filing of the complaint. We think it clear from the context of the statute and the purpose to be served by the issuance of summons it was not intended that, if the defendant appeared, the issuance of the summons would be necessary to the vesting of jurisdiction, but that the only purpose of the requirement, besides providing a mode for the giving of notice, is to fix the date at which the value of the land is to be assessed. Section 1249."

[21-23] All actions must be dismissed if summons has been served and no answer filed, plaintiff having failed to have judgment entered within three years after the service of summons. § 581a. An action may in the discretion of the court be dismissed for want of prosecution when there has been a failure to bring it to trial within two years after its filing (§ 583), but all actions may be prosecuted, in the same manner as if summons had been issued and served (Code Civ.Proc., § 581a), if appearance is voluntarily made within three years.

In Lindsey v. Superior Court, 100 Cal. App. 37, 279 P. 837, an action was commenced on November 10, 1925 but no summons served. On June 26, 1928, an amended complaint was filed, and subsequently a further amended complaint to which defendants demurred and filed an answer. On December 18, 1928, the parties proceeded to trial. During the trial a further amendment of the complaint became necessary to conform to the proof, at which time defendants moved to dismiss upon the ground that more than three years had elapsed since the filing of the original complaint, and, the summons not having been served, the court, under the provisions of section 581a, was without jurisdiction to proceed. On appeal the court said (100 Cal.App. at page 41, 279 P. at page 839): "Here the defendants voluntarily appeared within the three-year period and answered to the merits the amended complaint, which stated a cause of action in favor of the ward. As was said in Nisbet v. Clio Min. Co., 2 Cal.App. 436, 442, 83 P. 1077, 1080: '"Courts, under the reformed system of procedure, look to the substance of things rather than to form, and to persons and things rather than mere names. This manner of treating things constitutes the life and spirit of the reformed system of procedure." (Anglo, etc., Co. v. Turner Casing Co., 34 Kan. 340, 8 P. [403] 404.) That system was designed to enable courts of justice to brush aside technicalities affecting no substantial right, and decide cases upon the merits.'" However, this is not a petition involving the dismissal of an action after summons served and no answer filed within three years, nor one involving the discretionary power of the court to dismiss if not brought to trial within two years, nor one in which an appearance is voluntarily made within three years. This case presents the problem not of jurisdiction over the subject matter for five years, but lack of jurisdiction over a particular defendant, petitioner herein, through non service of summons, until such defendant voluntarily appeared after the five year period. The Lindsey case is cited to indicate that litigants may not close their eyes to substantial facts and rely upon mere technicality. The section under consideration was not intended arbitrarily to terminate the proceedings at the end of five years under all circumstances. Christin v. Superior Court, supra.

[24-26] A voluntary appearance generally of a defendant is a waiver of service of summons and of any defect therein. Code Civ.Proc., § 416; Carpenter v. Pacific Mut. L. Ins. Co., 13 Cal.2d 306, 89 P. 2d 637. The filing of an answer is a general appearance. Code Civ.Proc., § 1014. A party may appear though he is not named in the complaint. In Farmers', etc., Nat. Bank v. Peterson, 5 Cal.2d 601, 606, 55 P.2d 867, 869, the court said: "The defendants complain that trustee Boothe, who appeared voluntarily and filed his answer, was not properly a party defendant because he was not named as a party in the complaint or the amended complaint, and that consequently the judgment against him is void. There is, of course, no merit to the point. Boothe invoked the judgment of the court by his voluntary appearance, and may not now be heard to deny the jurisdiction of the court to render such judgment. Tyrrell v. Baldwin, 67 Cal. 1, 4, 6 P. 867; section 416, Code Civ.Proc. His voluntary appearance must be deemed to be a waiver of any failure to name him as a defendant. Eastern Outfitting Co., Inc. v. Myers, 39 Cal.App. 316, 180 P. 669."

[27] In the condemnation proceeding here sought to be dismissed, the defendant, petitioner herein, accepted the jurisdiction of the superior court by filing its answer. It is true that such answer was filed over five years after the date of the com-

mencement of the action. It is also true that defendant was not specifically named in the complaint, but voluntarily appeared and alleged that it was "sued herein as Black-White Company, a corporation". Its conduct indicated an intent to submit the issues on the merits, otherwise it could have appeared and requested a dismissal upon the ground that the summons had not been served within three years. Code Civ.Proc., § 581a. But the defendant evidenced its intention to present a defense by filing an amended answer. As stated, the record shows that the fourth amended answer is now on file. Litigants should not be permitted to inject themselves into a controversy, raise issues therein and then change position and seek to avoid the contest. Assuming that petitioner on its first appearance was entitled to raise a jurisdictional question, there appears to be a waiver by failure to seasonably object. Harrington v. Superior Court, supra.

[28] Granting that in certain circumstances a defendant is not required immediately to move under the provisions of section 583, but may avail himself of the rights conferred by the provisions of that section at any time after the expiration of five years from the commencement of the action, still we are confronted with another phase of the facts in this case, namely, that the defendant prays for damages as a tenant under an oral lease of the parcel of land in controversy upon the allegation that the improvements thereon are necessary to the operation of its business. In an ordinary action, the claim for damages would properly appear in a cross-complaint, but in eminent domain proceedings a special provision permits a defendant to set forth in an answer the estate or interest claimed in the parcel of property involved, and the amount of damages accruing as a result of a condemnation judgment. Code Civ.Proc., § 1246. Thus, a defendant is allowed to pray for affirmative relief in an answer. Whether the document filed is designated an answer or a cross-complaint, if it asks for affirmative relief in damages the general rule is that the action may not be dismissed without the consent of the party from whom damages are sought.

[29-31] It was the privilege of the plaintiff, by service of summons, to identify the parties designated under fictitious names. If any party appeared improperly, plaintiff had a right to move to strike his pleading from the file. Mercantile T. Co. v. Stockton, etc., Co., 44 Cal.App. 558, 186 P. 1049. Its failure within a reasonable period to move to strike the answer from the file was an admission that defendant, sued under a fictitious name, was a party to the action from its commencement (Day v. Western Loan & Building Co., 42 Cal.App. 2d 226, 108 P.2d 702), and an acquiescence in its appearance in that capacity. No objection was presented by plaintiff upon which the superior court could act. Mullia v. Mayer, 217 Cal. 209, 17 P.2d 705. On the contrary the conduct of both plaintiff and defendant (Sax v. Clark, 180 Cal. 287, 180 P. 821) indicates a waiver of any question of the propriety of the appearance of the latter. Dowling v. Superior Court, 122 Cal.App. 443, 10 P.2d 197, cited by petitioner is not in point. The petitioner in that case was not a party and had no knowledge of a stipulation to continue the trial of the action. A careful reading of the opinion indicates that it was the view of the court that section 583 was applicable only to those making an appearance prior to the termination of the five-year period. "There is, moreover, nothing in the wording of the statute in question to deprive the court of jurisdiction upon the mere lapse of five years." Rio Vista Min. Co. v. Superior Court, supra, 187 Cal. at page 5, 200 P. at page 618.

[32] The record herein discloses that other parties named as defendants in connection with the particular parcel of property here involved, stipulated in writing to a continuance of the trial beyond the five-year period. Had the case proceeded to trial, and it appeared that a complete determination of the controversy could not be had without the presence of petitioner herein, and Bayle-Lacoste as an interested party did not make application therefor, it would have been the duty of the trial court to have ordered such party brought in and if necessary to that end, to have ordered amended and supplemental pleadings. Code Civ.Proc., § 389. In Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 671, 284 P. 445, 447, the court said: "Whether 'a complete determination of the controversy cannot be had without the presence of other parties' may readily involve questions of fact as to which the discretion of the court might be exercised. But, when the trial court finds, or the record indisputably shows, that a 'complete determination of the controversy cannot be

had without the presence of other parties,' such parties become necessary and indispensable parties, and the section is mandatory, and the question then becomes one of jurisdiction in that the court may not proceed without bringing them in." Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163. If in the condemnation proceeding the allegations of the answer are correct, a judgment in favor of plaintiff would affect the rights of petitioner herein. Bank of California v. Superior Court, 16 Cal.2d 516, 106 P.2d 879.

[33] Another feature of the present proceeding is worthy of mention, namely, the futility of a dismissal of the action. The jurisdiction of the subject matter was obtained by filing the complaint. Jurisdiction of the petitioner herein was not obtained until it appeared voluntarily in the superior court proceedings and filed its answer. Harrington v. Superior Court, supra; People v. Southern Pacific R. R. Co., 17 Cal.App.2d 257, 61 P.2d 1184. While the answer does not specifically aver that the complaint is defective in its allegations of title as to the particular parcel of land, nevertheless it is based upon such contention, that is, that Bayle-Lacoste & Co., Inc. has some interest in the parcel which is not set forth in the complaint. Section 1250, Code Civil Procedure provides: "If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this title prescribed."

[34-37] It is our conclusion that where it is legally impossible to bring condemnation proceedings to trial within the statutory period designated in section 583, the voluntary appearance of a defendant, subsequent to the five-year period as fixed by the filing of the complaint, waives the provisions of that section. In addition, as to this proceeding, as evidenced by the filing of at least four amended answers, the petitioner is, or claims to be, a necessary and indispensable party to the action. The filing of an amended complaint may not prolong the period (Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 47 P.2d 716), but no more binding stipulation waiving the time could have been written into the records of this proceeding than is constituted by the filing by petitioner of its answer, amended answers, and the acquiescence of plaintiff in such appearance.

Petitioner's demurrer to the answer to the petition for the writ is overruled. Respondents' demurrer to the petition is sustained, the alternative writ is discharged and the peremptory writ denied.

PETERS, P. J., and KNIGHT, J., concurred.

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46 Cal.App.2d 580

HANLON et al. v. WESTERN LOAN & BLDG. CO. et al.

Civ. 11697.

District Court of Appeal, First District, Division 1, California.
Aug. 27, 1941.

1. Appeal and error 🔑138

Where maker of a deed of trust allegedly sold mortgaged realty to purchaser after deed of trust was executed, and purchaser, who was a party to suit to quiet title to realty, died before judgment was rendered in the suit leaving a will bequeathing purchaser's interest, if any, in realty to maker's son, the son, as legatee under will, was the "real party in interest" on appeal from judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Party in Interest".

2. Appeal and error 🔑994(3)

The credibility of witnesses was for trial court.

3. Mortgages 🔑86(3)

In suit to quiet title to realty as against loan company which had purchased realty at trustee's sale under foreclosure of a deed of trust where plaintiffs, who had notice of existence of deed of trust when taking a deed to realty from alleged purchaser under maker of deed of trust, claimed that purchaser acquired realty from maker before foreclosure sale as a bona fide purchaser without notice of lien of company, evidence sustained finding that there was no fraud by company in obtaining note secured by deed of trust from maker.

4. Quieting title 🔑44(3)

In suit to quiet title to realty as against loan company which had purchased realty at trustee's sale under foreclosure of a deed of trust where plaintiffs, who had notice of existence of deed of trust when taking a deed to realty from alleged purchaser under maker of deed of trust, claimed that purchaser acquired realty from maker before foreclosure sale as a bona fide purchaser without notice of lien of company, evidence supported finding that no agreement had been made with maker by a collector for company whereby collector promised maker that if maker would agree to have rents from realty turned over to company, the company would not take a default under deed of trust.

5. Mortgages 🔑186(5)

In suit to quiet title to realty as against loan company which had purchased realty at trustee's sale under foreclosure of a deed of trust where plaintiffs, who had notice of existence of deed of trust when taking a deed to realty from alleged purchaser under maker of deed of trust, claimed that purchaser acquired realty from maker before foreclosure sale as a bona fide purchaser without notice of lien of company, evidence justified judgment quieting title in company on its cross-complaint on ground that alleged purchaser had actual and constructive notice of deed of trust and that purchaser and plaintiffs were mere nominal parties, acting for maker, and that transfers to purchaser and plaintiffs were in execution of a plan concocted by maker to prevent company from realizing on its deed of trust.

6. Evidence 🔑594

A trial court may not arbitrarily disregard uncontradicted and unimpeached testimony but under proper circumstances uncontradicted testimony may be disregarded.

7. Witnesses 🔑331½

Testimony of a witness may be impeached by other than direct contradiction.

8. Evidence 🔑594

The manner in which a witness testifies, the character of his testimony, his motives, and inherent probabilities of the situation may be sufficient to entitle trial court to disregard so-called uncontradicted evidence.

9. Mortgages 🔑186(5)

In suit to quiet title to realty as against loan company which had purchased realty at trustee's sale under foreclosure of a deed of trust where plaintiffs, who had notice of existence of deed of trust when taking a deed to realty from alleged purchaser under maker of deed of trust, claimed that purchaser acquired realty from maker before foreclosure sale as a bona fide purchaser without notice of lien of company, evidence warranted holding that alleged purchaser was not a bona fide purchaser on ground that maker was purchaser's agent and attorney in transactions and that maker's knowledge was to be imputed to purchaser. Civ. Code, § 2332.

10. Principal and agent 🔑180

Ordinarily, where agent is dealing directly with principal in a transaction, knowledge of agent gained independently of his employment may not be charged to principal.

11. Principal and agent 🔑177(1)

The statutory rule that as against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and exercise of ordinary care and diligence, to communicate to the other is based upon principle that it is the agent's duty to communicate to principal the knowledge that agent has with respect to subject-matter of negotiation. Civ.Code, § 2332.

12. Principal and agent 🔑177(1)

There is a presumption that an agent has performed his duty to communicate to principal the knowledge that agent has with respect to subject-matter of negotiations conducted by agent, and where such presumption arises, it is conclusive. Civ.Code, § 2332.

13. Principal and agent 🔑177(1)

The rule imputing notice to principal of agent's knowledge is not affected by agent's failure to communicate his information to principal. Civ.Code, § 2332.

14. Principal and agent 🔑182

The rule that notice to an agent is notice to his principal extends to cases where the notice was imparted to agent so near before the transaction in question that agent must be presumed to recollect it, but before such extension of the rule will be applied it must be shown that the knowledge of former transaction was present in agent's mind at time of second transaction. Civ.Code, § 2332.

15. Reformation of Instruments 🔑25

Failure to read a contract does not necessarily prevent a reformation of contract on ground of mistake.

16. Appeal and error 🔑842(1)

Whether cross-complainant's failure to discover defective description of realty in trust deed was result of inexcusable negligence, so as to preclude relief by reformation of trust deed, or whether failure to discover error was result of excusable neglect was a "question of fact", the determination of which rested largely in trial court's discretion.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

17. Reformation of Instruments 🔑45(8)

In suit to quiet title to realty as against loan company which had purchased realty at trustee's sale under foreclosure of a deed of trust, where company filed cross-complaint for reformation of deed of trust with respect to description of realty, evidence authorized reformation of deed of trust on ground that negligence of company in failing to discover mistake in description when preparing deed of trust was not so gross as to forfeit right of company to relief from mistake, especially where intent of parties regarding property intended to be covered could not be disputed.

18. Reformation of Instruments 🔑44

The rule that the description of property conveyed is an essential part of a deed and if insufficient or incomplete cannot be made good by parol evidence does not apply to actions for reformation of a deed.

19. Reformation of Instruments 🔑44

In suit to quiet title to realty as against loan company which had purchased realty at trustee's sale under foreclosure of a deed of trust, where company filed cross-complaint for reformation of deed of trust with respect to description of realty, a decree of reformation was proper, as against contention that statute of frauds prevented reformation because proper description of realty rested on parol testimony, where maker of deed of trust admitted that the instrument was intended to describe certain premises and correct description did not depend entirely on oral testimony. Civ.Code, § 3399.

20. Deeds 🔑42

Mortgages 🔑335

If from the description in a deed, taking into consideration all its calls, it is possible by rejecting calls which are apparently false to ascertain its application to a particular tract of land as embraced within the description, the false call will be rejected and the deed sustained, and such rule applies to a notice of breach and election to sell under a trust deed covering realty. Code Civ.Proc. § 2077.

21. Mortgages 🔑335

Where trustee's notice of breach and election to sell realty covered by trust deed properly recited that deed was recorded in a certain book in recorder's office of San Francisco county and notice stated that trust deed covered described property in "San Francisco, Alameda County, California", the words "Alameda County" could be deleted from notice leaving notice complete and correct, and such notice was a proper notice. Civ.Code, § 2924; Code Civ.Proc. § 2077.

22. Mortgages 🔑169

Where a proper trustee's notice of breach and election to sell realty covered by trust deed was properly recorded in county where realty was located before maker of trust deed executed a deed purporting to convey realty to a purchaser, the notice of breach gave constructive notice to purchaser of trust deed, and hence purchaser could not claim as a "bona fide purchaser" without notice of lien under trust deed. Civ.Code, § 2924.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Purchaser".

23. Reformation of instruments 🔑17(1)

An equity court could reform a trustee's notice of breach and election to sell realty covered by a trust deed with respect to mistake in notice respecting location of realty. Civ.Code, § 3399.

24. Equity 🔑39(1)

Where an equity court had authority to reform a deed of trust with respect to mistake therein concerning description of mortgaged realty, the court could do full justice by reforming all subsequent documents which perpetuated the error. Civ.Code, § 3399.

25. Equity 🔑39(1)

The rule in equity is to do nothing by halves but, in proper cases, to administer a full measure of relief, so as to avoid circuity of action and promote ends of justice.

26. Reformation of Instruments 🔑47

Whether, after foreclosure of a mortgage or sale under a deed of trust, where there is a defective description and reformation is sought, the trial court should order a new sale of the property rests in trial court's discretion, and if the court is of opinion that, under circumstances, a new sale should be ordered, it may order such sale, but if the court, after considering circumstances, is of opinion that a new sale is not equitably necessary, it may reform the deed without ordering a new sale.

27. Reformation of instruments 🔑47

Where error in description of realty in trust deed was obvious and would have misled no one, and trustee's notice of breach and election to sell contained a proper description of realty, and trustee's deed contained a proper description, and no prospective purchaser at trustee's sale was or could have been misled or discouraged from bidding, trial court could properly reform trust deed and other documents with respect to mistake in description of realty after foreclosure sale without ordering that a new sale should be had, especially where no purchasers without notice were involved. Civ.Code, § 3399.

28. Quieting title 🔑39

In suit to quiet title to realty, a cross-complaint seeking to quiet title to realty other than that described in complaint and asking reformation of certain documents was proper where both parcels of land were involved in one transaction. Civ.Code, § 3399.

29. Pleading 🔑147

One may bring in, by cross-complaint, a cause of action arising out of the same transaction as that set forth in complaint, but which would not otherwise be a proper subject of cross-complaint.

30. Reformation of instruments 🔑37

When circumstances warrant reformation, it may be had by means of a cross-complaint in a suit to quiet title.

31. Appeal and error 🔑101(1)

An order appointing a receiver for realty involved in quiet title suit was an "appealable order". Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

32. Appeal and error 🔑870(4)

Where trial court appointed a receiver after commencement of quiet title suit, and plaintiffs and cross-defendants appealed from order appointing receiver, and appeal was dismissed, on subsequent appeal by plaintiffs and cross-defendants from order settling receiver's accounts plaintiffs and cross-defendants could not have validity of order appointing receiver reviewed, especially where alleged want of jurisdiction to appoint receiver did not appear on face of order for receiver's appointment. Code Civ.Proc. § 963.

◆

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson and I. L. Harris, Judges.

Suit by R. Y. Hanlon and another against the Western Loan & Building Company to quiet title to land, wherein defendant filed a cross-complaint requesting that certain documents be reformed and that its title to certain land be quieted. From a judgment for defendant and from a special order made after final judgment approving accounts of a receiver appointed by the trial court, R. Y. Hanlon and Martha G. Hanlon, his wife, Thomas D. Aitken, individually and as executor of the will of Alice J. Neal, and Harold E. Haven, as trustee for Alice J. Neal, appeal.

Judgment and order affirmed.

Thos. D. Aitken, of San Francisco, for appellants.

Tobin & Tobin and Charles R. Collins, all of San Francisco, for respondents.

PETERS, Presiding Justice.

R. Y. Hanlon and Martha G. Hanlon, his wife, Thomas D. Aitken individually and as executor of the will of Alice J. Neal, and Harold E. Haven as trustee for Alice J. Neal, appeal from a judgment in favor of defendant and cross-complainant Western Loan & Building Company reforming certain instruments under which the loan company claims title to certain real property, and quieting its title to such property. The same parties also appeal from a special order made after final judgment approving the accounts of a receiver appointed by the trial court.

The action was commenced by the Hanlons against the loan company to quiet their title to a piece of improved property at 1350 Turk Street, in San Francisco. The loan company cross-complained naming as cross-defendants not only the Hanlons but also Thomas D. Aitken and Marian N. Aitken, his wife, Alice J. Neal and Harold E. Haven and others, requesting that certain documents by which it claimed title to the real property at 1350 Turk Street be reformed to set forth the true description of the property, and that its title be quieted as against the cross-defendants not only to the property at 1350 Turk Street, but also as to property located at 1340 Turk Street. The judgment reformed the various instruments as requested by respondent, and quieted its title to both parcels. Appellants assert no title to the property at 1340 Turk Street, but do contend, among many other things, that it was error to quiet title by means of a cross-complaint to property not included in the original complaint.

Both parcels of property were originally owned by a contractor by the name of J. D. Hannah who had constructed an apartment building on each parcel. The Western Loan & Building Company held several promissory notes of Hannah, including one for $33,000 secured by a first mortgage on the property at 1340 Turk Street, and another for $33,000 secured by a first mortgage on the property at 1350 Turk Street. There were also second liens on both parcels, which liens were held by another company. Early in 1930 the holder of the second liens caused the two parcels to be sold under its deeds of trust. One Murphy purchased the two parcels at the trustees' sales. Murphy's title, which as to each parcel was, of course, subject to the $33,000 note and mortgage on each parcel held by the loan company, was purchased by Thomas D. Aitken, an attorney at law. Aitken had been Hannah's attorney, but he admittedly purchased the properties on his own account.

Before Aitken purchased the properties Hannah was having difficulties with the loan company, not only over the two loans on the Turk Street properties, but on some five or six other loans made by that company to him. These difficulties, and difficulties with his other creditors, finally resulted in involuntary bankruptcy proceedings. Hannah had instituted an action in the federal court against the loan company to recover alleged usurious interest and penalties on the various loans made by that company to him. When Aitken bought the two Turk Street parcels he intervened in the usury action, seeking a determination that the provision for interest in each of the two mortgages was void.

Hannah, during this period, was negotiating with the loan company through its northern California manager, C. H. McEntyre, for a large loan on other property, seeking to rehabilitate himself and to get back into business. Many conferences were had between McEntyre, Aitken and Hannah in which various propositions were discussed. Hannah was apparently somewhat disturbed over the fact that his attorney Aitken had purchased for his own account the title of the Turk Street properties. The loan company was insisting that before any further loans could be made to Hannah, the Turk Street loans had to be cleared up. In November of 1930 a settlement was agreed upon. On November 18, 1930, Aitken and his wife signed two notes for $33,000 each, payable to the loan company, each note being secured by a first deed of trust on one of the Turk Street parcels. The usury actions were dismissed. As part of the same transaction Aitken signed a "Receipt and Satisfaction" acknowledging that "all differences existing between Western Loan & Building Company, a corporation, and C. H. McEntyre on the one hand, and myself on the other hand, from time immemorial to the present time have been fully and completely adjusted and that all claims of whatsoever nature that I may have against the said Western Loan & Building Company, a corporation, and C. H. McEntyre are hereby settled and the new obligation incurred simultaneously with the signing hereof is free from taint of usury, duress or undue influence and is in consideration of the full amount of the obligation expressed herein." The loan company guaranteed that no deficiency judgment would be taken against the Aitkens on either of the two notes and deeds of trust. A document waiving a deficiency judgment was subsequently executed by the loan company. As part of the same transaction, and as additional security for the two notes, the Aitkens executed assignments of the rent of the apartments located on each parcel to the loan company, and chattel mortgages on the furnishings in each building. As part of the same transaction the Hannah mortgages were released of record.

Thereafter, on September 22, 1931, the loan company recorded notices of default under both deeds of trust, the Aitkens then being in default on both obligations, and at the trustees' sales purchased both parcels. By virtue of these sales, it claims that it is the owner in fee of both parcels, and the trial court so found.

There is no controversy over the fact that by such purchase the loan company became the owner of the parcel known as 1340 Turk Street. Appellants claim, however, that the loan company never became the owner of the parcel known as 1350 Turk Street because the property was in correctly described in the deed of trust on that property, and was incorrectly described in the notice of breach and election to sell filed by the loan company. They urge that, prior to the sales, Mrs. Neal purchased 1350 Turk Street without actual or constructive notice of the Aitken deed of trust. They contend, therefore, that the deed of trust was void, and that all proceedings in connection with the sale were void, and that the loan company has not a good or valid title to that parcel, and that the trial court erroneously reformed the documents, and erroneously quieted the loan company's title to that parcel.

The deeds of trust executed by Aitken and his wife in favor of the loan company were prepared by employees of the loan company, apparently at its home office in Salt Lake City. The deed of trust covering the parcel at 1350 Turk Street described the property conveyed to the trustee as "all that property in the County of Alameda, State of California, particularly described as follows, to-wit:" There then follows an accurate, complete, detailed and legal description of the property, except that no reference is made to the fact that the property was located in San Francisco. This deed of trust was recorded in San Francisco on January 9, 1931. The loan company, the Aitkens, and the title insurance company involved, were then ignorant of the mistake in the description. In the assignment of the rents of the apartment house at 1350 Turk Street, San Francisco, executed the same day as the deed of trust, the property is described as "those certain premises in San Fran. County, State of * * *" together with a proper legal description of the property. This assignment recites the fact that these premises are subject to a $33,000 note and deed of trust held by the loan company which deed of trust is of record "in the Office of the County Recorder of said County." This assignment was also recorded in San Francisco on January 9, 1931.

The chattel mortgage on the furnishings of the property at 1350 Turk Street, San Francisco, fails to state in what city or county the furnishings mortgaged are located, but contains an otherwise complete legal description of the premises. It refers to the outstanding deed of trust and note and contains a copy of the Aitken note. This document was also recorded in San Francisco on January 9, 1931.

The notice of breach and election to sell under the deed of trust, which was recorded in San Francisco, on September 22, 1931, refers to the Aitken deed of trust "recorded in Liber 2148 Page 73 of Official Records in the Recorder's Office of San Francisco County, California, and covering the following described property in San Francisco, Alameda County, California." Then follows a detailed, proper, legal description of the premises. The notice of sale, properly published and posted in San Francisco, contained a proper description of the premises, expressly stating that the property was located in San Francisco. The trustee's deed to the loan company, which was recorded on January 26, 1932, properly described the property as being located in San Francisco.

It is the documents wherein the property is incorrectly described that the loan company sought by its cross-complaint to have reformed to correctly describe the property. The trial court granted this relief.

The major contention on this appeal is that plaintiffs Hanlon and wife acquired the premises at 1350 Turk Street from Alice J. Neal; that Mrs. Neal was a bona fide purchaser from the Aitkens; that she took the premises free of the lien of the loan company; that she had no notice, actual or constructive, of the lien of the loan company; that recordation of the deed of trust did not give her constructive notice because of the error in the description in the deed of trust.

[1] Before describing the transactions by which Mrs. Neal and the Hanlons secured their deeds to the property it should be pointed out that appellants frankly concede that they make no pretense that the Hanlons were purchasers without notice. They admit that, when the Hanlons took their deed from Mrs. Neal, they knew of the existence of the deed of trust between the Aitkens and the loan company, or at least had knowledge of facts sufficient to put them under a duty of inquiry. They do contend, however, that the Hanlons are entitled to succeed as successors to Mrs. Neal, who, they contend, was a purchaser in good faith without notice. The evidence demonstrates that the Hanlons were mere dummies either for Mrs. Neal or for Aitken. It should also be mentioned that Mrs. Neal died before judgment was rendered in this case. By her will she bequeathed the residue of her estate, including necessarily any interest she might have

had in 1350 Turk Street, to Thomas D. Aitken, Jr., son of Thomas D. Aitken, Sr., maker of the deed of trust in favor of the loan company. Aitken, Sr., was named as executor. The real party in interest on this appeal is Aitken, Jr., as legatee under the will of Mrs. Neal. Thomas D. Aitken, Sr., represents appellants on this appeal.

What is the basis of the claim of Mrs. Neal? Mrs. Neal was about seventy-three years of age when the transaction occurred by which it is now claimed she secured good title as a bona fide purchaser. She was ill and had been confined to her room for some time. She testified in her deposition (she was too ill to attend the trial) that she had known Aitken for many years; that he handled all of her business transactions; that she had perfect confidence in him. Clearly, Aitken was her attorney, confidant and business adviser. The relationship was such that in her will she referred to Aitken, Sr., as "my friend of forty years standing * * * whom I have regarded as a son," and by that will bequeathed her entire estate to Aitken, Jr.

The notice of breach and election to sell is dated September 17, 1931, and was recorded in San Francisco on September 22, 1931. Sometime in October, 1931, Aitken, Sr., became aware of the fact that such notice had been filed. He testified that he knew that this notice referred to the property at 1350 Turk Street, San Francisco. At about this time he conceived the plan of deeding the property to some person who could claim to be a bona fide purchaser without notice of the loan company's deed of trust. In this way he hoped to be able to defeat the loan company's deed of trust. Pursuant to this plan, on December 29, 1931, he and his wife executed a grant, bargain and sale deed to Alice J. Neal, conveying the premises at 1350 Turk Street to her. This deed was recorded in San Francisco on January 6, 1932. Under date of January 2, 1932, Mrs. Neal executed a grant, bargain and sale deed to the premises to the Hanlons. This deed was recorded January 7, 1932. Both deeds were prepared in Aitken's office, and all details of the transactions were handled by the Aitken office. Hanlon gave Mrs. Neal a promissory note for $45,000, purportedly in payment of the purchase price of the property, but, admittedly, that note was merely part of the general plan of Aitken to have the Hanlons act as dummies for Mrs. Neal in the transaction. The case turns upon the question of whether Mrs. Neal was a bona fide purchaser. Aitken testified that at the time he and his wife deeded the property to Mrs. Neal he was indebted to her in an amount exceeding $17,000 on account of funds sent to him for her account from Manila, and which she permitted him to use as a loan. He testified, and Mrs. Neal corroborated him, that the property had been deeded to Mrs. Neal in return for her promise to cancel $15,000 of this indebtedness. No documents evidencing this cancellation were ever executed. Mrs. Neal testified that she had no knowledge of the size, income, or value of the apartment she purchased. Neither the manager nor anyone else connected with the apartment was notified of the alleged change of ownership. Subsequently, a receiver was appointed to care for the apartment. He testified that in September of 1932 he had a conversation with Mrs. Neal in which she stated she had no interest in the property.

[2, 3] Aitken testified that he deliberately did not tell Mrs. Neal about the loan company's deed of trust on the property; that the whole scheme was worked out by him for the purpose of defeating the lien of the loan company. As justification for his actions he testified that the original note signed by him and his wife had been secured by the fraud of the loan company; that as part of the settlement by which the usury suits were dismissed and he signed the notes and gave the deeds of trust on the two Turk Street parcels, McEntyre of the loan company had promised, orally, to pay the legal firm of Aitken & Aitken $1,500, and had promised to lend Hannah $90,000 on a piece of property in San Francisco, the exact location of which is not clear; that he had signed the notes largely to rehabilitate Hannah. Admittedly, the loan company never signed any agreement to this effect. McEntyre unequivocally denied the conversations testified to by Aitken. Aitken testified that he trusted the loan company and so did not get anything in writing. On the other hand, he also testified that he did not trust McEntyre and during many of its telephone conversations with him he had an associate listen in on an extension—yet he never secured any writing embodying the alleged agreement, and signed a complete release on the date he executed the notes. He explained that the reason he signed the release, even though he claimed

$1,500 was due from the loan company as attorney's fees, was that the fees were due the firm of Aitken & Aitken, and that in signing the release as an individual he did not think that that affected the partnership claim. Obviously, the credibility of these two witnesses was a matter for the trial court. It must be held that the finding of the trial court that there was no fraud on the part of the loan company is amply supported by credible substantial evidence.

Aitken also explained that another reason why he conceived the Aitken-Neal-Hanlon transactions was that in July of 1931 he had a conversation with a Mr. Moore, a collector for the loan company; that at that time he, Aitken, was in default in interest and taxes; that Moore promised him that if he would agree to having the rents from the apartment turned directly over to the loan company that the company would not take a default; that he notified the manager of the apartment by letter to turn the rents over to the loan company; that when he discovered that the loan company had recorded a notice of breach and election to sell on September 22, 1931, he was very angry at the company's breach of faith, and thereafter conceived and put into effect the plan above described. He states that he felt justified in thus attempting "to get even financially" with the loan company; that it was just a case of "the biter getting bitten."

[4] Moore denied making any such promises to Aitken. McEntyre testified that he had never authorized such a proposition. Although Aitken had testified that he did not trust the loan company, and, according to his own story, by July of 1931 knew the loan company had violated its promises to pay the fee and to finance Hannah, nevertheless, he made no attempt to secure from Moore a written agreement not to take a default, and did not mention the supposed agreement in his correspondence with the loan company. Under these circumstances, the credibility of these two witnesses was a matter entirely within the power of the trial court. Certainly, to say the least, there is credible, substantial evidence to support the finding of the trial court that no such agreement was ever made by Moore.

Aitken admitted in his testimony that when he "sold" the property to Mrs. Neal he did not tell her of the income of the property, nor that there were several thousands of dollars in back taxes due on the property. He conceded that no title report or other search of the title was made by, or on behalf of, Mrs. Neal, and contended that he never told her about the title. He placed a value on 1350 Turk Street of $45,000—yet he sold the premises as he believed free and clear of all encumbrances for a cancellation of the $15,000 loan made by Mrs. Neal to him. He explained that he had a vague indefinite understanding with her that if she sold the property, or if Hanlon exchanged it for her, and, if she received $45,000 from the sale, that then she was to reimburse him in some indefinite amount.

The trial court found the facts substantially as above set forth, and further found that the misdescription in the deed of trust and notice of breach were caused by accident and mistake; that Alice J. Neal, the Hanlons and the other cross-defendants had notice of the Aitken deed of trust and of the notice of breach when the Aitken-Neal, Neal-Hanlon deeds were executed; that, to make the deed of trust and notice of breach conform to the intent of the parties, it is necessary and proper that they be reformed. It is further found that the Aitken-Neal deed was made without consideration; that Mrs. Neal was not a bona fide purchaser; that she never became the beneficial owner but was simply the nominal owner of the property as the representative of the Aitkens; that Aitken was the attorney, agent and confidant of Mrs. Neal; that the Hanlons had actual notice of the Aitken deed of trust when they accepted the deed from Mrs. Neal; that the Hanlons paid no consideration for the deed; that the Hanlon deed was executed for the convenience and in furtherance of the purposes of the Aitkens; that the Aitken-Neal-Hanlon transactions did not divest the Aitkens of title to the property. The court also found that, in addition to actual knowledge, Mrs. Neal and the Hanlons had constructive knowledge of the Aitken deed of trust, and had knowledge of sufficient facts to place upon them a duty of inquiry; that if inquiry had been made the Aitken deed of trust would have been discovered; that the loan company made none of the promises testified to by Aitken as an inducement to secure the loan; that the mistake of the scrivener or typist who prepared the Aitken deed of trust in describing the property, which mistake was partially carried over into the notice of breach, was a mutual mistake and not in accordance with the agreement and intention of the parties. By its judgment the court ordered that the Aitken deed of trust and the notice if breach be reformed to set forth the correct description of the property at 1350 Turk Street, San Francisco, and quieted the title of the loan company to that parcel, and also as to 1340 Turk Street.

Appellants have filed an opening brief totaling 240 pages. They there attack the pleadings of the loan company, the judgment on its merits, and make innumerable objections to the findings of the trial court. Many of the points urged are discussed and argued three different times in different places in the brief. In discussing the facts appellants frequently fail to give the required transcript references. Facts are stated as established facts that are directly contradicted, and found, contrary to the facts stated by appellants. No useful or necessary purpose would be served in reviewing and discussing all of the points urged by appellants. To do so would unduly extend this already long opinion. All important issues presented on this appeal can be determined by a discussion of the following major points:

Was Mrs. Neal a bona fide purchaser?

Appellants' whole case is constructed around the contention that Mrs. Neal was a bona fide purchaser without notice of the Aitken deed of trust. Aitken testified that he did not tell her of the deed of trust, and Mrs. Neal testified that she had no knowledge of the deed of trust. Both testified that Mrs. Neal had canceled $15,000 of a larger indebtedness owed to her by Aitken in payment for the property. Both admitted that, had Mrs. Neal resold the property for $45,000, or more, Aitken would then have had some undefined interest in the proceeds. The appellants contend that this so-called uncontradicted evidence conclusively demonstrates that Mrs. Neal was a bona fide purchaser.

As already pointed out, the trial court found that Mrs. Neal had actual and constructive notice of the deed of trust. The court also found that Mrs. Neal and the Hanlons were mere nominal parties, acting for Aitken, and that the transfers to Neal and the Hanlons were in execution of a plan concocted by Aitken to prevent the loan company from realizing on its deed of trust. Appellants urge that those findings are unsupported.

[5] The facts have already been set forth in this opinion. A reading of the record demonstrates that the above-mentioned findings are amply supported. It is true that there is no direct evidence contradicting Aitken and Mrs. Neal, and in the nature of things such evidence would be almost impossible to secure. But the surrounding circumstances demonstrate almost to a certainty that Mrs. Neal was a mere dummy for Aitken who had conceived the entire plan as a method of defeating the loan company's lien in retaliation for his real, or fancied, grievances against that company.

What does the record show to support this theory of the case? It shows that, although Mrs. Neal was seventy-three years of age and confined to her room with illness when this transaction was entered into, she was in full control of her faculties. At this time, and for some time prior thereto, Aitken had been her close friend, confidant, business adviser and attorney. By will, she left her entire estate (including this property, if she has any interest therein) to Aitken's son. Her testimony was taken by deposition. Although the record shows that she was an educated woman, having taught in the San Francisco public schools for many years, and later having acted as a supervisor over a portion of the public schools of Manila, her testimony is full of evasions and equivocations. She made many damaging admissions during the taking of her deposition, but such answers were all changed upon the signing of her deposition. Many of these changes caused the answer as corrected to be diametrically opposed to that given originally. Her counsel contends that these corrections were necessary because of the errors of the shorthand reporter. She admitted she knew practically nothing about this apartment house that she was purchasing for $15,000. She did not give Aitken any writing evidencing a release of the indebtedness. She did not know how many apartments, or, in fact, how many floors, were in the building. She did not know who the manager was or whether books of account were kept. She had no idea at all of the income of the property, whether she had any fire or other insurance on it. She did not know whether she had purchased the furniture along with the building, or whether she had sold such furniture to the Hanlons. No title search was secured, nor did she ever ask Aitken about the building or about the title. It is a clear inference from her testimony that she was not an innocent purchaser for value; that she never purchased the property at all; that she was a mere dummy for Aitken in the transaction; that she knew she had no interest in the property.

These inferences are confirmed by the testimony of Aitken. He testified, in effect, that he conceived the plan by which he intended to defeat the note and deed of trust that he had executed in order to "get even" with the loan company. To accomplish this purpose he "sold" the property to Mrs. Neal by "canceling" a debt owed by him to her. He admittedly secured no written evidence of the cancellation. He or his office prepared all of the deeds and documents in the Aitken-Neal-Hanlon transactions. In protecting his client and close friend he secured no title search, nor was a pro ration of rents computed. He testified he was to pay outstanding bills. Either Aitken or his wife continued to collect the rents after the alleged transfers as they had done before. The manager of the apartment house was not told of any change in ownership, and she continued to look to Aitken for instructions. Aitken conceded that no notification to any of the fire insurance companies was given as to the alleged change in ownership although failure to notify them may have voided the policies. He knew the property was worth more than $15,000, and, in fact, fixed its value at about $45,000. He admittedly had a tentative and informal arrangement with Mrs. Neal whereby he was to receive some undefined portion of the profit if the property were resold.

[6-8] No useful purpose would be served by extending this opinion for the purpose of further discussing this phase of this appeal. Suffice it to say, that it is a reasonable inference from the above testimony that Mrs. Neal was not only not a bona fide purchaser, but was not a purchaser at all. The inference is clear that she was a mere dummy for Aitken, and that both Neal and the Hanlons in fact held title for Aitken. It is true that Aitken and Neal denied this. But the trial court was not bound by their testimony. While it is true that a trial court may not arbitrarily disregard the uncontradicted and unimpeached testimony of a witness (Hynes v. White, 47 Cal.App. 549, 190 P. 836), it is equally true that the trial court is the sole judge of the credibility of the witnesses, and that the testimony of a witness may be impeached other than by direct contradiction. Biurrun v. Elizalde, 75 Cal.App. 44, 242 P. 109; Whitaker v. Whitaker, 137 Cal.App. 396, 30 P.2d 538. Under proper circumstances, the trial court may disregard uncontradicted testimony. See annotation, 8 A.L.R. 796. Moreover, the manner in which the witness testifies, the character of his testimony, his motives, and the inherent probabilities of the situation all may be sufficient to entitle the trial court to disregard so-called "uncontradicted" evidence. Bohn v. Gruver, 111 Cal.App. 386, 295 P. 891. Applying these rules to the present case, it seems quite clear that the trial court was justified in disregarding the testimony of Aitken and Mrs. Neal, and that its inference that Mrs. Neal was a mere dummy for Aitken is amply supported.

[9-14] Even if this inference was not a reasonable one, this would not assist appellants. If it be held that Mrs. Neal was a purchaser of the property, she was not a bona fide purchaser. This is so because Aitken was clearly her agent and attorney in these transactions, and his knowledge must be imputed to her. While ordinarily, where the agent is dealing directly with the principal in a transaction, knowledge of the agent gained independently of his employment may not be chargeable to his principal, the present transaction is not an ordinary one. Aitken testified he had received from Manila about $17,000 for the account of Mrs. Neal. This money he deposited, with her consent, in his personal account. He received this money as agent. He used it for his personal purposes with her consent. Then he induced her to buy this property from him by canceling a portion of this indebtedness. She testified she entirely relied upon him in the transaction. In other words, she appointed him her agent to look out for her interests. He knew of the trust deed at all times. Can it be the law that a principal may thus place complete control of a transaction in the hands of her agent, a transaction suggested, induced and controlled by the agent, and that the agent may knowingly, intentionally and deliberately use the transaction to injure innocent third parties, without the principal being bound by the knowledge of her agent? I think not. It seems to me that § 2332 of the Civil Code, which provides that, "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other" was enacted for the very purpose

of taking care of situations like the instant one. This rule is based upon the principle that it is the agent's duty to communicate to his principal the knowledge that he has with respect to the subject matter of the negotiation, and the presumption is that he has performed that duty. Where this presumption arises, it is conclusive. The rule imputing notice is not affected by the agent's failure to communicate his information to his principal. See cases collected and commented on in 1 Cal.Jur. p. 846, § 125; 1 Cal.Jur. p. 853, § 130. While it is generally stated that before knowledge will be imputed, the agent must gain the knowledge in a transaction within the scope of his authority, that is neither a complete nor a correct statement of the rule. It is well-settled that the rule that notice to the agent is notice to the principal, extends to cases where the notice was imparted to the agent so near before the transaction in question that he must be presumed to recollect it. Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am.St. Rep. 172; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; Cooke v. Mesmer, 164 Cal. 332, 128 P. 917. A good illustration of this extension of the rule is to be found in Christie v. Sherwood, 113 Cal. 526, 45 P. 820, where a bank cashier's knowledge of an encumbrance arising out of a previous transaction was imputed to the bank. It is true that before this extension of the rule will be applied it must be shown that the knowledge of the former transaction was present in the mind of the agent at the time of the second transaction. That was clearly shown in the instant case, in fact, it was admitted by Aitken. Under these circumstances, even if Mrs. Neal was a purchaser she was not a bona fide purchaser because the knowledge of Aitken must be imputed to her.

This disposition of this point makes it unnecessary to decide whether, as urged by respondent, the recordation of the deed of trust defectively describing the premises gave constructive notice of its contents—in other words, whether the defective recordation was sufficient notice to place a purchaser under a duty of inquiry. We do not pass upon that point.

Was the loan company entitled to a reformation of the Aitken deed of trust?

[15-17] Appellants contend that the loan company was negligent in preparing and in not reading and discovering the mistake in the description; that in such circumstances there is no right of reformation; that the mistake must occur without fault or negligence of the party who complains of it. That is not a correct statement of the law. It is true that there are cases denying reformation where the person seeking that relief was negligent. See cases collected and commented on in California Trust Co. v. Cohn, 214 Cal. 619, 7 P.2d 297. But there are other cases holding that failure to read a contract does not necessarily prevent a reformation. See Los Angeles R. Co. v. New Liverpool Co., 150 Cal. 21, 87 P. 1029; Travelli v. Bowman, 150 Cal. 587, 89 P. 347; Cantlay v. Olds & Stoller Inter-Exch., 119 Cal.App. 605, 7 P.2d 395. Whether the failure to discover the defective description was the result of inexcusable negligence, so as to preclude relief by way of reformation, or, whether the failure to discover the error was the result of excusable neglect, is a question of fact, the determination of which rests largely in the discretion of the trial court. In the instant case, Aitken admitted that it was the intention of all of the parties concerned that the trust deed should cover the premises at 1350 Turk Street, San Francisco. He testified that he did not observe or know about the mistake when the deed of trust was executed. The title company did not observe the mistake in description. As was said in Los Angeles R. Co. v. New Liverpool Co., supra, 150 Cal. at page 28, 87 P. at page 1031: "There was, it is true, some negligence on the part of the plaintiff in the case at bar. But it was an inadvertence of a character which will sometimes occur in the conduct of men of prudence and caution. * * * The negligence [in failing to read the document and to observe the error] was not so gross as to constitute a neglect of legal duty, or forfeit the right of either party aggrieved to relief from the mistake." That language applies with particular force to the present case. That a mistake was made clearly appears, and the precise mistake is so plain that the true intent of the parties as to the property intended to be covered could not be, and is not, disputed.

[18] It is also contended that, because the proper description of the property rests on parol testimony, the statute of frauds prevents reformation. Appellants cite several cases for the point that the description of the property conveyed is an essential part of a deed and if insufficient or incomplete it cannot be made good by parol evi-

dence. It is said in these cases that the deed, under such circumstances, is void. See Saterstrom v. Glick Bros. Sash, etc., Co., 118 Cal.App. 379, 5 P.2d 21; Gordon v. Perkins, 108 Cal.App. 336, 291 P. 644; Scott v. Woodworth, 34 Cal.App. 400, 167 P. 543; Craig v. Zelian, 137 Cal. 105, 69 P. 853. None of these cases was an action for reformation. They were actions for breach of contract for the sale of real property or for specific performance. The rule therein announced has no application to actions for the reformation of a deed. The Saterstrom case, supra, expressly recognized this when it stated (118 Cal.App. at page 383, 5 P.2d at page 23): "There was no attempt to reform the deed of trust to set forth a correct and definite description of the property."

In other jurisdictions there is some conflict of authority upon the question as to whether a court of equity will reform a contract within the statute of frauds, and enforce it as reformed. See cases collected 53 Cor.Jur. p. 911, § 11. In an annotation on the subject appearing in 86 A.L.R. 448, p. 450, it is stated to be "well-settled" by the "weight of authority" that the statute of frauds is no obstacle to reformation in this situation.

[19] In Travelli v. Bowman, 150 Cal. 587, 89 P. 347, a deed which described land as being in the wrong county was reformed. In Oatman v. Niemeyer, 207 Cal. 424, 278 P. 1043, the property was described as being in the "city of Wheatland, County of Yuba, State of California, and bounded and particularly described as follows, to wit:" The particular description was entirely omitted, but, nevertheless, reformation was decreed. These cases, in addition to necessarily determining that the statute of frauds offers no insurmountable barrier to reformation, also furnish an answer to appellants' contention that reformation should be denied because a reading of the deed would have plainly disclosed the mistake. In neither of these cases was there any antecedent written contract which contained the correct description. It should be mentioned that in the present case the correct description does not entirely depend on the oral testimony of the parties. Not only did Aitken concede that the deed of trust was intended to describe the premises at 1350 Turk Street, but, prior to the execution of the deed of trust, he signed an application for a loan with the loan company in which the property was fully and correctly described. Other documents fully and correctly describe the property. Under these circumstances, we think that the trial court had the power to decree reformation of the deed—in fact, any other conclusion would have been an abuse of discretion.

Did the trial court properly reform the notice of breach and election to sell?

Appellants next urge that the trial court had no power to reform the notice of breach and election to sell; that section 3399 of the Civil Code provides only for the reformation of contracts; that there is no statutory authority for the revision of a notice; that where a statute requires a particular notice to be given, that notice must be given; that a defective notice cannot be corrected nunc pro tunc to make it comply with a statutory requirement.

To these contentions there are two answers. In the first place, it is very doubtful whether the notice of breach and election to sell had to be reformed. If the description in the notice was legally sufficient to describe the premises at 1350 Turk Street, San Francisco, the mere fact that it was "reformed" to describe those premises would not give appellants cause to complain. It will be remembered that the notice of breach and election to sell described the property as follows:

"That Western States Realty Company, a corporation, is Trustee under that certain Deed of Trust, made by Thomas D. Aitken and Marian N. Aitken and recorded in Liber 2148 Page 73 of Official Records in the Recorder's Office of San Francisco County, California, and covering the following described property in San Francisco, Alameda County, California." Thereafter follows a legal description of the property wherein it appears that the property is located at Turk and Webster Streets in Western Addition Block No. 305. The section that requires the notice to be filed (§ 2924 of the Civil Code) expressly requires the trustee to file a notice either "identifying the * * * deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded", or to give "a description of the * * * trust property". Here the reference to the book and page where recorded was complete and exact in all details. The trustee then attempted to also do something he was not required to do—to describe the trust property. There he erroneously stated, "San

Francisco, Alameda County". Could any reasonable person being reasonably familiar with this general area have read that description without knowing instantly that the words "Alameda County" were improperly inserted? Could any such reasonable man have come to any other conclusion but that the property was in San Francisco? I think not.

Section 2077 of the Code of Civil Procedure provides in part:

"The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

"1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first-mentioned particulars. * * *"

[20-21] In applying the rule of construction above-stated, the courts of this and other states have established the rule that in interpreting a deed, and certainly the same rule should apply to a notice, that: "If from the description in the deed, taking into consideration all its calls, it is possible by rejecting calls which are apparently false to ascertain its application to a particular tract of land as embraced within the description, the false call will be rejected and the deed sustained." Hall v. Bartlett, 158 Cal. 638, 642, 112 P. 176, 177; see, also, People v. Ayer, 18 Cal.App. 2d 755, 64 P.2d 769; cases collected 9 Cal. Jur. p. 293, § 158; 26 C.J.S., Deeds, p. 336, § 90 et seq.; 16 Am.Jur. p. 586, § 263. Under this rule of construction the superfluous words "Alameda County" could have been deleted from the notice, leaving the notice complete and correct.

[22] If this construction of the notice is correct, and we believe that it is, then it offers another complete answer to appellants' contention that Mrs. Neal was a bona fide purchaser. This notice, which we hold to be a proper notice, was properly recorded in San Francisco on September 22, 1931. The Aitken-Neal deed was dated December 29, 1931, and was recorded January 6, 1932. Obviously, therefore, this notice gave constructive notice to Mrs. Neal of the Aitken deed of trust.

[23-25] Even if the notice were imperfect, the trial court had power to reform it. The court clearly had authority to reform the deed of trust. Since this is so, the equity court had power to do full justice by reforming all subsequent documents which perpetuate the error. This rule was laid down in this state as early as 1869 in the case of Quivey v. Baker, 37 Cal. 465. In that case the mortgage and all proceedings down through the judgment of foreclosure and the sheriff's deed erroneously described the mortgaged premises. In holding that reformation could be granted as to all these documents the court stated (37 Cal. at page 472): "But a Court of equity does not administer justice on these narrow principles. It will not only go back to the original error and reform it, but will administer complete justice, by correcting all subsequent mistakes which grew out of and were superinduced by the first. It would be a vain thing to reform the first and perpetuate the last, by refusing to disturb it. The rule in equity is to do nothing by halves; but, in proper cases, to administer a full measure of relief, so as to avoid circuity of action and promote the ends of justice." See, also, Busey v. Moraga, 130 Cal. 586, 62 P. 1081; Dunning Brothers Co. v. Johnson, 47 Cal. App. 397, 190 P. 829.

May the trial court reform a deed of trust so as to validate a sale had before the reformation?

Appellants urge that a reformation of a deed of trust should not have the effect of validating a sale under the deed of trust which has taken place before reformation, even though there are no rights of purchasers without notice involved. It is contended that the effect of the defective description as unreformed, even though there may be no doubt as to the property intended to be covered, would be to discourage possible buyers at the trustee's sale. Such prospective buyers, seeing the defective description, it is urged, would know they were buying a lawsuit, and, therefore, would be discouraged from bidding.

[26] On the question as to whether, after foreclosure of a mortgage or sale under a deed of trust, where there is a defective description and reformation is sought, the trial court should order a new sale of the property, there is a conflict of authority. The problem is discussed in

annotations in 73 A.L.R. 612, and 89 A.L.R. 1444. There is some authority to the effect that in fairness to all concerned a new sale should be ordered. However, the weight of authority seems to be to the effect that the matter rests in the discretion of the trial court. If the trial court is of the opinion that, under all the circumstances, a new sale should be ordered, it may order such sale. But if the trial court, after considering all of the circumstances, is of the opinion that a new sale is not equitably necessary, it may reform the deed without ordering such new sale. California has definitely aligned itself with this school of thought. The first case where the matter was considered was Quivey v. Baker, supra. In that case the mortgage described the property as "Lot Six, in Block Three, and Range Two North". The property intended to be covered was "Lot Six, in Block Two, Range Three North". The erroneous description was carried into the decree of foreclosure, the order of sale and the sheriff's deed to the purchaser. The court decreed reformation of the judgment and sheriff's deed, as well as the mortgage, and did not order a new sale. This case was cited with approval in Busey v. Moraga, supra. In that case the mortgage, foreclosure decree, notice of sale and certificate of sale erroneously described certain lots as in "block H" instead of "block K". The trial court denied reformation. In reversing the judgment the Supreme Court stated (130 Cal. at page 588, 62 P. at page 1082):

> "It is also urged as an objection to the remedy by independent action that the mortgagor is deprived of his property by a sale without notice, the property having been described as certain lots in block H; but it is in the power of a court of equity, after having reformed the mortgage and proceedings down to the sale, to direct a new notice and sale, if justice requires it." The court did not indicate whether a new sale was to be required. It left that problem up to the trial court to be determined on the facts of the particular case.

Appellants urge that the holding in Quivey v. Baker, supra, that, after foreclosure sale the court may reform the foreclosure decree and deed as well as the mortgage, and that a new sale is not necessary, has been overruled by the case of Hull v. Calkins, 137 Cal. 84, 69 P. 838. It is true that the court in that case did state (137 Cal. at page 88, 69 P. at page 840), in referring to the Baker and other cases, that: "In these cases, as in the case of Waldron v. Letson [15 N.J.Eq. 126], the equities of the case were very strongly in favor of the purchaser or his successors in interest, and, as in that case, may have justified the actual decision; but it is difficult to perceive on what recognized principle of equity the court was justified in amending the sheriff's deed. But whatever may be the merits of those decisions, they differ from the case at bar * * *". In the Hull case the foreclosure proceedings did not contain a misdescription as such, but omitted to provide for a sale of a material part of the property. Obviously, in such a case, the equities might well require a new sale. The court did not refer to the case of Busey v. Moraga, supra.

[27] It seems quite clear to us that the court, in the Hull case, supra, did not intend to overrule the Baker case, supra. The most that can be said is that under the facts of the Hull case, a new sale was required. But, under the facts of this case, there are no compelling reasons why a new sale should be required. The error in the description in the trust deed was obvious and would mislead no one. The notice of breach and election to sell, as already pointed out, contained a proper description. The trustee's deed contained a proper description. No prospective purchaser at the trustee's sale was, or could have been, misled or discouraged from bidding. Moreover, the loan company did not seek or secure a deficiency judgment against the Aitkens. These were all matters before the trial court, and were undoubtedly some of the reasons why a new sale was not ordered. It is our view that, under the circumstances of this case, the trial court acted well within its equitable powers in reforming the trust deed and other documents without requiring a new sale.

Other Contentions of Appellant.

[28, 29] As already pointed out, appellants make numerous other technical contentions. The pleading of respondent is attacked on many technical and minor grounds. The findings are attacked with a fine tooth comb as being inconsistent, and, in many respects, unsupported by the evidence. It is urged, among many other things, that it was error to permit respondents to seek to quiet title to the parcel at 1340 Turk Street, San Francisco, by means of a cross-complaint. By the cross-

complaint respondent also sought reformation. The filing of the cross-complaint was clearly proper. The record shows that both parcels of land were involved in one transaction, and both deeds of trust were executed at the same time as part and performance of an agreement between Aitken and the loan company for a settlement of their difference. For a time, the cases seem to overlook the right to bring in, by cross-complaint, a cause of action arising out of the same transaction as that set forth in the complaint, but which would not otherwise be a proper subject of cross-complaint. More recent cases have clearly established the right. California Trust Co. v. Cohn, 214 Cal. 619, 7 P.2d 297; H. & J. Mabury Co. v. Bryant, 9 Cal.2d 586, 71 P. 2d 1111.

[30] It is also well-settled that when the circumstances warrant reformation, it may be had by means of a cross-complaint in an action brought to quiet title. California Trust Co. v. Cohn, supra; Murphy v. Lacey, 204 Cal. 94, 266 P. 535.

[31, 32] The record shows that after the commencement of this action the trial court appointed a receiver. Appellants appealed from that order, and also applied for a writ of prohibition, attacking the validity of that order. The appeal was dismissed and the writ denied. They now appeal from an order settling the receiver's accounts, and make the sole contention that the order appointing the receiver was void. The order appointing the receiver was an appealable order (§ 963 of Code Civ.Proc.) An appeal was taken and that appeal has been determined adversely to appellants. On the appeal from the order settling the accounts the appellants cannot be permitted to review the validity of the order appointing the receiver. Otherwise, appellants would have two appeals from the same order. Moreover, even if the appointment of the receiver could now be questioned, the alleged want of jurisdiction would have to appear on the face of the order. Such is not this case.

The other contentions of appellants have been considered by the court. They are too insubstantial to require specific discussion. They are all without merit.

The judgment and order appealed from are affirmed.

KNIGHT and WARD, JJ., concurred.

FENNESSEY et al. v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 11598.

District Court of Appeal, First District, Division 1, California.

Aug. 27, 1941.

Rehearing Denied Sept. 26, 1941.

Hearing Granted Oct. 23, 1941.

1. Statutes 🔑199

The word "emergency" as used in legislative enactments does not always have precisely the meaning ascribed to it by lexicographers.

See Words and Phrases, Permanent Edition, for all other definitions of "Emergency".

2. Municipal corporations 🔑120
Statutes 🔑179

Where the word "emergency" is defined by statute or ordinance, an interpretation thereof must be confined to and limited by such definition, and the subject-matter enacted.

3. Automobiles 🔑12

Under ordinance prohibiting the parking of automobiles between a safety zone and an adjacent curb but allegedly containing an exception in favor of public utilities while the driver of an automobile is engaged in necessary performance of emergency duties, the word "emergency" has reference to a method adopted as an expedient for meeting a situation which ordinarily calls for immediate action.

4. Automobiles 🔑246(55)

In pedestrian's action against a gas and electric company, its truck driver, and operator of a bus for injuries sustained when pedestrian was struck by bus as it was driven to left of a safety zone to avoid truck which was parked between curb and safety zone while driver was servicing street light fixtures, where an ordinance prohibited parking between a safety zone and adjacent curb but allegedly contained an exception in favor of public utilities while driver was engaged in necessary performance of emergency duties, refusal of instruction that if driver, at time of accident, was engaged in work involving maintenance of lights pedestrian could not recover was proper, since, under evidence regarding servicing of lights, truck was not being used in an "emergency" within ordinance. Vehicle Code, § 586, St.1935, p. 191.

5. Automobiles ⚷173(4)

Where pedestrian was struck by a bus as it was driven to left of a safety zone to avoid the truck of a gas and electric company, which truck was parked between curb and safety zone while truck driver was servicing street lights, the fact that method employed in servicing lights was the most practicable that could be used, or that company had a contract with city to perform the work, was immaterial in determining liability of company for pedestrian's injuries, especially where truck was parked between a safety zone and curb in violation of ordinance. Vehicle Code, § 586, St.1935, p. 191.

6. Automobiles ⚷245(62)

In pedestrian's action against a gas and electric company, its truck driver, and operator of a bus for injuries sustained when pedestrian was struck by bus as it was driven to left of a safety zone to avoid truck which was parked between curb and safety zone while driver was servicing street light fixtures owned by city and county, whether parking of truck had anything to do with swerve or turn of bus onto street car tracks, as result of which accident occurred, or whether bus operator could have avoided accident, notwithstanding that he violated ordinance prohibiting driving to left of safety zone, were questions for jury. Vehicle Code, § 586, St.1935, p. 191.

7. Appeal and error ⚷1002

District Court of Appeal could not interfere with verdict based on conflicting evidence.

8. Negligence ⚷61(2)

Where the original negligence continues and exists up to time of injury, the concurrent negligent act of a third person causing injury will not be regarded as an "independent act of negligence", but the two concurring acts of negligence will be held to be the "proximate cause" of injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Act of Negligence" and "Proximate Cause".

◆

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Irene Fennessey and another against the Pacific Gas and Electric Company, and others, for personal injuries. From a judgment for plaintiff, Irene Fennessey, defendants Pacific Gas and Electric Company and Thomas Foley appeal.

Affirmed.

See, also, 10 Cal.2d 538, 76 P.2d 104.

Thos. J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, for appellants.

John J. Taaffe, George B. Harris and P. J. Murphy, all of San Francisco, for respondents.

WARD, Justice.

Appeal by defendants Pacific Gas and Electric Company, a corporation, and Thomas Foley, one of its employees, from a judgment rendered following a jury's verdict in favor of plaintiff Irene Fennessey for damages for personal injuries. Mrs. Fennessey's husband died prior to the trial of the action. Defendant George L. Manecis, the driver of a jitney, as the result of a collision with which plaintiff's injuries were sustained, defaulted and judgment was taken against him.

The accident occurred on the south side of Market street just west of Tenth street in San Francisco, where Foley had parked a company truck between the south curb and a safety zone for the purpose of cleaning, servicing and doing repair work to street lighting fixtures owned by the city and county of San Francisco. The work as performed involved the use of a "tower" truck and it is admitted that in its position near the curb there was insufficient space for eastbound traffic to pass between it and the safety zone. Defendant Manecis, proceeding east on Market street, passed the truck by driving his automobile, which he was using as a jitney bus, to the left (north) of the safety zone, along the street-car tracks. Mrs. Fennessey was standing in or very near the marked pedestrian lane which crosses Market street at Tenth street, when she was hit by the Manecis car.

The main contentions of appellants are that the evidence proves as a matter of law that at the time of the accident they were engaged in "emergency" work within the meaning of a municipal ordinance, but that, assuming negligence on their part, the evidence fails to show that such negligence was a proximate cause of the accident. In regard to the latter contention, it is their theory that the act of the jitney bus driver broke the chain of causation between any negligence in parking the truck and plaintiff's injuries.

Section 138 of the Motor Vehicle Act (now section 586 of the Vehicle Code of 1935, St.1935, p. 191) and Article V, section 35 (now section 76), San Francisco Traffic Ordinance, are substantially to the same effect, namely, the prohibition of parking between a safety zone and an adjacent curb. Appellants contend that section 8, Article II of the Traffic Ordinance contains an exception in favor of public utilities "while the driver of any such vehicle is engaged in the necessary performance of emergency duties." Our attention has not been called to a definition of the word "emergency" in the traffic ordinance.

In Fennessey v. Pacific Gas & Electric Co., 10 Cal.2d 538, 540, 76 P.2d 104, 105, on a former appeal in this case, the court held that "The parking of the truck between the safety zone and the curb was a violation of state law and municipal ordinance * * * in force at the time of accident * * * unless it was 'engaged in the necessary performance of emergency duties.'"

[1-3] The word "emergency" as used in legislative enactments does not always have precisely the meaning ascribed to it by lexicographers. Huff v. City of New York, 202 App.Div. 425, 195 N.Y.S. 257. It may be defined by the statute or ordinance. If so, an interpretation thereof must be confined to and limited by such definition and the subject matter enacted. The law governing this question indicates that "emergency" has reference to a method adopted as an expedient for meeting a situation which ordinarily calls for immediate action. Mason v. Crawford, 17 Cal. App.2d 529, 62 P.2d 420. The evidence shows that to keep the lights on both sides of Market street reasonably serviced and in repair requires more than a month's continuous work, going from pole to pole. Admittedly the work which Foley was doing, or was expected to do, upon the fixtures, was routine in nature and was not unforeseen, unexpected or the correction of a condition which had suddenly arisen.

[4] Appellants requested an instruction which first quoted a part of the ordinance and then proceeded as follows: "Therefore, if you believe from the evidence that, at or about the time of the accident in question, the said Thomas Foley was engaged in work involving the maintenance of the street lamps as an employee of the Pacific Gas and Electric Company, then I instruct you that in that event the defendants Thomas Foley and Pacific Gas and Electric Company were not guilty of any negligence and your verdict must be for those defendants and against the plaintiff." The instruction was refused with the notation "no evidence of the existence of any emergency." The refusal of this instruction must be approved. The repair vehicle was not used in responding to an emergency call, nor was it parked as the result of its arrival at the scene of an "emergency." It was simply engaged in its normal daily routine of cleaning and repairing street light fixtures.

[5] The fact that the method employed in servicing was the most practical that could be used, or that appellant company had a contract with the city to perform the work, can play no part in the determination of the question. The record does not disclose any designated means or method to be used in performing the work. The contract could not justify the violation of a parking law except upon the theory that the servicing performed by appellants was an "emergency", which, as we have just said, was not the case. Until a legislative body in the exercise of its authority reframes an ordinance or statute excepting from the law prohibiting parking between a safety zone and an adjacent curb, vehicles engaged in the performance of routine work on behalf of a governmental agency, appellants are without remedy.

[6-8] Whether the parking of appellants' repair truck between the safety zone and the curb had anything to do with the swerve or turn of the jitney bus on to the first or second street car tracks, as the result of which the accident occurred, or whether the jitney driver could have averted such accident, notwithstanding that he violated the ordinance prohibiting driving to the left of a safety zone, were purely questions of fact to be determined by the jury. If the jury believed the evidence in support of respondents' theory that the parking of appellant company's car was a proximate cause of the accident, we are unable to interfere. Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 104 P.2d 26; McKay v. Hedger, 139 Cal.App. 266, 34 P.2d 221; Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376; Winsky v. De Mandel, 204 Cal. 107, 266 P. 534; Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 93 P.2d 135, Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 52 P.2d 922. In Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 98,

29 P.2d 781, 782, the court said: "The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury." Rae v. California Equipment Co., 12 Cal.2d 563, 86 P.2d 352; Taylor v. Oakland Scavenger Co., Cal.Sup., 110 P.2d 1044.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

46 Cal.App.2d 628

MARX v. ETTLINGER.

Civ. 11701.

District Court of Appeal, First District,
Division 1, California.

Aug. 28, 1941.

1. Divorce 🔑255

Where husband in divorce action permitted interlocutory and final judgments, which confirmed and adopted property settlement agreement, to become final without attack by way of appeal or otherwise, and thereafter the Supreme Court reversed trial court's order reducing amount of monthly payments to the wife, holding that the agreement was immune from judicial modification, the judgments of divorce and Supreme Court's judgment on appeal were "res judicata" on issue of the legality of the property settlement agreement, requiring judgment for the wife in husband's subsequent action to annul the adjudications concerning the property settlement agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Divorce 🔑255

In former husband's suit in equity to annul the adjudications of interlocutory and final judgments of divorce confirming and adopting a property settlement agreement, on ground that the property settlement agreement was "contra bonos mores", trial court was justified in refusing to intervene, where the former husband was admittedly in pari delicto with respect to the alleged immoral contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Contra Bonos Mores".

3. Divorce 🔑167

Where an interlocutory decree of divorce is procured by collusion of the parties to the action, equity will not interfere with the final divorce at the instance of either of the culpable parties.

4. Divorce 🔑167

Though it is to the interest of the state that divorces shall not be obtained by collusion between the parties, that interest does not extend so far as to prevent the operation of the doctrine that equity will not relieve a party from an improper judgment rendered on his own invitation, on full knowledge of the facts and without coercion, imposition, or fraud on him.

5. Divorce 🔑255

The fact that husband may not have seen fit to stress his claim of illegality of property settlement agreement, which was confirmed and adopted by interlocutory and final judgments of divorce, at time of the granting of the judgments of divorce or when he subsequently sought a modification of the property settlement adjudication, or in his defense of the wife's appeal from that order, did not entitle him subsequently to institute a suit in equity to annul the adjudications adopting the property settlement agreement.

6. Divorce 🔑255

In former husband's suit in equity to annul the adjudications of interlocutory and final judgments of divorce confirming and adopting a property settlement agreement, on ground that the agreement was contra bonos mores, evidence was insufficient to support a finding that the contract was in fact contra bonos mores.

7. Divorce 🔑255

The fact that wife, who had filed suit for separate maintenance, several months thereafter and about a week after entering into property settlement agreement with her husband amended her complaint so as to ask for a divorce, was not ground for nullifying the agreement in a subsequent suit in equity after judgment for divorce had become final.

8. Evidence ⊂⊃207(2)

In suit in equity by former husband to annul adjudications of interlocutory and final judgments of divorce confirming and adopting a property settlement agreement, a statement used by former wife's counsel in an argumentative sense in presenting an appeal to the Supreme Court on appeal from trial court's order in divorce action reducing monthly payments under agreement could not be considered as "evidence" against the former wife.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

9. Pleading ⊂⊃127(2)

Where former husband's complaint definitely alleged that property settlement agreement, which had been incorporated in interlocutory and final judgments of divorce, was entered into for the purpose of facilitating a divorce, and that allegation was positively denied by former wife's answer, and allegation of complaint that agreement was contrary to public policy and void and unenforceable was also positively denied by former wife's answer, alleged admission in answer that the agreement was contra bonos mores did not establish a prima facie case that the agreement was contra bonos mores.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Suit by Isaac Lionel Ettlinger against Millicent L. Sears Ettlinger to annul the adjudications of an interlocutory and a final judgment of divorce confirming and adopting a property settlement agreement and to enjoin the enforcement of the executory portions of such adjudications that defendant recover from plaintiff the monthly sum of $250 until her death or remarriage. From an order granting a nonsuit, the plaintiff appealed. Subsequent to the submission of the appeal on the merits, the plaintiff died, and Melville Marx, representative of the plaintiff's estate, was substituted as party plaintiff and appellant.

Order affirmed.

John Elliott Cook and Werner V. Olds, both of San Francisco, for appellant.

John H. Crabbe, of San Francisco, for respondent.

KNIGHT, Justice.

Subsequent to the submission of this appeal on the merits, Isaac Lionel Ettlinger, by whom the appeal was taken, died, and on August 28, 1941, on stipulation, the representative of his estate was substituted as party plaintiff and appellant, and it was further stipulated that the rights of the parties did not abate upon the death of the said Isaac Lionel Ettlinger. However, the decedent will be hereinafter referred to as the appellant.

The appeal is from an order granting a nonsuit in a non-jury trial. The complaint bears the caption "Complaint for Declaratory Relief", and appellant contends that such is the nature of the action. But the substance of the complaint, its allegations and prayer, show that it is a suit in equity brought to annul the adjudications of an interlocutory and a final judgment of divorce confirming and adopting a property settlement agreement, and to enjoin the enforcement of the executory portions of said adjudications that respondent do have and recover from appellant the monthly sum of $250 until her death or remarriage, upon the ground that the property settlement agreement is contra bonos mores.

The suit was commenced over six and a half years after the entry of the interlocutory judgment; and the respondent, besides upholding the legality of the property settlement agreement, contends in support of the ruling granting the nonsuit, first, that the two judgments entered in the divorce action and a judgment on appeal, Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540, 543, rendered by the Supreme Court six years after the entry of the interlocutory judgment, involving the particular portions of the divorce judgments here sought to be annulled, are and each of them is res judicata upon the question of the legality of said property settlement agreement; and secondly, that, under the undisputed facts here shown, established equitable doctrines preclude appellant from being granted any affirmative relief. It is our conclusion that the points so made by respondent are well taken.

The facts relating to the two latter issues may be stated as follows: The appellant, Isaac Lionel Ettlinger, and the respondent, Millicent L. Sears Ettlinger, were married in December, 1920, and separated in February, 1927. There were no children, and about two years subsequent to their separation and on March 28, 1929, Mrs. Ettlinger was granted an interlocutory judgment of divorce upon the ground of desertion. The question of the legality of the property settlement agreement was made an issue by the pleadings in the case. In this regard the record shows that Mrs. Ettlinger alleged in her divorce complaint: "That heretofore, to wit, on or about the 20th day of March, 1929, an agreement was entered into between the plaintiff and the defendant for the settlement of their property rights, that said agreement is fair, just and equitable *and that the same was not made for the purpose of facilitating or expediting a divorce by the parties,* but for the sole and only purpose of settling the property rights of the parties" (italics ours); and in his answer appellant denied all of the foregoing allegations. At the trial of the case appellant was represented by counsel; the agreement was introduced in evidence by respondent, and she gave testimony with respect thereto. It is a lengthy document, covering thirteen legal-size typewritten pages; and under its terms appellant agreed, among other things, to execute a deed conveying to Mrs. Ettlinger residential property in Monterey county (title to which stood in her name), to make certain cash payments aggregating $4,500, of which Mrs. Ettlinger was to receive $1,500, and in addition to pay her the monthly sum of $250 until her death or remarriage. After hearing the evidence introduced by respondent in support of her case the court found that the allegations of the complaint, which included the allegations above quoted relating to the property settlement agreement, were true and sustained by testimony free from legal exception as to its admissibility or sufficiency; and the interlocutory judgment contained, among others, these adjudications: "It is further ordered, adjudged and decreed that that certain agreement for the settlement of the property rights * * * a copy of which is attached hereto * * * and by such reference made a part hereof * * * be, and the same is, hereby ratified, approved and confirmed. And it is further ordered, adjudged and decreed that in pursuance of the aforementioned agreement the plaintiff [Mrs. Ettlinger] *do have and recover* from the defendant the sum of Two hundred fifty ($250.00) dollars per month commencing with the month of April, 1929, and payable on the first day of each and every month until the death or remarriage of the plaintiff." (Italics ours.)

Appellant permitted the interlocutory judgment to become final without attack by way of appeal or otherwise; and likewise he permitted the final judgment of divorce entered in the same form a year later to become final without any attack being made thereon. Meanwhile, in conformity with the terms of said interlocutory judgment, appellant executed said deed, and made said cash payments; and for nearly four years he accepted and carried out the remaining provision thereof by making said $250 monthly payments. At the end of that time and on March 7, 1933, he applied to the superior court for and over Mrs. Ettlinger's objections was granted an order reducing the amount of the monthly payments to $175 for a period of one year. Mrs. Ettlinger appealed and the Supreme Court reversed the order, holding that for the reasons given in the decision the agreement was immune from judicial modification. Ettlinger v. Ettlinger, supra. In so holding the court went on to say: "We are satisfied from an examination of the entire agreement, having particular reference to the above-quoted provisions thereof, that it was the intention of the parties to definitely, fully, and permanently adjust and settle all of their property rights. The agreement indicates that the monthly payments to be made thereunder by defendant to plaintiff, stated to be for the latter's 'support and maintenance,' constituted an integral and important element in the amicable adjustment and liquidation of such property rights. In our opinion, the contract suggests that such payments were to be made to and received by plaintiff as part of the property settlement and in lieu of property rights. * * * That the parties may contract with regard to their properties and their respective interests therein is now settled. Though not binding in the first instance on the court in which the divorce action is pending, such contract may be approved and confirmed by the court, and if appropriately referred to and adopted in its decree, as here, such decree, as to the matters covered by the agreement, becomes immune from subsequent modification." That decision was rendered on April 16, 1935, and about six months later appellant instituted the present suit.

[1-4] From the foregoing it becomes obvious that the suit is nothing more than an open attack upon the plain provisions of a judgment for the payment of money, made more than six years after said judgment has become final, upon the ground that those

provisions are based upon an alleged immoral contract in which appellant was admittedly in pari delicto; and we are in complete accord, not only with respondent's contention that the judgments of divorce and the judgment rendered by the Supreme Court on appeal are res judicata upon the issue of the legality of said property settlement agreement, but also with respondent's further contention that under the existing facts and circumstances the trial court herein, sitting as a court of equity, was fully justified in refusing to intervene in appellant's behalf by granting him the equitable relief sought by him in the present suit. In this latter respect there would seem to be no difference in principle between the present suit and one whereby a party seeks through equity to nullify a judgment of divorce which has become final, upon the ground that it was procured through a collusive agreement to which he was a party. Godfrey v. Godfrey, 30 Cal.App.2d 370, 86 P.2d 357; Bancroft v. Bancroft, 178 Cal. 359, 173 P. 579, L.R.A.1918F, 1029. As said in the former case [30 Cal.App.2d 370, 86 P.2d 362], "When an interlocutory decree of divorce is procured by collusion of the parties to the action, equity will not interfere with the final divorce at the instance of either of the culpable parties." (Citing cases.) And in the latter case, the following language used by Mr. Justice Shaw in his concurring opinion would seem particularly apt to the present situation. He said: "* * * while it is to the interest of the state that divorces shall not be obtained by collusion between the parties, that interest does not extend so far as to prevent the operation of the doctrine that equity will not relieve a party from an improper judgment rendered upon his own invitation, upon full knowledge of the facts and without coercion, imposition, or fraud upon him." [178 Cal. 359, 173 P. 581, L.R.A.1918F, 1029.]

[5] The fact that appellant may not have seen fit to stress his claim of illegality of the property settlement agreement at the time of the granting of the judgments of divorce or when he sought a modification of the property settlement adjudication or in defending the appeal from the order made in that behalf, does not strengthen his position, for admittedly he could have done so on any of those occasions; and having failed so to do, he was precluded from doing so afterwards in a proceeding instituted for that specific purpose. Godfrey v. Godfrey, supra; Allen v. Allen, 159 Cal. 197, 113 P. 160; Short v. Short, 106 Cal.App. 210, 288 P. 1111. Appellant cites and seems to rely strongly on the cases of Schley v. Andrews, 225 N.Y. 110, 121 N.E. 812, and English v. English, 9 Cal.2d 358, 70 P.2d 625, 128 A.L.R. 467. But neither case is here controlling, for, among other reasons, the factual situations there involved were essentially different from the one here presented.

[6] Irrespective, however, of the two points above discussed, and even assuming that under some possible theory appellant could, in the present suit, go behind said judgments and assail the legality of the agreement upon which they are founded, it is manifest that the trial court was fully warranted in granting the nonsuit upon the ground that appellant failed to produce any evidence which would support a finding that said contract was contra bonos mores. The only evidence adduced established to the contrary. In this regard the record discloses that appellant offered no oral testimony whatever. All he did was to introduce in evidence the judgment roll and files in the divorce action, a transcript of testimony taken at the trial thereof, and a copy of respondent's opening brief filed in the Supreme Court on the appeal from the order of modification. The facts appearing therefrom were these: Appellant deserted respondent and continued to live separate and apart from her for more than a year, at the end of which period, to-wit, in February, 1928, respondent sued for separate maintenance upon the ground of desertion. Appellant, answering, filed a cross-complaint for divorce upon the ground of cruelty. During the several months which followed appellant's deposition was taken, whereby it was revealed that he was the owner of separate property of the net value of $265,000. Finally the parties arrived at a property settlement which was reduced to writing and signed on March 20, 1929. It embodied these provisions: "Whereas, it is the desire of both parties hereto that all of the property rights of the parties hereto respectively shall be finally adjusted, settled, and determined, and whereas, the parties hereto have agreed to adjust, liquidate and settle between themselves all rights and claims of each as against the separate property of the other, there being no community property. Now therefore, it is hereby agreed and stipulated by and between the parties hereto as follows: 1. This agree-

ment does not in any way and is not in any way intended to bind either of the parties hereto as to their respective courses concerning the filing, maintenance or defense of any action for divorce or as to any facts necessary to the maintenance of any action for divorce or any defense thereto, and the parties hereto shall be entirely free as to their respective action in the matter of applying for a divorce or resisting any application for a divorce or any other steps in any divorce action save and except as to the property rights of the parties hereto and the maintenance and support of the first party and the amount of the costs, expenses and attorney fees and in those respects both of the parties hereto agree and stipulate as hereinafter set forth." Being thus entirely unrestricted by said agreement as to the exercise of any of her legal rights respecting court matters, respondent amended her complaint so as to ask for a divorce upon the ground of desertion, instead of a decree for separate maintenance on that ground. Appellant then filed an answer denying the allegations of desertion and a request for a dismissal of his cross-complaint; whereupon, on March 28, 1929, the divorce trial took place and the interlocutory judgment was granted, which as already pointed out ratified, approved and confirmed the property settlement agreement.

It appears, therefore, that at the time of the granting of the nonsuit the only evidence before the trial court bearing upon the legality of the property settlement agreement consisted of the agreement itself, which in direct terms declared that it was not made to facilitate a divorce, but left the parties entirely free to act as they saw fit; the allegations in respondent's divorce complaint that said agreement was not entered into to facilitate a divorce, and the findings of the trial court that said allegations were true; the decrees of divorce based on said findings; and the decision of the Supreme Court refusing to modify said decrees. There was also the fact of the failure of appellant to appeal from either of the divorce decrees, and the fact that in making his application to modify the same, and in defending the appeal before the Supreme Court, he took the position that the agreement was valid. Furthermore, it was at no time claimed that the divorce was obtained by collusion, or that respondent did not have a meritorious cause of action for a divorce upon the ground of desertion. In that state of the record a finding that the agreement was contra bonos mores would have been entirely wanting in evidentiary support. Cookinham v. Cookinham, 219 Cal. 723, 28 P.2d 1045; Queen v. Queen, 44 Cal.App. 2d 475, 112 P.2d 755.

[7, 8] Appellant points out that respondent first filed suit for separate maintenance; that several months later she amended her complaint so as to ask for a divorce, and that the property settlement agreement was signed about a week before she amended her complaint. But certainly it cannot be said that these circumstances serve as ground for nullifying the agreement. Nor can the excerpt taken by appellant from the argument made by counsel for respondent in the brief filed by him on the appeal to the Supreme Court be considered as evidence against respondent in the present suit. It was simply a statement used by her counsel in an argumentative sense in presenting her appeal.

[9] Appellant also calls attention to the fact that respondent's answer herein admitted a portion of the allegations of paragraph III of the complaint, which appellant construes as an admission by respondent that the agreement was contra bonos mores. An analysis of the allegations of paragraph III and the answer thereto would seem to demonstrate, however, that the admission does not go that far. In any event, in paragraph IV of appellant's complaint it was definitely alleged that the agreement was entered into for the purpose of facilitating a divorce, and this allegation was positively denied by respondent's answer. Again in paragraph VII of the complaint it was in effect alleged that the agreement entered into between the parties was "contrary to public policy and void and unenforceable"; and the allegations of that paragraph also were positively denied by respondent's answer. Therefore, reading the complaint and the answer thereto as a whole, it is apparent that the admissions relied on by appellant by no means established a prima facie case that the agreement was contra bonos mores.

The remaining points do not require attention; nor do we deem any of the other authorities cited in appellant's briefs as here controlling.

The order is affirmed.

PETERS, P. J., and WARD, J., concurred.

46 Cal.App.2d 648

ELMHURST PACKERS, Inc., v. SUPERIOR COURT OF ALAMEDA COUNTY.

Civ. 11804.

District Court of Appeal, First District, Division 1, California.

Aug. 29, 1941.

1. Dismissal and nonsuit 🔑60(2)

The statute providing that any action shall be dismissed, on motion of defendant, after due notice to plaintiff or by the court upon its own motion, unless action is brought to trial within five years after plaintiff has filed the action, except where parties have stipulated in writing that the time may be extended, is to be given a strict construction. Code Civ.Proc. § 583.

2. Dismissal and nonsuit 🔑60(2)

The statute providing that any action shall be dismissed, on motion of defendant, after due notice to plaintiff or by the court upon its own motion, unless action is brought to trial within five years after plaintiff has filed the action, except where parties have stipulated in writing that the time may be extended, is a legislative determination to fix a maximum period of five years, upon expiration of which the delay is declared to be sufficient as a matter of law and dismissal is made mandatory, except where parties have stipulated in writing that the time may be extended. Code Civ.Proc. § 583.

3. Stipulations 🔑14(3)

If a stipulation between plaintiff and defendant providing that defendant should have 10 days after written notice from plaintiff within which to demur or answer amended complaint was of doubtful construction, acts of parties in further conduct of proceedings could be resorted to in determining intent of parties.

4. Dismissal and nonsuit 🔑60(6)

A written stipulation between plaintiff and defendant, in action for breach of contract, providing that defendant should have 10 days after written notice from plaintiff within which to demur or answer an amended complaint, did not extend the five-year period within which action was required to be brought to trial, especially where stipulation did not manifest an intent of parties that provisions of statute respecting dismissal of actions should be waived. Code Civ. Proc. § 583.

5. Dismissal and nonsuit 🔑60(6)

An agreement, if any, between counsel for plaintiff and defendant when demurrer to amended complaint was sustained that if a further amended complaint could not be filed within time allowed by trial court it could be filed at convenience of plaintiff's counsel, did not extend the time for bringing action to trial beyond the five-year period provided for in statute respecting dismissal of actions for failure to bring actions to trial, where it was not averred that agreement was in writing. Code Civ.Proc. § 583.

6. Dismissal and nonsuit 🔑50

That counsel was acting under pressure of other business and that plaintiff's delay in bringing action to trial was due to negotiations to settle litigation did not "estop" defendant from claiming benefit of statute respecting dismissal of actions not brought to trial within five years after being filed, where there was no indication of a concession on defendant's part or an understanding on plaintiff's part that defendant could not avail itself of statute. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

Petition by Elmhurst Packers, Incorporated, against the Superior Court of Alameda County for writ of mandate to compel the dismissal of an action for failure to bring it to trial within five years.

Peremptory writ of mandate granted.

Chickering & Gregory, of San Francisco, for petitioner.

Samuel J. Jones, of San Francisco, for respondent.

WARD, Justice.

Petitioner seeks a writ of mandate to compel the dismissal of an action for failure to bring it to trial within five years. Code Civ.Proc., sec. 583.

An action for breach of a contract for the sale of frozen peas was filed on April 28, 1936, and summons served on defendant, petitioner herein, on April 30, 1936. A demurrer to the complaint, served on or about May 27, 1936, was sustained with leave to amend. On or about June 9, 1937, an amended complaint was served and filed and a stipulation entered into between the parties that defendant should have ten days from and after written notice from plaintiff within which to demur or answer the amended complaint. On December 18, 1940, notice to demur or answer was so given, and on December 28, 1940, a demurrer by petitioner herein was filed, which was subsequently, on or about January 16, 1941, sustained, the plaintiff being given thirty days within which to amend its complaint. No further amended complaint appears of record. On or about May 3, 1941, shortly after the expiration of the five-year period, a motion to dismiss for want of prosecution was filed. This motion was denied.

The petitioner contends that the stipulation giving it, as defendant in said action, ten days after written notice to demur or answer the amended complaint, did not have the effect of extending the five-year period in which an action must be brought to trial. The effect of the stipulation was to relieve defendant from complying with the requirement to plead within ten days of service of the amended pleading. Plaintiff could have given the ten-day notice at any time. Until the case was at issue it could not be brought to trial. Three years after the stipulation the notice was given by plaintiff.

[1, 2] The tendency of decisions is to give a strict construction to the second clause of section 583, Code of Civil Procedure, which "makes a fixed and arbitrary rule that requires the performance of 'an act which the law specially enjoins'". Andersen v. Superior Court, 187 Cal. 95, 98, 200 P. 963, 964. In Romero v. Snyder, 167 Cal. 216, 220, 138 P. 1002, 1003, it was said that it was a legislative determination to fix "A maximum period of five years, upon the expiration of which, the delay is declared to be sufficient as a matter of law and the dismissal is made mandatory" except where the parties have stipulated in writing that the time may be extended.

[3, 4] In the present case the facts are admitted. The only written stipulation between the parties is dated June 9, 1937. Its meaning, scope and effect require no judicial determination. It speaks for itself. If the stipulation was of doubtful construction, the acts of the parties in the further conduct of the proceedings could be resorted to in determining the intent of the parties. Assuming that the terms of the stipulation are doubtful in the present case, there is nothing therein to show an intent on the part of either party that the provisions of section 583 should be waived. The delay stipulated came to an end on December 18, 1940, upon written notice from plaintiff to defendant to demur or answer the amended complaint. Ten days later defendant complied with the notice by filing a demurrer which was sustained, plaintiff being given thirty days to amend. No further action by plaintiff seems to have been taken. The written stipulation of June 9, 1937, is of no further concern in the present proceeding.

[5] Respondent in its answer to the present petition avers that when the demurrer to the amended complaint, filed pursuant to the notice dated December 18, 1940, was sustained, it was agreed between counsel that if a further amended complaint could not be filed within the time allowed by the court, it could be filed at the convenience of plaintiff's attorney. It is not averred that this agreement was in writing, and it did not extend the time beyond the five-year period. Miller & Lux, Inc. v. Superior Court, 192 Cal. 333, 219 P. 1006; Bank of America, etc. v. Superior Court, 22 Cal.App.2d 450, 71 P.2d 296.

[6] It is respondent's theory that the petitioner is estopped to take advantage of the mandatory provision of section 583 by the "unusual facts of this case". The facts appear as follows: That counsel was acting under pressure of other business, which we do not deem necessary to comment upon; that there was another action pending similar to the case here involved, and that the motion to dismiss in that case was also denied—a matter which is not before this court; and finally, that the delay was due to negotiations to settle the litigation in California and elsewhere. "But estoppel resulting from such conduct does not appear to be a proper ground for creating an exception to the terms of the statute." Christin v. Superior Court, 9 Cal.2d 526, 529, 530, 71 P.2d 205, 207, 112 A.L.R. 1153. In the words of Mr. Justice Sloane in City of Los Angeles v. Superior Court, 185 Cal. 405, 414, 197 P. 79, 83: "During all the pendency of the action there was correspondence and conferences regarding preliminaries to the trial, and tentative attempts to settle the case out of court; but accepting as true the facts as stated in respondents' answer and affidavits, we fail to find any intimation by word or conduct that suggests a concession on the part of defendant or an understanding on the part of plaintiff that defendant might not avail itself of the provisions of section 583."

A peremptory writ of mandate requiring the Superior Court of the County of Alameda to enter an order dismissing said action as to petitioner, is granted.

PETERS, P. J., and KNIGHT, J., concur.

BEALS v. CITY OF LOS ANGELES et al.

Civ. 2783.

District Court of Appeal, Fourth District, California.

Aug. 27, 1941.

Rehearing Denied Sept. 17, 1941.

Hearing Granted Oct. 23, 1941.

1. Municipal corporations ⇨671(2)

The right of access to a lot through an adjacent public alley is a valuable property right, the destruction of which gives the owner a cause of action.

2. Municipal corporations ⇨669, 671(2)

The right of access which an abutting owner has in adjacent street is peculiar to the abutting owner, differing from the right of passing to and fro on the street which he enjoys in common with public, and for any infringement of this right he is entitled to compensation.

3. Highways ⇨86

A road is primarily laid out for benefit of adjoining landowners.

4. Easements ⇨1

An "easement" creates an interest in the land.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

5. Municipal corporations ⇨671(2)

Where the owner of an adjacent lot had a right of passing to and fro upon an alley, that right was infringed when any part of the alley was closed in a manner to prevent the exercise of that right.

6. Highways ⇨87

Unlawful obstruction or interference with highway is per se a "nuisance", giving abutting owner usual rights and remedies of owner of freehold.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

7. Municipal corporations ⇨657(2)

If city has right to close one end of alley, it has right to obstruct both ends and thus prevent any use thereof by abutting owner.

8. Municipal corporations ⇨671(4)

When a city has obstructed an alley and prevented use thereof by abutting owner, the abutting owner has a property right and is entitled to show the facts and let trier thereof determine question and extent of injury.

9. Municipal corporations ⇨671(2)

In order to authorize recovery by a land owner when access to his land through an alley has been interfered with, obstruction need not be immediately in front of or touching upon his real estate.

10. Highways ⇨87

Property owners on a public way may maintain an action to open the way when by closing one end thereof their property is placed in a cul-de-sac.

11. Eminent domain ⇨69, 76

Rights of owner of private property taken or damaged for public use are right to compensation and right to have that compensation paid into court before his property is taken or injuriously affected.

12. Eminent domain ⇨74, 79

Rights of owner of private property taken or damaged for public use may be waived but, where there is no waiver, the constitution affords protection that property shall not be taken or damaged without compensation first made, and it is not incumbent upon owner to demand that authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them.

13. Municipal corporations ⇨692, 697(4)

The obstruction of a public alley is a "public nuisance" and to obtain redress against a public nuisance in a private action a plaintiff must aver that he will suffer some injury of special nature peculiar to him and different from that to which public is subjected. Civ.Code, § 3493.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Nuisance".

14. Municipal corporations ⇨657(4)

Land owner's action against city to prevent closing of an alley was not barred on ground that land owner's injury was no different from that sustained by public, as allegation that ingress and egress to and from abutting property of plaintiff landowner were prevented by obstruction, was allegation of injury to private property.

15. Municipal corporations ⇨669

Owner of property abutting upon street or alley owns the incidental rights of ingress and egress as completely as he does the property to which the rights are incident, and an infringement upon these rights is a private wrong.

16. Municipal corporations ⇨671(2, 7)

An abutting owner to an alley having right to an easement therein may sue for damages or to enjoin continuance of obstruction to alley regardless of fact that obstruction is injury to his public right of travel and regardless of number of persons who may suffer similar injury, as the injury in so far as it affects value of property is peculiar to the owner and constitutes a "private" as well as "public nuisance".

See Words and Phrases, Permanent Edition, for all other definitions of "Private Nuisance".

17. Municipal corporations ⇨649, 657(5, 6)

The Street Opening Act did not require any declaration by ordinance of intention that vacation or abandonment of a street was required by public interest or convenience, but conferred power upon city council to open or close streets whenever public interest or convenience might be required, and in absence of fraud or collusion determination of this question by that body was not open for review by courts. St.1889, p. 70.

18. Municipal corporations ⇨646, 657(5)

Adoption of final ordinance concerning the opening or closing of streets by the city council is a determination by that body that the public interest or convenience requires the improvement. St.1889, p. 70.

19. Municipal corporations ⇨646, 657(6)

Where evidence shows that intent of legislative body was to disregard public interest or convenience and to confer benefit upon private individual or corporate body, the courts will determine the validity of ordinance opening or closing street or alley. St.1889, p. 70.

20. Municipal corporations ⇨657(6)

Whether or not closing of an alley and substituting in its place an underground headquarters building of city water and power department was for benefit of public was question of fact and if owner abutting the alley could show that only interest subserved was private interest of the water and power department acting in the exercise of proprietary rather than of governmental powers, then court would have had authority to inquire into real purpose of ordinance and to declare it invalid. St.1889, p. 70.

21. Pleading ⇨204(4)

If complaint states a cause of action in equity for any one of a number of plaintiffs, it is sufficient against a general demurrer.

22. Municipal corporations ⇨517

When an assessment for a public improvement by a city is so arbitrary and unjust as to work a confiscation of private property, it is not a legal assessment, but is in effect a "legal fraud" upon owners of private property which is not conclusive upon the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Legal Fraud".

23. Action ⇨6

Municipal corporations ⇨121, 657(4)

Where city by ordinance had vacated alley adjacent to plaintiff's land to put thereon an underground headquarters building of city water and power department, obstructing plaintiff's access to her land through the alley, plaintiff was entitled to trial of case on merits to determine validity of ordinance, whether plaintiff was entitled to injunctive relief, and whether she had a justiciable controversy entitling her to declaratory relief under the statutes. Code Civ.Proc. § 1060.

24. Municipal corporations ⇨657(4)

In suit by a land owner against city to prevent vacation of an abutting alley, complaint was sufficient as against contentions that plaintiff had no valuable property right the destruction of which gave her a cause of action and that no cause of action was stated because no injury was alleged different in kind from that sustained by the public at large. Code Civ.Proc. § 452.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Addie Lillian Beals against the City of Los Angeles for an injunction and declaratory relief. From a judgment dismissing plaintiff's action upon order of court sustaining defendant's demurrers to complaint without leave to amend, plaintiff appeals.

Reversed, with directions to overrule demurrers.

Chas. Lloyd Clearman and E. H. Delorey, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., S. B. Robinson, Chief Asst. City Atty., Francis H. Lindley, Asst. City Atty., G. Ellsworth Meyer, and Alfred H. Driscoll, Deputy City Attys., all of Los Angeles, for respondents.

MUNDO, Justice pro tem.

This is an appeal from a judgment dismissing appellant's action upon the order of the court sustaining respondents' demurrers to appellant's amended and supplemental complaints without leave to amend. The case stated by the pleadings, so far as material, is substantially that the plaintiff is the owner of land in the City of Los Angeles abutting on an alley which the city council had ordered closed; that the Department of Water and Power (hereinafter called the Department) is a part of the municipal corporation, City of Los Angeles, and operates as a unit with full proprietary capacity; that the Department filed a petition asking for the vacation of a portion of the alley which touched the rear of plaintiff's property on First Street between Boylston and Corto streets; that said petition alleged that the vacation was required in order that a valuable property right of the City of Los Angeles and the Department might be utilized, and particularly that permanent buildings might be erected upon said land; that no other corporation or person, or anyone representing the public generally joined in said petition but that the requested vacation of said alley was wholly instigated by the Department; that notice of intention was published; that plaintiff filed her protest which was heard and by the council denied; that the Planning Committee of the City Council approved the passage of an ordinance providing for the vacation of said alley; that at the present time the matter is before the City Council for final passage; that defendants, without regard to plaintiff's rights, have caused an excavation to be made in said alley rendering passage along same impossible; that defendants are about to begin construction of a building over and across said alley; that ingress and egress to plaintiff's property over and on that part of the alley appropriated by defendants has been destroyed; that a valuable property right of plaintiff has thereby been destroyed; that her right to its use as a member of the public has been destroyed; that the vacation is solely for the benefit of the Department; that public interest and convenience does not require the closing of said alley; that for this reason the proceedings are void; that a legal fraud is being practiced upon plaintiff; that appraisers to assess benefits and damages have not been appointed as provided for in the Street Opening Act of 1889, p. 70, resulting in a loss to plaintiff of a valuable property right; that plaintiff was wrongfully included in the assessment district; that the Department was negotiating to purchase her land when officials became angry with plaintiff, claiming she wanted an exorbitant price; that plaintiff has offered to sell her land at a reasonable figure; that the defendants are deliberately trying to make her suffer for not capitulating to the demands of the Department; and that plaintiff's property right is being taken without due process of law and without compensation.

In the supplemental complaint plaintiff alleges that the City Council has passed the final closing ordinance; that the said ordinance is void and constitutes a legal fraud against plaintiff. Plaintiff prays for declaratory relief and injunction. A plat and exhibits are attached to the amended complaint. The plat shows that the portion of the alley to the rear and contiguous to plaintiff's property is not closed. Plaintiff is affected only as her right to the use of the alley as a means of access to Boylston Street is destroyed.

[1] The question is whether this is a valuable property right the destruction of which gives her a cause of action. We are of the opinion that it is.

In Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, at page 617, 37 P. 750, at page 751, 42 Am.St.Rep. 149, is a statement of the law which is applicable in this case. The court points out that:

"The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation; and any act by which this right is impaired is, to that extent, a damage to his property. When a city subdivides a tract of land, of which it is the owner, into blocks and streets, and sells the same, it thereby dedicates the streets to public use, and the purchaser of one of those lots acquires an easement in the street fronting upon his lot, for the purposes of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as in the lot itself; and any subsequent act of the municipality by which that easement is destroyed or substantially impaired, for the benefit of the public, is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation. Such easement is a right of property incident to the lot itself, and any damage sustained by the owner, in its destruction or impairment, is a damage peculiar to himself, and independent of any damage sustained by the public generally. For the purpose of determining this damage, it is immaterial whether he has the fee in the street, or only an easement for its use. In either case it is property, for an injury to which he is entitled to relief."

In Brown v. Board of Supervisors, 124 Cal. 274, at page 280, 57 P. 82, at page 83, the court said:

[2] "The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action."

[3-5] A road is primarily laid out for the benefit of the adjoining landowners. Elliott v. McCombs, 17 Cal.2d 23, 109 P. 2d 329. An easement creates an interest in the land. Eastman v. Piper, 68 Cal.App. 554, 229 P. 1002. If the plaintiff had a right of passing to and fro upon the alley that right is infringed when any part of the alley is closed in a manner to prevent the exercise of that right.

[6] "Any unlawful obstruction or interference with a highway is per se a nuisance, and an abutting owner has all the usual rights and remedies of the owner of a freehold concerning the same, including trespass, ejectment, action for damages, injunction, or an action to remove an obstruction or abate a nuisance. Hargro v. Hodgdon, 89 Cal. 623, 26 P. 1106." Fitzgerald v. Smith, 94 Cal.App. 480, 485, 271 P. 507, 509.

[7, 8] If the city has a right to close one end of an alley it has a right to obstruct both ends and thus prevent any use thereof by an abutting owner. It may be that plaintiff has other means of convenient approach and access to her property. It may be that she has sustained no loss or damage by the closing. It may be that her damage is inconsequential, but in any event, she has a property right and she should be allowed to show the facts and let the trier thereof determine the question and the extent of injury. She may be able to show that the erection of a large building across the alley will cut off from her the light and the enjoyment of air. She may be able to show that the closing has diminished the value of her land. She may be able to show that the closing of the alley deprived her of access to an improved street and left her with access to an unimproved or poorly paved street. And she may be able to show that other conveniences and privileges which she has enjoyed have been taken from her by reason of the closing.

[9] In Pennsylvania Co. v. Stanley, 10 Ind.App. 421, 37 N.E. 288, 289, petition for rehearing denied 38 N.E. 421, the court said: "We have here a lot, or several lots, one of the ordinary means of access to which was by the alley in question. This alley the appellant closed at one end, so as to cut off the entrance to it at that point, and thus the case presents a physical disturbance of the right to use the alley. This act necessarily and directly materially interfered with ordinary and usual means of access to the lots. It is a matter of general knowledge that the alleys in the rear of town or city lots are usual means of reaching the lots for many purposes, and they ordinarily add to the value and convenience of the property. In this instance, both the allegations and proof show a material diminution in the value of the lots by reason of the obstruction. In order to authorize a recovery by appellee, it is not necessary that the obstruction should have been immediately in front of or touching upon his real estate." See, also, Horton v. Williams, 99 Mich. 423, 58 N.W. 369; Kaje v. Chicago, etc., Ry. Co., 57 Minn. 422, 59 N.W. 493, 47 Am.St.Rep. 627; Bannon v. Rohmeiser, 90 Ky. 48, 13 S.W. 444, 29 Am.St.Rep. 355; Henderson v. City of Lexington, 132 Ky. 390, 111 S.W. 318, 22 L.R.A.,N.S., 20; Coy v. City of Tulsa, D.C., 2 F.Supp. 411;

Dries v. City of St. Joseph, 98 Mo.App. 611, 73 S.W. 723.

[10] In Cartmell v. City of Maysville, 231 Ky. 666, 22 S.W.2d 102, the court said it is well settled that the property owners on a public way may maintain an action to open the way when by the closing of one end thereof their property is placed in a cul-de-sac.

[11, 12] "The constitutional rights of an owner of private property which is sought to be taken or damaged for public use are two: First, the right to compensation; and second, the right to have that compensation made or paid into court before his property is taken or injuriously affected. Either or both of these rights he may waive; that is to say, he may waive his right to any compensation, or he may waive his right to prepayment of compensation. But, where there is no such waiver, the property owner may rest secure in the protection which the constitution affords him that his property shall not be taken or damaged without compensation first made. It is not incumbent upon him to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them." Bigelow v. Ballerino, 111 Cal. 559, 564, 44 P. 307, 309.

Respondents contend that no cause of action is stated by appellant because no injury is alleged different in kind from that sustained by the public at large. In Harniss v. Bulpitt, 1 Cal.App. 140, at page 141, 81 P. 1022, at page 1023, the court, in answering a similar contention, said:

[13-16] "The nuisance complained of, being the obstruction of a public alley, is a public one. That plaintiff may have redress in a private action, it must appear by proper averment that the plaintiff will suffer some injury therefrom in its nature special and peculiar to him, and different in kind from that to which the public is subjected. Civ.Code, § 3493; Siskiyou Lumber [etc.] Co. v. Rostel, 121 Cal. [511] 513, 53 P. 1118. Applying this test to the complaint, we regard it as sufficient. The allegations that ingress and egress to and from the abutting property owned by plaintiffs upon or through the alley is prevented by the obstruction is an allegation of an injury to a private right incidental to private property. The owner of property abutting upon a street or alley owns the incidental rights to ingress and egress as completely as he does the property to which the rights are an incident. Brown v. Board of Supervisors, 124 Cal. [274] 280, 57 P. 82. An infringement upon these rights is, therefore, a private wrong." See also Fitzgerald v. Smith, supra, where the court said:

"As abutting owners, they have the right to private easements, and may sue for damages or to enjoin the continuance of the injury thereto, regardless of the fact that the same obstruction also constitutes an injury to his public right of travel, and regardless of the number of persons who may suffer a similar injury to similar private easements appurtenant to other lots fronting on the street. [Citing cases.] The injury in so far as it affects the value of their property is a right peculiar to the owners and any interference with it constitutes a private as well as a public nuisance."

[17-19] Much is said in the briefs by both sides in this case touching the necessity of a finding by the City Council of public interest, necessity and convenience before proceedings of this kind may be had. The Act of 1889 does not require any declaration by the ordinance of intention that the vacation or abandonment of a street is required by the public interest or convenience. People v. City of Los Angeles, 62 Cal.App. 781, 218 P. 63. The statute, however, confers upon the City Council the power to open or close streets whenever the public interest or convenience may be required, and as a general rule, in the absence of fraud or collusion the determination of this question by that body is not open for review by the courts. Symons v. San Francisco, 115 Cal. 555, 42 P. 913, 47 P. 453. The adoption of the final ordinance is a determination by the City Council that the public interest or convenience requires the improvement. Brown v. Board of Supervisors, supra; People v. City of Los Angeles, supra. It may be shown, however, and the courts will review cases where the evidence shows that the intent of the legislative body is to disregard the public interest or convenience and to confer a benefit upon a private individual or a corporate body. In such cases the courts will determine the validity of the ordinance. People v. City of Los Angeles, supra.

"'The true rule seems to be that a municipality cannot vacate a street or a part thereof for the sole purpose of benefiting an abutting owner, and that the power to vacate streets cannot be exercised in an arbitrary manner, without regard to the interest and convenience of the public or individual rights; but that the municipality may vacate a street on the petition of an abutter for his benefit where the vacation is also for the benefit of the municipality at large; i. e., where the use to which the vacated part of the street is to be put is of more benefit to the community than the retention of such land as a way for a street.' " People v. City of Oakland, 96 Cal.App. 488, 497, 274 P. 438, 442, quoting from 4 McQuillin on Municipal Corporations, 2d Ed., pp. 269, 270.

[20] We may say here that the effect of the abandonment of the alley was to take from the public whatever advantage or convenience the use of the alley afforded and to substitute an underground headquarters building of the Department of Water and Power of the City of Los Angeles in its place. This building may or may not be of a public nature and there is a question of fact as to whether or not the closing is altogether to the advantage and benefit of the general public. The court may find that the use to which the vacated part of the alley is to be put is of more benefit to the community than the retention of such land as a way for an alley, or it may find that the closing is for the sole benefit of an abutting owner. The respondents may adduce evidence to the effect that the purpose of the closing is not to benefit a private corporation but is to comply with a public demand. The appellant, on the other hand, may be able to show that the only interest or convenience subserved by the act of the City Council in ordering the vacation of the alley was the private interest of the Department or the City acting in the exercise of proprietary rather than of police or governmental powers. If the latter could be shown, the court would have authority to maintain an inquiry into the real purpose and the result of the ordinance; it might also declare such ordinance invalid. People v. City of Los Angeles, supra; Postal-Tel.-Cable Co. v. City and County of San Francisco, 53 Cal.App. 188, 199 P. 1108; City of Los Angeles v. Los Angeles Gas & Electric Corp., 251 U. S. 32, 40 S.Ct. 76, 64 L.Ed. 121.

[21, 22] In Erro v. City of Santa Barbara, 123 Cal.App. 508, 11 P.2d 890, 891, the City Council had attempted by ordinance to establish a public alley and included therein the portions theretofore existing as a private alley touching plaintiffs' property. Plaintiffs brought action to have the proceedings for the opening of the alley declared void. The trial court found that the lands of plaintiffs had a perpetual easement or right of way to the existing private alley and that other lands included in the assessment district did not have any right to the use of the existing alley. The court also concluded that the proposed assessment district was of no possible public benefit to plaintiffs but was for the sole benefit of the other lands in the district. The court decreed that the proceedings leading to the opening of the public alley were void because they were not instituted for a public purpose but were instituted solely for the use and benefit of the owners of the lots which did not have an easement in the existing private alley. The City appealed and contended that the complaint was insufficient because it failed to allege that the proceedings before the City Council were the result of fraud, collusion or gross abuse of discretion. The appellate court said:

"It is true that the complaint does not use the word 'fraud' in any of its allegations, and collusion between the city council and the owners of the lots to be benefited by the proceedings is not alleged in express terms, but it cannot be said that the facts pleaded do not present a case of gross abuse of discretion amounting to legal fraud. If the complaint states a cause of action in equity for any one of the plaintiffs, it is sufficient against a general demurrer." The appellate court also said: "* * * it is alleged in this complaint, and found by the trial court, that the owners of all these lots have a perpetual right to the use of the existing alley by reason of the partition decree, and this, of course, is a right of property which cannot be taken or damaged without compensation first paid therefor under the express terms of section 14 of article 1 of the Constitution. The case comes squarely within the rule of those cases which hold that, when the assessment for a public improvement is so arbitrary and unjust as to work a confiscation of private property, it is not a legal assessment, but is in effect a legal fraud upon the owners of private property which is not conclusive upon the court." (Citing cases.)

[23, 24] In the instant case plaintiff is entitled to a trial of the case on its merits

for an ultimate determination of whether or not the ordinance is void; whether or not she is entitled to injunctive relief; and whether or not she has a justiciable controversy entitling her to declaratory relief under section 1060 of the Code of Civil Procedure. We deem the pleadings sufficient. Code Civ.Proc., § 452; Eachus v. Los Angeles, 130 Cal. 492, 62 P. 829, 80 Am.St.Rep. 132; Andrews v. City of Piedmont, 100 Cal.App. 700, 281 P. 78; Greenfield v. Board of City Planning Commissioners, 6 Cal.App.2d 515, 45 P.2d 219.

The judgment is reversed and the trial court is directed to overrule the demurrers.

BARNARD, P. J., and GRIFFIN, J., concurred.

46 Cal.App.2d 615

MADERIS v. PATTAVINA et al.
SAME v. SILVA et al.

Civ. 11686.

District Court of Appeal, First District, Division 2, California.

Aug. 27, 1941.

Hearing Denied Oct. 23, 1941.

1. Covenants 🔑103(3)

Where grantors orally represented to grantees that all lots in subdivision were being sold subject to condition that property should not be used or occupied by any person other than one of Caucasian race and grantees relied upon representation, and grantors thereafter conveyed other lots without any condition or restriction, condition that property should not be used or occupied by any person other than one of Caucasian race was "waived", and could not be enforced by grantors against the earlier grantees.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Covenants 🔑103(3)

Where restrictions in a deed are inserted pursuant to a general scheme or plan of building up tract, and for the benefit of the lots located in the tract, and of the persons purchasing such lots, grantors by later selling other lots in the tract without such restrictions "waive" right to enforce restrictions against earlier grantees.

◆

Appeals from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by C. B. Maderis against James Pattavina and others and Jack P. Silva and others, to enforce a condition subsequent contained in each of the deeds under which defendants derived title, and to quiet title. From judgments for the defendants, plaintiff appeals.

Affirmed.

Hearing denied; HOUSER, J., dissenting.

Victor A. Chargin, Owen D. Richardson, and Donald B. Richardson, all of San Jose, for appellant.

Bruce P. Griswold and Bohnett, Hill, Cottrell & Boccardo, all of San Jose, for respondents Pattavina et al.

C. C. Coolidge and John R. Sullivan, both of San Jose, for respondents Silva.

DOOLING, Justice pro tem.

These two cases were tried together and the appeals are presented on a single typewritten record. In each of them the plaintiff sought to enforce a condition subsequent contained in the respective deeds under which defendants derive title and to quiet title against defendants for violation of such condition. The lots involved, lots 32 and 33, were a part of a subdivision consisting of 34 lots known as Delwood Park. The subdivision map was recorded on October 20, 1924. Each of the deeds from plaintiff and her husband, the original subdividers, to the lots in question contained the following language: "This conveyance is made and accepted upon the express condition * * * that said property shall not be used or occupied by any person other than one of the Caucasian race * * *." And each contained a further provision that in the event of a breach of such condition the estate granted should terminate and become void and the property should revert to the grantors or their successors.

The court found as to the two lots in question that lot 33 had been occupied by negroes and that defendant Juana Pattavina, in occupancy of lot 32 with her husband, is a person of one-quarter negro and three-quarters Caucasian blood. For the purpose of this opinion we may assume, without deciding, that Juana Pattavina is not a person of the Caucasian race within the meaning of the condition in the deed.

[1] The court found that plaintiff and her husband, at the time of the respective conveyances of lots 32 and 33 by them, orally represented to the grantees that all the lots in the subdivision were being sold subject to the conditions and restrictions contained in the deeds to them and that the grantees believed and relied upon such representations. It was further found that subsequently plaintiff and her husband conveyed to others lots 31 and 34 of Delwood Park without any conditions or restrictions. From these facts the court concluded that the condition here involved had been waived and entered judgments quieting defendants' title against plaintiff.

These judgments were clearly correct under the settled law in this state. Brown v. Wrightman, 5 Cal.App. 391, 90 P. 467; Hanna v. Rodeo-Vallejo Ferry Co., 89 Cal.App. 462, 265 P. 287; Los Angeles, etc., Land Co. v. Marr, 187 Cal. 126, 200 P. 1051; Wedum-Aldahl Co. v. Miller, 18 Cal.App.2d 745, 64 P.2d 762.

[2] These cases are to the effect that where the restrictions in a deed are inserted pursuant to a general scheme or plan of building up the tract and for the benefit of the lots located in the tract and of the persons purchasing such lots, the grantors by later selling other lots in the tract without such restrictions waive the right to enforce the restrictions against the earlier grantees.

Appellants complain of the finding of the oral representations above referred to and cite Werner v. Graham, 181 Cal. 174, 183 P. 945. The case is not in point on the question here presented. That case held that oral representations cannot enlarge the effect of conditions inserted in deeds to lots in a tract so as to transform them into reciprocal covenants running in favor of the other lot owners. That was not the effect of the representations here found. Their effect was to establish a general scheme of building up the tract for the benefit of all the purchasers of lots in the tract and so to bring these within the rule of waiver above referred to.

The judgments appealed from are affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

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46 Cal.App.2d 662

SILVA v. DIAS et al.

Civ. 13185.

District Court of Appeal, Second District, Division 1, California.

Aug. 30, 1941.

1. Executors and administrators 🔑224

Attorney of grantee to whom realty was conveyed to secure attorney's fees was not required to assert a claim with the grantor's administratrix, but could enforce a lien against the specific realty under the statute providing that an action may be brought by the holder of a mortgage or lien to enforce it against estate's property subject thereto, where all recourse against other property of estate is expressly waived. Probate Code, § 716.

2. Executors and administrators 🔑224

A mortgage lien is not a "claim" within meaning of statute providing that no parties, or assignors of parties or persons in whose behalf an action or proceeding is prosecuted, may testify against an executor or administrator on a claim, or demand against a decedent's estate, as to any matter or fact occurring before decedent's death, and hence beneficiary of instrument creating the lien was entitled to testify with respect to the lien in an action by administratrix. Code Civ.Proc. § 1880, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim".

3. Mortgages 🔑38(1)

In action to have a deed adjudged a mortgage and to quiet title, evidence supported trial court's conclusion that there was due $601.81 for attorney's fees for which the deed was executed as security and which was a lien against the realty.

4. Quieting title 🔑14

In an action to quiet title, no affirmative relief can be granted until balance due as lien on the realty be paid or secured.

5. Mortgages 🔑417, 608½

Where realty was conveyed to grantee to secure attorney's fees for services to be performed by attorney for the grantor, either the grantee or the attorney had the right to foreclose the deed as a mortgage, and hence either the grantee or the attorney could defend action by grantor's administratrix to have the deed adjudged a mortgage and to quiet title.

6. Witnesses ⚿228

Question whether witnesses shall be permitted to testify in narrative form instead of by question and answer, is addressed to the trial court's sound discretion, and unless prejudice is shown, it can scarcely be said that trial court's action amounted to an abuse of discretion.

7. Witnesses ⚿228

In action to have a deed adjudged a mortgage and to quiet title, wherein attorney who was one of the defendants, claimed that deed was executed to another defendant to secure attorney's fees for services to be performed by attorney, and that he had performed such services of a certain value, trial court did not err in permitting attorney to testify in narrative form instead of by question and answer.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by Agnes J. Silva, etc., against Florence Dias and others to have a deed adjudged a mortgage and to quiet title. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Fred A. Shaeffer, of Santa Maria, for appellant.

John H. Machado, of San Jose, for respondents.

DORAN, Justice.

This is an action to have a deed adjudged a mortgage and to quiet title. Briefly the record reveals that John H. Machado was the attorney for John F. Silva in his lifetime, and in a transaction between them the property in question, which was owned by Silva, was conveyed to Florence Dias to secure attorney's fees for services to be performed by Machado for Silva.

The complaint alleged, "plaintiff is ready and willing to satisfy and discharge the indebtedness which said deed was executed to discharge, whenever the amount thereof shall be ascertained and determined". Plaintiff prevailed at the trial. The court quieted title in plaintiff and decreed that a proper conveyance be executed accordingly, but only upon the payment by plaintiff to defendant Machado of the sum of $601.81 within a certain time specified in the judgment, which sum it was adjudged was due the defendant Machado from the estate of Silva, since deceased, and which amount was further adjudged to be a lien upon the real property involved in the action.

It is contended by plaintiff-appellant: first, that the defendant Machado could not assert a claim against the estate without first filing such claim with the administratrix; second, that Machado was foreclosed from testifying in the action in support of his claim by virtue of section 1880 of the Code of Civil Procedure; and third, that in the absence of Machado's testimony, the findings lack support in the evidence, and hence such findings fail to sustain the judgment.

[1-4] The record reveals that Machado asserted no claim against the estate. Machado's answer in substance and effect was limited to the single effort to enforce a lien against specific property, the authority for which is provided by section 716 of the Probate Code. A mortgage lien is not a claim within the meaning of subdivision 3, section 1880 of the Code of Civil Procedure, and hence Machado's testimony was properly admitted. This being true, the evidence sustains the findings. Moreover, the evidence supports the court's conclusion that the sum due was correct, and in that connection the law is well-settled that no affirmative relief in an action to quiet title can be granted without first paying or securing the balance due, if any. 17 Cal.Jur. 818, 819. The judgment requiring the payment above mentioned, therefore, was proper.

[5] Appellant complains also about the finding and conclusion that the property in question was being held in trust by Florence Dias for Machado. Although such contention is relatively unimportant, the conclusion was not incorrect either in fact or law. The fact that the property was conveyed to Florence Dias, under the circumstances revealed by the record, afforded to either the right to foreclose the deed as a mortgage. 17 Cal.Jur. 749. The converse is equally true and, therefore, either could defend the action herein on the grounds relied upon by Machado. Having depended upon the lien exclusively, it was unnecessary to file a claim with the administratrix. Probate Code, § 716.

[6, 7] It is also urged by appellant that the court erred in permitting the witness Machado, who was also attorney for defendants, to testify in "narrative form", instead of by question and answer. Such questions are primarily addressed to the sound discretion of the trial court, and unless prejudice is shown, it can scarcely be said that such action amounted to an abuse of discretion. No prejudice appears to have resulted from the ruling.

There are no prejudicial errors in the record, and the judgment is therefore affirmed. The appeal from the order denying motion for new trial is dismissed.

YORK, P. J., and WHITE, J., concurred.

46 Cal.App.2d 618

PEOPLE v. HALEY.

Cr. 1760.

District Court of Appeal, Third District, California.

Aug. 27, 1941.

1. Criminal law 🔑625

The provisions of the Welfare and Institutions Code relating to sexual psychopaths do not have the same force and effect as the insanity provisions of the Penal Code. Pen.Code, §§ 1367, 1368; St.1937, p. 1005, § 5500 et seq., as added by St.1939, p. 1783 et seq.

2. Criminal law 🔑625

Under Welfare and Institutions Code provision that if it appears by affidavit to the satisfaction of the court that person charged with an offense is a sexual psychopath, court may adjourn the proceeding or suspend the sentence and thereupon proceed as provided by another section, court is not ousted of jurisdiction over criminal proceeding by the mere filing of an affidavit asserting that accused is a sexual psychopath, but court has discretion to determine whether accused is a sexual psychopath, since the word "may" is not a mandatory direction to adjourn the proceeding or suspend the sentence on the filing of the affidavit, regardless of sufficiency of showing. St.1937, p. 1005, §§ 5500–5502, as added by St.1939, p. 1783.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

3. Criminal law 🔑1148

Under statute giving trial court discretion to determine from affidavits filed and evidence adduced whether accused is in fact a sexual psychopath as defined by Welfare and Institutions Code, trial court's determination on the filing of an affidavit asserting that accused is a sexual psychopath cannot be disturbed on appeal unless there is an abuse of discretion. St.1937, p. 1005, §§ 5500–5502, as added by St.1939, p. 1783.

4. Criminal law 🔑625

Under Welfare and Institutions Code provisions defining a sexual psychopath and providing "If, when any person is charged with a crime, either before or after adjudication of the charge, it appears by affidavit to the satisfaction of the court that such person is a sexual psychopath", court may adjourn the proceeding or suspend the sentence and thereupon proceed as provided by another section, words "If, when any person is charged with a crime" were intended to mean charged with a crime having some relation to the type of offenses in the section defining a sexual psychopath, and the words "the court may adjourn the proceeding or suspend the sentence" were intended to vest in the trial court discretion in determining whether the crime charged was sufficiently related to those matters set forth in an affidavit alleging sexual psychopathy. St.1937, p. 1005, §§ 5500–5502, as added by St.1939, p. 1783.

5. Criminal law 🔑625

Where accused was charged with mayhem, robbery by means of force and fear, kidnapping and kidnapping with intent to rob, and counsel filed verified petition supported by affidavit asking that accused be declared to be a sexual psychopath, it was within province of trial court to consider offenses with which accused was charged in determining action which should be taken on affidavit, and the offenses not being related in any manner to commission of sexual offenses against children, denial of petition to adjourn proceeding or suspend the sentence was proper. St.1937, p. 1005, §§ 5500–5502. as added by St.1939, p. 1783.

6. Indictment and Information 🔑159(1)

The amendment of three counts of an indictment charging kidnapping with intention to rob, by adding to each of them the statement that the kidnapped persons "suffered bodily harm" incident to the commission of the crimes charged, without resubmitting the indictment to the grand jury was not prejudicial, since added words were not a necessary element of offense of kidnapping and holding one for purpose of robbery and did not change offenses charged, but merely supplied statement of facts which might be considered by the jury in determining penalty for crime as provided by Penal Code. Pen.Code, §§ 209, 1008.

7. Witnesses 🔑274(2)

A prosecuting attorney may cross-examine character witnesses as to their knowledge of reports or specific acts or charges inconsistent with the good character of the defendant as testified to by such witnesses on direct examination.

8. Criminal law 🔑1170½(6)

Where prosecuting attorney in cross-examining accused's character witness regarding the knowledge of the witness of specific alleged immoral acts and conduct of the accused in connection with young boys, asked if witness knew that certain immoral pictures had been found in the accused's room, and over objection of accused's counsel witness was then shown certain pictures obtained from the accused's room, propounding of question, to which objection was sustained, as to whether witness thought the pictures were immoral was not prejudicial misconduct on part of the prosecuting attorney.

9. Criminal law 🔑1170½(6)

Where accused was charged with kidnapping, kidnapping with intent to rob, mayhem and robbery by means of force and fear, prosecuting attorney's cross-examination of character witness for accused regarding the knowledge of the witness of specific alleged immoral acts and conduct of the accused in connection with young boys and the exhibition of alleged indecent pictures found in the accused's room, if improper, was not prejudicial where trial court instructed jury that accused was not on trial for offenses brought out on the cross-examination or anything except what was included in the indictment.

10. Criminal law 🔑730(11)

Prosecuting attorney's comment during argument on failure of the accused to deny certain charges contained in questions propounded on cross-examination to character witness was improper but not prejudicial where court specifically instructed jury that questions propounded during cross-examination of a character witness are not to be considered as evidence of commission of offense charged. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Leroy Haley was convicted on seven separate counts of an indictment charging him with kidnapping, kidnapping with intent to rob, mayhem, and robbery by means of force and fear, and he appeals.

Affirmed.

C. K. Curtright, of Sacramento, and Edwin B. Polhemus, of Elk Grove (P. H. Johnson, of Sacramento, of counsel), for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

The defendant was convicted on seven separate counts of an indictment. The first three counts charged him with kidnapping different individuals with intent to rob them. These three counts were subsequently amended, by leave of court, by alleging that the kidnappings were accompanied by bodily injuries suffered by the respective victims. Other counts of which the defendant was convicted charged him with mayhem, robbery by means of force and fear, and with kidnapping.

To each of the counts the defendant first plead not guilty and not guilty by reason of insanity. The plea of insanity was subsequently withdrawn. At the time of hearing the motion to amend the indictment, counsel for defendant filed a verified petition, supported by his affidavit, asking that the defendant be declared to be a sexual psychopath under the provisions of Chapter 4 of the Welfare and Institutions Code, St. 1937, p. 1005, § 5500 et seq., as added by St. 1939, p. 1783 et seq., which, upon hearing, was denied.

A petition for a writ of prohibition on the ground last mentioned was then presented to the Supreme Court and denied. Thereupon a petition for a writ of habeas corpus was presented to this court on the same ground, and denied.

After trial and conviction of the defendant as previously stated, but prior to the pronouncing of sentence, the defendant moved to arrest judgment for failure of the court to determine that he was a sexual psychopath pursuant to the provisions of the Welfare and Institutions Code, which petition was denied. A motion for a new trial was also denied, and the defendant was thereupon sentenced to imprisonment, as provided by law, in the state prison for the term of his natural life, without the privilege of parole. From that judgment this appeal was perfected.

It is not contended the evidence is insufficient to support the verdicts of conviction, but it is asserted the court erred in refusing to determine that the defendant was a sexual psychopath, and to therefore suspend the criminal proceeding as provided by the Welfare and Institutions Code; that the court erred in allowing the amendments of the indictment by alleging that the kidnappings were accompanied by bodily injuries inflicted upon the respective victims without first resubmitting the proposed amendments to the grand jury for that purpose. Finally it is claimed the prosecuting attorney was guilty of prejudicial misconduct in exhibiting to one of the defendant's character witnesses on cross-examination certain lewd pictures, and by his commenting to the jury upon those pictures by arguing that defendant's possession of them indicated his immoral and depraved character.

Since it is not contended the evidence is insufficient to support the verdicts and judgment of conviction of the crimes charged, except for the alleged errors above mentioned, we shall make no attempt to review the details of the revolting facts attending the commission of the crimes.

Without doubt there is an abundance of evidence to support every essential element of each crime of which the defendant was convicted. The record clearly shows that the defendant kidnapped, with the use of a pistol, at least five different boys, aged from 17 to 21 years, and after taking them to sequestered spots, he bound and gagged them, removed their clothes, robbed some of them of all their money, and cruelly tortured them by maiming and injuring their private organs. His victims were then abandoned and left in their pain and bondage to procure their own release and to make their way back to town. One or two of the boys were so seriously injured as to require medical aid. One of them was confined to a hospital on that account for 17 days. Five of the victims of these assaults positively identified the defendant as their assailant. There appears to be no doubt of his identity, nor of the cruel and revolting conduct with which he invariably kidnapped the boys and accomplished his purpose.

[1] It is appellant's position that upon the filing of the affidavit under Section 5501 of the Welfare and Institutions Code the trial court was deprived of jurisdiction to continue the criminal proceeding, and then retained jurisdiction only to proceed with a hearing upon the issue of sexual psychopathy as presented by the affidavit; that a finding in favor of appellant in this regard under section 5500 of the same code made it mandatory on the trial court to adjourn the criminal proceeding until the petition was finally determined. It is contended the provisions of the Welfare and Institutions Code relating to sexual psychopaths should be so construed as to give it the same force and effect as the insanity provisions of sections 1367 and 1368 of the Penal Code. We think not. The two statutes are essentially different.

There are no prior decisions in this state construing the foregoing provisions of the Welfare and Institutions Code relating to sexual psychopaths, and it therefore becomes necessary for us to determine the effect of that statute. Section 5500 of Chapter 4 of the Welfare and Institutions Code of California defines a "sexual psycopath" as follows: "As used in this chapter 'sexual psychopath' means any person who is affected, in a form predisposing to the commission of sexual offenses against children, and in a degree constituting him a menace to the health or safety of others, with any of the following conditions:

"(a) Mental disease or disorder.

"(b) Psychopathic personality.

"(c) Marked departures from normal mentality."

Appellant relies principally on the following two sections of the same code. Section 5501 provides in part as follows: "If, when any person is charged with a crime, either before or after adjudication of the charge, it appears by affidavit to the satisfaction of the court that such person is a sexual psychopath within the meaning of this chapter, the court may adjourn the proceeding or suspend the sentence, as the case may be, and thereupon proceed as provided by this chapter."

Section 5502 reads: "If, upon the hearing on the allegation of sexual psychopathy, the person before the court upon trial or under conviction, is found not to be a sexual psychopath, the court may proceed with the trial or impose sentence, as the case may be. If the person is committed to a State hospital as a sexual psychopath, whenever thereafter * * * he is no longer a menace to the health or safety of others, the court may order his return to await the further action of the court in respect to trial or sentence upon the criminal charge."

[2, 3] We are of the opinion the court has a sound discretion under section 5501, supra, to determine from the affidavits filed and the evidence adduced whether the petitioner is in fact a sexual psychopath as defined by the preceding section of that code. The section clearly infers that the court possesses that discretion, for the court may adjourn the criminal proceeding only when "it appears by affidavit to the satisfaction of the court that such person is a sexual psychopath within the meaning of this chapter". The court is not ousted of jurisdiction over the criminal proceeding by the mere filing of an affidavit asserting that the accused is a sexual psychopath. It is not mandatory that the court shall adjourn the criminal proceeding when the affidavit is filed. The word "may", as it is used in that section should not be construed as a mandatory direction to the court regardless of the sufficiency of the showing. It is merely discretionary. Unless there is an abuse of that discretion the ruling of the court in that regard may not be disturbed on appeal.

[4] Keeping in mind the language of section 5500 defining a sexual psychopath the language employed in section 5501 becomes clear. The language of section 5501, "If, when any person is charged with a crime", was intended to mean charged with a crime having some relation to the type of offenses referred to in section 5500. The legislature further indicated their intention by the use of the word "may" in referring to the action to be taken by the court. The language of section 5501, "the court may adjourn the proceeding or suspend the sentence", was intended to vest in the trial court a discretion in determining whether the crime charged was sufficiently related to those matters set forth in an affidavit alleging sexual psychopathy.

A contrary construction of the foregoing provisions would be most illogical in view of the use of the word "may". If the legislature had not intended that the nature of the crime should be considered in passing upon the allegations of an affidavit of sexual psychopathy, but had intended that the affidavit alone be considered, the words "must" or "shall" would have been employed in referring to the action to be taken by the court.

[5] From the foregoing conclusions it follows that the trial court in the present case did have a discretion in the matter of considering the petition for adjournment of the criminal proceedings, and it was within the province of the court to take into consideration the offenses with which appellant was charged in determining what course of action was to be followed upon the filing of the affidavit alleging sexual psychopathy. If the nature of the crimes for which appellant was charged had no connection with nor relation to the offenses (offenses against children) alleged in the sexual psychopathic affidavit, the petition for adjournment of the criminal proceedings was properly denied. As already stated, appellant was charged with the crimes of kidnapping for the purpose of robbery, robbery by force and fear, and mayhem. These crimes are not related in any manner to the commission of sexual offenses against children, and we can find no abuse of discretion on the part of the trial court, in the exercise of its power, either before or after the judgment of conviction, in denying appellant's petition to adjourn the proceeding or suspend the sentence. Sections 5502 and following do not have any bearing upon the question in issue, but simply outline the procedure to be followed in the event that the court does adjourn the criminal proceeding or suspend the sentence.

[6] The defendant was not prejudiced by the amendment of three counts of the indictment by adding to each of them the statement that the kidnapped persons "suffered bodily harm" incident to the commission of the crimes charged. People v. Britton, 6 Cal.2d 1, 56 P.2d 494. The amendments were made by leave of court, without resubmitting the indictment to the grand jury. It is true an indictment may not be amended in that manner so as to "change the offense charged". § 1008, Pen.Code. The addition of the language mentioned did not change the offenses charged. It merely supplied the statement of facts which may

be considered by the jury in determining the penalty for the crime as provided by section 209 of the Penal Code. The Britton case declares that the section last mentioned defines but one criminal offense. These challenged counts of the indictment charged the defendant with kidnapping named individuals with the intention of holding or detaining them for the purpose of robbery. That offense is not changed by adding the statement that the victims suffered bodily harm in the commission of the crimes. The allegation with relation to bodily harm is not an essential element of the crime of kidnapping. The changes in the present indictment in that regard were therefore harmless. The indictment in the Britton case contained no such language. In that case the defendant pleaded guilty to the charge of kidnapping. Upon pronouncing judgment the court received evidence of bodily harm for the purpose of determining the penalty for the crime.

The same rule prevails regardless of whether the accused person pleads guilty or not guilty. It follows that since the language with respect to bodily harm is not a necessary element of the crime of kidnapping and holding or detaining one for the purpose of robbery or for any of the other reasons mentioned in section 209 of the Penal Code, the offenses charged in three counts of the indictment were not materially changed, and the defendant was not prejudiced thereby.

Finally, the appellant contends the prosecuting attorney was guilty of prejudicial misconduct in cross-examining a character witness called in behalf of the defendant.

[7] Under the rule of law announced in People v. Buchanan, 119 Cal.App. 523, 6 P.2d 538, a prosecuting attorney may cross-examine character witnesses as to their knowledge of reports of specific acts or charges inconsistent with the good character of the defendant as testified to by such witnesses on direct examination. At page 526 of 119 Cal.App., at page 539 of 6 P.2d of the Buchanan case, supra, the right of the prosecuting attorney to inquire into the witnesses' knowledge regarding specific acts is explained in the following language:

"A witness who testifies that the general reputation of the accused is good in a particular respect is not declaring his personal opinion, for that is inadmissible, but is stating in effect that, having contacted with a substantial number of the people of the community who would be likely to know the character of the accused, he has not heard or learned of anything which would justify the conclusion that the latter was not of good character. Obviously, the prosecutor is not bound by such a statement on direct examination, and, under his basic right to cross-examine the witness upon the subject of his direct testimony, the district attorney may inquire whether the witness did not hear of a certain specified matter detrimental to the character to which he has testified."

[8] Mr. Frye, who testified as a character witness in behalf of appellant, was asked upon direct examination: "Are you acquainted with his reputation for decency and morality?" Mr. Frye said, "Yes", and upon being asked if that reputation was good or bad, he answered, "It is good". Upon cross-examination, the prosecuting officer asked the following question: "Mr. Frye, have you ever had occasion to discuss the fact that he has been having immoral acts with young boys thirteen and fourteen years old?" Counsel for appellant objected to this question, and the court sustained the objection upon the ground that the question was bad in form. Mr. Frye was then asked if he had not heard the defendant had committed immoral acts with a certain boy. The witness stated that he did not recall the name of the boy, but he had read in the newspapers that the defendant had been accused of immoral conduct with different boys. After further cross-examination regarding the knowledge of the witness of specific alleged immoral acts and conduct of the defendant in connection with young boys, the witness was asked if he knew that certain immoral pictures had been found in the defendant's room. Over objection of counsel for the defendant the witness was then shown certain pictures obtained from the defendant's room, and asked if he had not heard of defendant taking a thirteen or fourteen year old boy into his room and showing him these indecent pictures. The witness was asked if he did not think the pictures were immoral. The trial court sustained an objection to this question. The propounding of that question did not constitute prejudicial misconduct.

[9] Assuming, without so deciding, that it was improper to produce and exhibit the immoral pictures to the character witness, any prejudice resulting therefrom was cured by the following admonition which was then given to the jury by the court:

"He isn't on trial for those offenses or anything except what is included in the indictment, and the jury will understand that, and I am going to instruct them on that at the determination of the case. There is no evidence here, the questions asked were questions, and questions are not evidence. Now, he is only on trial for the charges contained in this indictment. Proceed."

[10] We agree with counsel for the appellant that it was improper for the prosecuting attorney to comment, during his argument to the jury, on the failure of the defendant to deny certain charges contained in the questions propounded on cross-examination to the character witness. As already indicated, matters arising during the course of the cross-examination of a character witness are not to be considered as evidence of the commission of the offense charged. The court specifically so instructed the jury. The misconduct of the prosecuting officer, in that regard, was cured by the admonition of the court. With respect to the alleged prejudicial argument of the prosecuting officer, the following proceedings occurred:

"Mr. O'Shea: What I am trying to get, gentlemen of the jury, is this: You know, as a matter of fact, as a matter of experience, that if he (defendant) says that those things were not true, he couldn't have gotten on that witness stand too quick to deny it. You would do it, I would do it, any man would do it.

"The Court: He is not required to do it, Counsel.

"Mr. O'Shea: He is not required to do it, but I can comment on it under the law.

"The Court: The mere fact that you asked the questions doesn't make that evidence; those questions are not evidence.

"Mr. O'Shea: I am not saying they are, your Honor.

"The Court: The only things that are evidence is that that is testified to. You asked Mr. Frye if he knew those things, he said no. Now, that is the end of it. It isn't evidence, it is nothing to be considered by this jury in any way."

We do not deem it necessary to resort to the provisions of Section 4½ of Article VI of the Constitution, but we do wish to state that the record before us fails to disclose any evidence of a miscarriage of justice arising out of the conviction of appellant.

The judgment and order are affirmed.

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46 Cal.App.2d Supp. 879

BOOGE v. FIRST TRUST & SAVINGS BANK OF PASADENA.

No. 4916.

Appellate Department, Superior Court, Los Angeles County, California.
Aug. 25, 1941.

1. Execution 🔑358

The statutory proceedings supplemental to execution were intended as a substitute for a creditor's bill. Code Civ.Proc. §§ 714–721.

2. Execution 🔑358

The procedure under statutes respecting proceedings supplemental to execution is not by its terms made exclusive and the statutory proceedings are authorized in the same action in which the execution issues, up to point where garnishee denies existence of a debt or claims an interest in property adverse to judgment debtor. Code Civ.Proc. §§ 714–721.

3. Execution 🔑358

The necessity of an independent action where third person either claims an interest in property adverse to judgment debtor or denies the debt is recognized by statute respecting proceedings supplemental to execution. Code Civ.Proc. § 720.

4. Creditors' suit 🔑6

The right to maintain an independent action in nature of a creditor's bill to reach and subject assets of a judgment debtor to payment of a judgment has not been abrogated by statutory proceedings supplemental to execution where supplementary proceedings do not, for any reason, afford adequate relief. Code Civ.Proc. §§ 714–721.

5. Creditors' suit 🔑9, 13

Where a third person holding property levied upon under execution as property of judgment debtor denied liability to debtor and claimed title to property when third person appeared in response to order procured by judgment creditor under statute, creditor could proceed by a creditor's suit without first pursuing remedy of statutory proceedings supplemental to execution, and, in such case, it was not necessary for creditor to obtain an order authorizing suit, since to require third person to turn over property to creditor under such circumstances would be to deprive him of his property upon a summary proceeding and without "due process of law". Code Civ.Proc. §§ 714–721.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

6. Creditors' suit 🔑1

Where plaintiff recovered judgment in superior court against judgment debtor and caused execution to be issued thereon and levied on all property in defendant's possession belonging to or owing to debtor, and plaintiff, after defendant denied liability to debtor and claimed title to property, filed an independent action against defendant in municipal court, such action, even though recognized by statute, was the same as a creditor's bill and was therefore an "action in equity", supplementing statutory proceedings supplemental to execution, and the fact that municipal court action was mentioned in statute did not take from it any of its equitable character. Code Civ.Proc. §§ 714–721.

See Words and Phrases, Permanent Edition, for all other definitions of "Action in Equity".

7. Execution 🔑402

Statutory proceedings supplemental to execution, which serve as a substitute for a creditor's bill, end with orders authorized by statutes respecting trial judge's authority to order property of a judgment debtor to be applied toward satisfaction of judgment and regarding a judgment creditor's right to maintain an action against a person or corporation allegedly having property belonging to debtor or indebted to him. Code Civ.Proc. §§ 719, 720.

8. Execution 🔑403

The action mentioned in statute providing that if it appears that a person or corporation, alleged to have property of judgment debtor, or to be indebted to him, claims an interest in property adverse to debtor, or denies the debt, the judgment creditor may maintain an action against such person or corporation, for recovery of such interest or debt is not a part of statutory proceedings supplemental to execution. Code Civ. Proc. § 720.

9. Creditors' suit 🔑1

An independent action commenced by superior court judgment creditor against defendant in municipal court, after defendant had denied liability to judgment debtor and claimed title to property levied upon in defendant's possession as property of debtor, did not lose its equitable character because, under certain circumstances, the action was authorized by statute. Code Civ.Proc. § 720.

10. Courts 🔑188(3), 486

Where plaintiff recovered judgment in superior court against judgment debtor and caused execution to be issued thereon and levied on all property in defendant's possession belonging to or owing to debtor, and plaintiff, after defendant denied liability to debtor and claimed title to property, filed an independent action against defendant in municipal court, sustaining defendant's demurrer to municipal court action was proper, since such action was an "action in equity" and beyond the court's jurisdiction, but municipal court should have ordered case transferred to superior court instead of entering a judgment of dismissal. Code Civ.Proc. §§ 89, 396, 720.

Appeal from Municipal Court of City of Los Angeles; A. E. Paonessa, Judge.

Action by J. H. Booge, trustee, against the First Trust and Savings Bank of Pasadena, a banking corporation. From a judgment of the Municipal Court of the City of Los Angeles, County of Los Angeles, dismissing the action, plaintiff appeals.

Reversed, with directions.

See, also, Cal.App., 114 P.2d 427.

Newton E. Anderson, of Los Angeles, for appellant.

Riccardi, Webster & Donahue, of Pasadena, for respondent.

PER CURIAM.

Plaintiff recovered a judgment in the Superior Court against one Reinicke and caused execution to be issued thereon and levied upon all moneys or other assets in possession of defendant and belonging to or owing to said Reinicke. The defendant answered that it had in its possession and under its control certain funds belonging to Reinicke, but claimed that by virtue of spendthrift provisions of a certain trust indenture said funds were exempt from execution and declined to pay over any of the money. Plaintiff then secured an order for the appearance and examination of defendant pursuant to the provisions of section 717, Code of Civil Procedure. Defendant appeared and filed an answer setting forth the spendthrift provisions of the trust in greater detail and claimed that by reason of the trust provisions it had an interest in the trust property adverse to the judgment debtor and denied that it was indebted to said Reinicke. The referee thereupon issued an order restraining defendant from making any transfer of the money until an action could be commenced and prosecuted to judgment. Plaintiff then filed this action in the Municipal Court. Defendant demurred on the ground, among others, "that the court had no jurisdiction of the subject of the action" because of the very limited equitable jurisdiction conferred upon that court by the code (section 89, Code of Civil Procedure). The demurrer was sustained without leave to amend. From the judgment of dismissal plaintiff appeals.

The jurisdiction of the Municipal Court depends on whether this is an action at law or an action in the nature of a creditor's bill to discover and apply property of the judgment debtor, in the possession of a third person, to the satisfaction of plaintiff's judgment.

[1-5] Before statutory provision was made for proceedings supplemental to execution, it was necessary for a judgment creditor, where he could not reach assets of his debtor by execution, to invoke the jurisdiction of a court of equity in what was called a creditor's bill or suit. This additional suit meant additional expense, delay and trouble. In order to obviate as much of this difficulty as possible statutory proceedings supplementary to execution have been developed. Sections 714–721, Code of Civil Procedure. It has been said in a number of cases in this state that these proceedings were intended as a substitute for a creditor's bill. See McCutcheon v. Superior Court, 1933, 134 Cal.App. 5 and cases therein cited on page 8, 24 P.2d 911. In this connection, however, three things must be kept in mind. They are: (1) The statutory procedure is not by its terms made exclusive; (2) The statutory proceedings supplemental to execution are authorized in the same action in which the execution issues, up to the point where the garnishee denies the existence of a debt or claims an interest in the property adverse to the judgment debtor; (3) The necessity of an independent action where the third person either claims an interest in the property adverse to the judgment debtor or denies the debt is recognized by statute in section 720, Code of Civil Procedure. It is therefore apparent that the right to maintain an independent action in the nature of a creditor's bill in order to reach and subject assets of a judgment debtor to the payment of plaintiff's judgment was not expressly abrogated by the statutory procedure. The decisions support the conclusion that it has not been abrogated where the supplementary proceedings do not, for any reason, afford adequate relief. 7 Cal. Jur. 800. Where the third person denies liability to the judgment debtor or claims title to the property, the judgment creditor may proceed by creditor's suit without first pursuing the statutory remedy; and, in such cases, it was not necessary for him to obtain an order under section 720, Code of Civil Procedure, authorizing the suit, even when that section provided, as it does not now, for such an order. 7 Cal.Jur. 801; 11 Cal.Jur. 157; Rapp v. Whittier, 1896, 113 Cal. 429, 431, 45 P. 703; Phillips v. Price, 1908, 153 Cal. 146, 150, 94 P. 617; Bond v. Bulgheroni, 1932, 215 Cal. 7, 8 P.2d 130; Blake v. Blake, 1927, 86 Cal. App. 377, 260 P. 937. The reason for this rule is that to require a third person to turn over property to a judgment creditor under such circumstances would be to deprive him of his property upon a summary proceeding and without due process of law. Lewis v. Chamberlain, 1895, 108 Cal. 525, 527, 41 P. 413; Blake v. Blake, supra, 86 Cal.App. page 381, 260 P. 937; Takahashi v. Kunishima, 1939, 34 Cal.App.2d 367, 373, 93 P.2d 645.

[6-8] From this it seems clear that this action, though recognized in section 720, Code of Civil Procedure, is the same as the old creditor's bill. It is therefore an action in equity, supplementing the statutory procedure that has been provided. In fact, several of the decisions above cited recognize the proposition that the "supplementary proceedings," so called, which serve as a substitute for a creditor's bill, end with the orders authorized by sections 719 and 720, Code of Civil Procedure, and that the action mentioned in section 720 is not a part of those proceedings. See Bond v. Bulgheroni, supra, 215 Cal. pages 10 and 11, 8 P.2d 130; Phillips v. Price, supra, 153 Cal. page 150, 94 P. 617; Blake v. Blake, supra, 86 Cal.App. page 381, 260 P. 937. The mere fact that such an independent action is mentioned in section 720,

Code of Civil Procedure, does not take from it any of its equitable character. At most, the section places a limitation upon the right to bring the action until it appears that the person who is charged with holding property belonging to the judgment debtor or with being indebted to him, claims title to the property or denies the debt, or it appears for some other reason that proceedings supplementary to execution in the original action are inadequate.

[9] The independent action does not lose its equitable character because, under certain circumstances, it is authorized by the code, any more than actions to foreclose mortgages (Brichetto v. Raney, 1926, 76 Cal.App. 232, 240, 245 P. 235), to quiet title (Thomson v. Thomson, 1936, 7 Cal. 2d 671, 681, 62 P.2d 358, 117 A.L.R. 1), or to partition real property (Jameson v. Hayward, 1895, 106 Cal. 682, 687, 688, 39 P. 1078, 46 Am.St.Rep. 268), Akley v. Bassett, 1922, 189 Cal. 625, 647, 209 P. 576) lose their equitable character because they are provided for by the code.

[10] We therefore conclude that plaintiff's action is one in equity and that the trial court properly sustained defendant's demurrer because it lacked jurisdiction of the action. The court should, however, have ordered the case transferred to the Superior Court (section 396, Code of Civil Procedure) instead of entering a judgment of dismissal.

The judgment is reversed and the Municipal Court is directed to transfer said case to the Superior Court; appellant to recover its costs of appeal.

SHAW, P. J., BISHOP, and FOX, J. pro tem., concur.

18 Cal.2d 586

KACSUR v. BOARD OF TRUSTEES OF SOUTH WHITTIER ELEMENTARY SCHOOL DISTRICT et al.

HILL v. SAME.

L. A. 17898.

Supreme Court of California.

Sept. 3, 1941.

1. Schools and school districts 🔑136

The employment of teacher is primarily contractual.

2. Schools and school districts 🔑133

While relation between teacher and school district board of trustees is essentially contractual and teacher's re-employment in succeeding years is purely in board's discretion until teacher attains permanent status, teachers' tenure statutes confer on teachers, under specified circumstances, vested right to be classified and to teach as permanent instructors in district wherein such right has been secured, subject to reasonable rules not in conflict with law. School Code, § 5.501.

3. Schools and school districts 🔑136

The teachers' tenure statutes do not make relation between teacher and school district board of trustees any less contractual in origin, but annex to teachers' employment contracts, when repeated for sufficient time, certain legal consequences, which are not contractual, except in broad sense of being annexed by operation of law to contract. School Code, § 5.501.

4. Schools and school districts 🔑144(4)

A permanent teacher has no vested right to particular salary, and her salary may be changed by administrative authority of school district. School Code, § 5.731.

5. Schools and school districts 🔑144(4)

The fixing of permanent school teachers' salaries by school district boards of trustees must not be discriminatory, arbitrary or unreasonable. School Code, § 5.731.

6. Schools and school districts 🔑144(4)

In fixing permanent school teachers' salaries, administrative agencies must make comparison with salaries of other teachers or same teachers' salaries of previous years. School Code, § 5.731.

7. Mandamus 🔑168(4)

In mandamus proceedings to compel school district board of trustees to fix permanent school teachers' salaries for school year in at least annual sums previously paid them, evidence that board attempted to reduce petitioners' salaries materially from such sums to practically minimum allowed by law, that salaries of other district teachers were not reduced, that most of them were raised, and that salary of teacher of approximately same years of service, experience and qualifications as petitioners remained the same, was sufficient to show that board's action was unreasonable and arbitrary. School Code, §§ 5.731, 5.751.

8. Schools and school districts 🔑144(4)

There must be some degree of uniformity in salaries of school district teachers performing like services with like experience. School Code, § 5.731.

9. Mandamus 🔑164(2)

In mandamus proceedings to require school district board of trustees to fix petitioners' salaries as permanent teachers for school year in at least annual sums previously paid them, evidence that board attempted to reduce petitioners' salaries materially from such sums to practically minimum amount allowed by law, that no other teachers' salaries were reduced, and that salary of teacher of approximately same years of service, experience and qualifications as petitioners remained the same, established prima facie case of abuse of discretion, imposing on board burden of offering some reasonable explanation or justification for its action. School Code, §§ 5.731, 5.751.

10. Schools and school districts 🔑144(4)

An assignment of permanent school teacher to duties different from those previously performed by her does not justify reduction of her salary by school district board of trustees, as work assigned to such a teacher must be of grade and rank equivalent to that by which she acquired permanent status. School Code, § 5.731.

11. Schools and school districts 🔑144(4)

A school district board of trustees may offer evidence of incompetency or inefficiency of one of two teachers of same years of experience and service as justification for reduction of such teacher's salary or discrepancy between the two teachers' salaries in action instituted by dissatisfied lower salaried teacher. School Code, § 5.731.

12. Mandamus 🔑168(2)

In mandamus proceedings to compel school district board of trustees to fix petitioners' salaries as permanent teachers for certain school year in at least annual sums previously paid them, where petitioners alleged abuse of board's discretion in reducing petitioners' salaries and introduced evidence tending to support such allegation, burden was on board to show that there was no abuse of discretion. School Code, § 5.731.

13. Mandamus 🔑187(9)

In mandamus proceedings to compel school district board of trustees to fix petitioners' salaries as permanent teachers for certain school year in at least annual sums previously paid them, petitioners, alleging and introducing evidence that board abused its discretion in reducing petitioners' salaries, should not complain on appeal of admission of evidence, offered by board to justify its action, that petitioners were inefficient, though no charges were preferred against them. School Code, §§ 5.650 et seq., 5.731.

14. Mandamus 🔑168(4)

In mandamus proceedings to compel school district board of trustees to fix petitioners' salaries as permanent teachers for certain school year in at least sums previously paid them, evidence *held* insufficient to support trial court's finding that board did not act arbitrarily in reducing petitioners' salaries or fix unreasonable salaries. School Code, § 5.731.

15. Schools and school districts 🔑144(4)

A difference between school teacher's and school superintendent's philosophies of teaching does not justify reduction of teacher's salary by school district board of trustees on superintendent's recommendation. School Code, § 5.731.

16. Evidence 🔑20(1)

It is common knowledge that even authorities in educational field differ violently as to value of various philosophies of teaching and methods by which they should be carried out.

17. Schools and school districts 🔑144(4)

A reduction in permanent school teachers' salaries by school district board of trustees for purpose of forcing such teachers' resignations, thereby evading tenure law, would be arbitrary and subject to correction by court. School Code, §§ 5.501, 5.731.

18. Schools and school districts 🔑144(4)

A school district board of trustees should have reimbursed permanent school teacher for necessary traveling expenses incurred by her in connection with her assignment by board as home teacher. School Code, § 5.532.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceedings by Eleanor Roehr Kacsur and Thelma Weagley Hill, respectively, for writs of mandate requiring the Board of Trustees of South Whittier Elementary School District and others to fix petitioners' salaries as school teachers for certain school year in at least stated sums and draw warrants on the treasurer of Los Angeles county therefor. From judgments denying peremptory writs, petitioners appeal.

Reversed, with directions.

For prior opinion, see Cal.App., 109 P.2d 731.

Tanner, Odell & Taft and Robert A. Odell, all of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and William B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

Ray C. Eberhard, of Los Angeles, amicus curiae for California Teachers' Ass'n and another.

CURTIS, Justice.

These are appeals from judgments in mandate proceedings. Appellants, teachers in the South Whittier Elementary School District, sought by writs of mandate in the superior court to require the respondents to fix their salaries for the school year 1938-1939 at least in the sum of $1,600 and accordingly to draw warrants upon the county treasurer of Los Angeles County for such sums. Appellant Kacsur also sought the recovery of certain traveling expenses incurred by her in connection with her assignment as a home teacher. After a hearing the trial court refused to issue the peremptory writs requested. The cases were tried together in the lower court and are presented to this court on one set of briefs and one reporter's transcript. The appeals will therefore be considered together.

Appellant Hill has been a classroom teacher in respondent district since July 1, 1927, and appellant Kacsur since July 1, 1928. They are the only two permanent teachers of the eighteen full-time regular teachers of the district. This status was attained prior to August 14, 1931, the effective date of the amendment to section 5.501 of the School Code, St.1931, p. 1394, by which it was made optional with boards in school districts, such as respondent, which have under 850 pupils average daily attendance, to classify certified employees as "permanent". Respondent district exercised such option and decided not to classify any more teachers as "permanent".

From 1933 to 1937 the salaries of appellants had been $1,570 per year. For the year 1937-38, pursuant to a salary schedule adopted by the board which provided for annual increments if certain requirements of special study were met, their salaries were fixed at $1,600. This sum was the highest paid to any of the regular teachers for that year and was also the sum received by a Miss Harrington, who had been in the district for nine years but was not a permanent teacher because of the aforementioned option exercised by the district. The three had been paid identical salaries of $1,570 for the preceding three years.

In May, 1938, appellants were notified that they had been re-employed for the school year 1938-39 and were sent written forms of contracts specifying salaries of $1,325 for that year. (This was $5 over the minimum salary fixed by section 5.751 of the School Code.) The respondent board took action "abolishing" the salary schedule that had been adopted for the previous year, although other salaries were apparently fixed in accordance with the former salary schedule. Miss Harrington's salary was fixed at $1,600 and no other full-time classroom teacher's salary was so low as that proposed for appellants. Prior to the notification of salary changes the teaching assignment of appellant Kacsur had been changed. She was removed from the fifth grade to "home teaching," which necessitated her going to the homes of pupils of all grades. This home teaching was conducted for those pupils who, for various reasons, could not attend school. She was also assigned to remedial reading classes and to clerical work in the superintendent's office. No provision was made for her transportation to the homes and the respondent board refused to reimburse her for the expenses incurred in carrying out the home teaching assignment. At the opening of the school year 1938-39 appellant Hill was transferred from the eighth grade, which she had been teaching for the past three years, to the third grade.

Appellants protested against the proposed salary changes as being unreasonable and discriminatory and made written demand for salaries at least in the sum of $1,600. Appellant Kacsur also made demand for the sum of $20.50 actual and necessary traveling expenses incurred and made necessary by her assignment to home teaching work. The appellants did not reject employment in the district and did teach according to their assignments during the year 1938-39.

In denying the petitions for issuance of peremptory writs of mandate the trial court found "that in fixing the said salary the governing board of the district did not act arbitrarily or fix an unreasonable salary for said petitioner(s), but said salary was fixed by said board in good faith and not from any improper or illegal motive".

Appellants contend that the action of the respondent board in reducing their salaries was clearly unreasonable, arbitrary and discriminatory and that the finding of the superior court to the contrary is not supported by the evidence. Appellants further contend that the alleged discriminatory and arbitrary action was taken against them because they were the only two permanent employees, and the respondent board so acted in the hope of forcing their resignations and thus evading the permanent tenure provisions of the School Code.

[1-6] Respondents argue that discrimination or unreasonableness cannot be shown by comparison with salaries of former years or with salaries of other teachers for the reason that each teacher is an individual employee of the district and each teacher's salary is fixed under a one-year contract distinct from any past or future contract. The employment of a teacher is primarily one of contract (Fidler v. Board of Trustees, 112 Cal.App. 296, 296 P. 912), but the relationship of a permanent teacher differs materially from that of private employment. As was stated in Abraham v. Sims, 2 Cal.2d 698, 710, 42 P.2d 1029, 1035: "* * * Notwithstanding, however, that the relation between a teacher and the board of trustees is essentially one of contract, and that, until the teacher has attained a permanent status, his or her reemployment in succeeding years is a matter purely in the board's discretion, the situation is so far modified by the teachers' tenure enactments * * * that as said with respect to permanent teachers in Dutart v. Woodward, 99 Cal.App. 736, 739. 279

P. 493, 494, 'The Legislature has conferred upon teachers, under specified circumstances, a vested right to be so classified and to teach as permanent instructors, in the particular district where this right has been secured, subject to such reasonable rules as may be adopted, which are not in conflict with law'. The result of these enactments was not to make the relation any the less one originating in contract, but to annex to contracts of employment when repeated for a sufficient time certain legal consequences. These consequences are not contractual except in the broad sense of being annexed by operation of law to the contract and have been said to be 'in the nature of a civil service regulation.' * * *" Under section 5.731 of the School Code the administrative agencies may fix the salaries of teachers. It is now well established that a permanent teacher has no vested right to a particular salary and that such salary may be changed by the administrative authority. See Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838; Abraham v. Sims, supra; Emerson v. Board of Trustees, 23 Cal.App.2d 432, 73 P.2d 935; Hodge v. Board of Education, 22 Cal.App.2d 341, 70 P.2d 1009; Fidler v. Board of Trustees, supra. However, there are limitations on the powers of boards of trustees to change salaries of permanent teachers. One of the "legal consequences" referred to in the Abraham case, supra, is that the fixing of salaries must not be discriminatory, arbitrary or unreasonable. The above cited cases all so qualify the general power of the administrative agencies to fix the salaries of permanent teachers. Because of this qualification it necessarily follows that there must be a comparison with the salaries of other teachers or salaries of previous years. If this could not be done, the qualification would be meaningless. Respondents' contention that there can be no comparison is therefore without merit.

[7, 8] The record shows that the respondent board attempted to materially reduce appellants' salaries from $1,600 to $1,325, practically the minimum allowed by law. It is further shown that no other salaries were reduced; most of them were raised; and the salary of a teacher of approximately the same years of service, experience and qualifications remained the same. These facts standing alone are sufficient to force the conclusion that the attempted action of the board was unreasonable and arbitrary. The fact that the salary of a teacher of like experience and years of service was not reduced is particularly strong in support of appellants' claim of discrimination. That there must be some degree of uniformity was recently recognized by this court in the case of Fry v. Board of Education, 17 Cal.2d 753, 112 P.2d 229, 233, wherein it is stated: "'It must be conceded that, within the limits fixed by the School Code, the Board has discretionary control over the salaries of teachers. [Citing cases.] However, it must also be conceded that the legislature has enjoined on such Boards, within reasonable limits, the principle of uniformity of treatment as to salary for those performing like services with like experience. * * *'"

[9, 10] As a result of the above facts a prima facie case of abuse of discretion was established, and it was then incumbent upon the respondent board to offer some reasonable explanation or justification for its action. Allen v. McKinley, —— Cal. App.2d ——, 109 P.2d 429. Although an attempt was made by the respondents both in the proceeding in the trial court and in the reply brief, to explain or justify the action, it is difficult to follow such explanation. In the reply brief it is stated that appellants' salaries were fixed at $1,325 "because they had been assigned to different duties than theretofore performed, and also because the Board in its sound discretion believed that they should not be paid any more for the type and character of the teaching service which they were rendering to the district". The evidence does not support the first asserted ground for the reduction in salaries. On the contrary, the superintendent, on whose recommendation the board wholly relied in fixing the salaries at $1,325, expressly stated that the change of assignment had no bearing on the salary alteration. Furthermore, a change in assignment could not be used as justification for a reduction in salary, for although a board may reasonably change the assignment of a permanent teacher, the work assigned must be of grade and rank equivalent to that by which the permanent status was acquired. Hodge v. Board of Education, supra; Mitchell v. Board of Trustees, 5 Cal.App.2d 64, 42 P.2d 397; Cullen v. Board of Education, 126 Cal.App. 510, 15 P.2d 227, 16 P.2d 272. If such change in assignment warranted a reduction in salary, the work assigned could hardly be said to be of the same grade and rank.

[11] The appellants argue that the second ground of justification for the change in salary offered by respondent board, viz., that they should not be paid any more for the type and character of the teaching service they were rendering, is an issue as to their qualifications and, as such, could not be tried in this proceeding. It is contended that the trial court erred in admitting any testimony designed to show that appellants were inefficient when, by the admission of the pleadings, no charges had ever been preferred against them. In support of such contention appellants refer to those sections in the School Code which provide for dismissal proceedings because of incompetency or inefficiency. § 5.650 et seq. Under these sections an employee has a right to notice and an opportunity to correct his faults before any action may be taken. In the instant case there was, of course, no dismissal proceeding instituted by the board. The case of Lotts v. Board of Park Com'rs, 13 Cal.App.2d 625, 57 P.2d 215, is particularly relied on by appellants. This case involved certain civil service regulations similar to the provisions of the School Code relating to dismissal. The Board of Park Commissioners of Los Angeles attempted to assign certain employees to half-day work with a consequent reduction in salary. The court held that the attempted change in assignment was a removal or discharge and that such could not be done except by the regular dismissal proceeding provided for in the city civil service regulations. The board attempted to justify its action by showing that the employees had become incapable of performing their usual duties. The court again referred to the removal proceedings and held that if inefficiency or inability were charged, the employees had a right to notice and hearing as provided by the civil service regulations. While there is language in that opinion which might support appellants' contention, we are not prepared to say that in no case may a school board offer evidence of incompetency or inefficiency as justification for a reduction in salary or a discrepancy in salary between two teachers of the same years of experience and service. It is quite possible that a situation might exist in which one of two teachers of similar experience and service might be not only more capable, but also more industrious and willing than the other, who although sufficiently competent to prohibit dismissal, might be somewhat indolent and non-cooperative. In such a situation the school board should be permitted to exercise its reasonable discretion in raising the salary of the industrious teacher as a reward for her good work without at the same time having to increase the salary of the undeserving teacher. But if no evidence of the inefficiency or shortcomings of one and the efficiency of the other was permitted in an action which might be instituted by the dissatisfied lower salaried teacher, then the board would have no way of justifying its action, and all discretion would be taken from such board. What has just been stated here does not conflict with the previously quoted "uniformity" statement in the case of Fry v. Board of Education, supra. The "within reasonable limits" phrase was no doubt inserted in that case so that a school board would still retain some discretion as to the fixing of salaries even as to teachers performing like services with like experience.

[12-16] In the instant case the appellants alleged abuse of discretion on the part of the respondent board and introduced certain evidence already referred to which tended to support that allegation. The burden was then on the board to show that there was no abuse of discretion. The appellants should not now complain against the acceptance of evidence offered by the respondent board in an attempt to justify its action. However, we are of the opinion that the evidence introduced by the board was not sufficient to support the finding of the trial court that the board did not act arbitrarily or fix an unreasonable salary.

Appellants' salaries for the year 1938-39 were fixed by the respondent board at $1,325 wholly on the recommendation of the school superintendent Winton Smith, who had been employed in that capacity at the close of the 1936-37 school year. Mr. Smith testified at length as to his reasons for recommending the salary changes, but his testimony falls far short of being sufficient to justify the action of the board. There are some general statements directed against the efficiency of appellants, but such testimony is too vague to be of any value, and, in fact, the superintendent expressly stated: "I am not endeavoring to prove that they (appellants) are inefficient teachers." There is some intimation that the change of assignments was the reason for the change in salary, but as previously pointed out, there are direct statements to the contrary, at least as to appellant Hill. In regard to appellant Kacsur, there is no express statement that the change to home teaching was the reason for the change in salary, and Mr. Smith admitted that just as much ability was required in home teaching as in classroom teaching. The superintendent's basic reason for his recommendation apparently was that the "philosophy of teaching" of appellants differed to some extent from his. As was stated by him: "Now, I didn't have any particular quarrel with these teachers, and I am not trying to set out here that they are indifferent in any way, the only thing is they didn't seem to embrace wholeheartedly the philosophy of teaching which I was trying to get over to them at that time." It seems self-evident that such an indefinite and uncertain term as "philosophy of teaching" cannot be used as justification for the salary reduction and differentiation that is existent here. This court is admittedly not sufficiently enlightened to discuss or even recognize the different philosophies of teaching. It is common knowledge that even the authorities in the educational field differ violently not only as to the value of the various philosophies of teaching, but also as to the methods by which they should be carried out. If such generalities were permitted to be used as justification for salary changes, then the actions of the administrative boards would not be discretionary but wholly arbitrary. The instant case is illustrative of the inadvisability of using such a method to test the value of a teacher. It is disclosed by the record that the county authorities desired that the teaching be conducted on a more informal basis by the use of the "activity" or "unit" plan. This is apparently what Mr. Smith meant by his philosophy of teaching. However, when called upon to explain it to the lower court, he found himself unable to do so and was forced to refer to and read from a certain text on the subject. The superintendent might well have asked appellant Kacsur to explain it to the judge, for as disclosed by the record, he at one time requested her to address the Parent Teachers' Association on the progress of the activity work system and praised her explanation at that time. There is no testimony in the record showing that appellants refused to perform their duties as requested. Both carried out their work as they were instructed to do. Nor do we find any specific criticism by Mr. Smith of any particular phase of the work of appellants. When asked in what respect appellant Kacsur failed to follow a course of study he had outlined for her, he stated: "That course of study, as I said before, involves the teaching philosophy as a whole, and I can't point out any particular point or matter that she didn't follow." From the testimony referred to and that of a similar nature running throughout the entire record, we are convinced that the superintendent completely failed to justify his recommendation of the salary reductions.

[17] Appellants earnestly insist that the respondent board took the action complained of to force their resignations and thus evade the tenure law. They point to the fact that they are the only permanent teachers in the district; that no charges have ever been made against them; that each was requested to resign at the end of the third year of employment; that the salary of a probationary teacher of similar years of experience and service was kept at $1,600; that the salaries of other teachers were raised; and that they were given strange assignments. Appellants also contend that the evidence clearly shows that the board was opposed to the tenure law. That there have been numerous and diverse attempts to circumvent the tenure law is evidenced by the number of times both this court and the district courts of appeal have been called upon to examine and prohibit such scheme of evasion. If a reduction in salary is made for the purpose of getting rid of a teacher who had acquired permanent status, such action would unquestionably be arbitrary and subject to correction by a court. Emerson v. Board of Trustees, supra. While the facts of the instant situation tend to support appellants' contention, we do not find it necessary to base our decision on that ground. It is also stated in the Emerson case, supra, 23 Cal. App.2d at page 435, 73 P.2d at page 936: "It may be possible to suppose a case where the nature of the reduction would be such as to disclose in itself that it was unreasonable and arbitrary * * *." The present case is a good example of the type Justice Barnard had in mind when he made the above-quoted statement. We prefer to base our decision on this ground rather than on the ground that the respondent board intentionally attempted to evade the tenure law.

The cases in which salary reductions have been permitted are of no aid to respondent board. Indeed, those cases strengthen our conclusion that there was no justification for the fixing of appellants' salaries at such a low figure in this case. In Fidler v. Board of Trustees, supra, the salary was fixed at $2,500 as against $2,900 for the previous year. From the opinion it appears that the board had lost certain federal state aid and further, that the previous year the teacher had performed duties of an administrative or executive character under the title of vice-principal. The teacher was not protected by the tenure law as to his vice-principalship, and the court concluded that the relief from those duties plus the loss of funds available justified the lower salary. Hodge v. Board of Education, supra, is quite similar in that the teacher was relieved of certain supervisory duties. It was further pointed out in that case that no other teacher with similar qualifications was paid a higher salary. In Emerson v. Board of Trustees, supra, there was only one teacher in the school, and it was held that $1,000 was reasonable because of the insufficiency of funds to warrant a higher salary. There were more funds actually available, but the court pointed out that the board was charged with the duty of trying to make the funds available cover the expenses which were reasonably to be anticipated.

[18] Appellant Kacsur's demand for $20.50 incurred by her as necessary traveling expenses is governed by section 5.532 of the School Code. That section provides, in part: "The governing board of any school district shall have the power and duty to provide for the payment of the actual and necessary traveling expenses of any employee of the district when performing services for the district under the direction of the governing board thereof." The allegation in respect to this expenditure was found to be true by the trial court, and respondent board does not question such finding on this appeal. The board should have reimbursed appellant Kacsur for the sum expended and for any further sums since expended in a like manner.

For the foregoing reasons the judgments are reversed and the superior court is ordered to enter judgments determining that appellants are entitled to have respondent board fix their salaries for the school year 1938-39 at such sums as shall not be unreasonable or discriminatory, and at least in the sum of $1,600 for each appellant for said school year; and that appellant Eleanor Kacsur is entitled to the sum of $20.50 as and for necessary traveling expenses incurred in performing services for said district at the direction of the governing board thereof during the school year 1937-38, and is also entitled to be paid her necessary traveling expenses in performing any service under the direction of said respondent board during the school year 1938-39. It is further ordered that the superior court issue its writs of mandate directed to the respondent board commanding said board to fix the salaries of appellants as hereinabove determined and directing said board to draw its warrant and demand on the county treasurer of Los Angeles County in favor of each of said appellants for her salary as so fixed for the school year 1938-39, less any amounts paid said appellant by said board on account of services rendered by her during said school year.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

18 Cal.2d 610

COMMERCIAL DISCOUNT CO. v. COWEN.

L. A. 17888.

Supreme Court of California.

Sept. 10, 1941.

1. Replevin 🔑8(3, 4)

To sustain an action for recovery of specific personalty, plaintiff must have right to immediate and exclusive possession of the personalty at time of commencement of the action, although it is not essential that he should show that he ever had actual possession of it.

2. Replevin 🔑8(4)

A plaintiff who seeks recovery of specific personalty must have a general or special property in the personalty, entitling him to right of immediate and exclusive possession, but it is not essential that he be the absolute owner.

3. Chattel mortgages 🔑172(1)

A chattel mortgage, which provides that on default mortgagee may immediately take possession of property and sell it to pay the debt, gives mortgagee a "special interest" in the mortgaged property and the right to its immediate possession, sufficient to maintain an action for its recovery should the mortgagor after demand refuse to surrender possession.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Interest".

4. Assignments ⚿1

The word "assign" in the ordinary legal sense, means to transfer title or ownership of property, and is usually but not always used in connection with the transfer of a thing in action, and may be used to indicate an act whereby title to property is conveyed by one living person to another.

See Words and Phrases, Permanent Edition, for all other definitions of "Assign".

5. Assignments ⚿1

In legal phraseology, the word "transfer" is commonly used to denote the passing of title in property, usually realty, or an interest therein from one person to another. Civ.Code, § 1039.

See Words and Phrases, Permanent Edition, for all other definitions of "Transfer".

6. Assignments ⚿1

The word "transfer" in its ordinary use has a very general meaning, including the removal of a thing from one place or person to another, the changing of its control or possession, or the conveyance of title to it, and a transfer of property may be effected by delivery of its possession to another.

7. Assignments ⚿1

Where a document is prepared by one skilled in the law, the word "transfer" may be synonymous with the word "convey" and connotes the passing of title by legal instrument. Civ.Code, § 1039.

See Words and Phrases, Permanent Edition, for all other definitions of "Convey".

8. Contracts ⚿170(1)

Where terms of contract are uncertain and capable of more than one reasonable construction, the practical construction put upon it by the parties furnishes one of the most reliable means of arriving at their intention when executing it.

9. Contracts ⚿189

A contract relating to liquidation of indebtedness, which provided that assets of debtor's business should be immediately "assigned and transferred" to creditor in case of default, was properly construed as a promise to execute an instrument conveying title to creditor in case of default, and not to deliver immediate possession to creditor.

10. Replevin ⚿8(4)

Where contract, relating to liquidation of indebtedness, which provided that assets of debtor's business should be immediately "assigned and transferred" to creditor in case of default, was construed as a promise to execute an instrument conveying title of the property to creditor rather than to deliver immediate possession to him, creditor had no right of immediate possession of assets upon default, and therefore was precluded from maintaining claim and delivery action to recover the assets, since right to immediate possession was a "condition precedent" to maintaining such action.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action in claim and delivery by the Commercial Discount Company against O. L. Cowen to recover possession of certain property. From a judgment for defendant, the plaintiff appeals.

Affirmed.

For prior opinion, see 109 P.2d 391.

Chapman & Chapman and Don L. Warner, all of Los Angeles, for appellant.

Fred A. Wilson and Wilson & Coughlin, all of San Bernardino, for respondent.

PER CURIAM.

This cause was taken over after decision by the District Court of Appeal of the Fourth Appellate District, 109 P.2d 391, not because of any dissatisfaction with the conclusion there announced, but for the sole purpose of deleting certain language from the opinion. Upon further examination of the record, we adopt the opinion of Mr. Justice Marks, with such omissions and additions as hereinafter appear, as and for the decision of this court. It reads:

"Plaintiff brought this action in claim and delivery to recover all motor vehicles, machinery, furniture, office and garage furnishings, fixtures, equipment, cash and checks, and all accounts, notes and contracts receivable at defendant's place of business in Barstow, California. It was alleged that plaintiff was entitled to the immediate possession of this property and had demanded immediate possession from defendant which had been refused. Among other things, the answer put in issue plaintiff's right of possession and its demand for immediate possession. The trial court found in favor of defendant on these issues and entered judgment for him. This appeal followed.

"The determination of this appeal rests largely on the interpretation to be placed on a contract entered into by the parties on March 15, 1937. This contract recites that defendant had three places of business in connection with his motor vehicle business. One was located in San Bernardino, a second in Rialto and a third in Barstow.

"Defendant had become indebted to plaintiff in the sum of $53,000 which it was desired to liquidate. He had a prospective sale or plan of liquidation of the business in San Bernardino and Rialto. He agreed to open an escrow within ten days, having as its object the liquidation of the assets of those places of business. The term of the escrow was fixed at thirty days. A period of sixty days after the closing of the escrow was given within which to proceed with the liquidation, with an option of terminating it at an earlier date given to plaintiff should the operations prove unprofitable.

"A separate section of the contract dealt with the Barstow business. It opens as follows:

"'4. It is understood and agreed that the operations of the said O. L. Cowen business now located at Barstow, California, shall not be included in the proposed escrow and during the life of this Agreement, said operations at Barstow shall remain the property of the said O. L. Cowen, subject, however, to the following terms and conditions:

"'In the event of any breach or prior termination of this Agreement, for any reason whatsoever, except by payment in full by the said second party, any and all of the assets of said Barstow operations shall be immediately assigned and transferred to First Party herein for liquidation in any manner and under any process which said First Party may desire; the net proceeds of said liquidation to be credited by said First Party to the indebtedness of said O. L. Cowen, as aforesaid.' Then follows details of the plan for liquidation of the Barstow business which are not material here.

[1, 2] "It is well settled in California that 'To sustain an action for the recovery of specific personal property the plaintiff must have the right to immediate and exclusive possession of such property at the time of the commencement of the action, although it is not essential that he should show that he ever had actual possession of it. While plaintiff must have a general or special property in the thing sought entitling him to such right of possession, it is not essential that he be the absolute owner: a special property therein entitling him to such right of possession is sufficient. But whether the right in the property is general or special, it must entitle the plaintiff to immediate and exclusive possession.' 5 Cal. Jur. 160.

[3] "This special property in personalty, with the right to its immediate possession which gives the right to bring an action of this kind, is illustrated by the cases involving chattel mortgages which provide that on default a mortgagee may immediately take possession of the mortgaged property and sell it to pay the debt. It is held that such an agreement gives a mortgagee such special interest in the mortgaged property, and the right to its immediate possession, sufficient to maintain an action for its recovery should the mortgagor, after demand, refuse to surrender possession to the mortgagee. Plaintiff relies strongly on such cases. See Commercial & Savings Bank of Stockton v. Foster, 210 Cal. 76, 290 P. 583; Riverside Portland Cement Co. v. Taft, 192 Cal. 643, 221 P. 357; Tuohy v. Linder, 144 Cal. 790, 78 P. 233.

"The theory upon which these decisions rest is that the mortgage and the covenant of the mortgagor to deliver possession of the mortgaged property to the mortgagee for the purpose of sale immediately upon default and demand for possession, gives the mortgagee a special interest and right of immediate possession that will support an action for its possession, after refusal of a demand for possession. The question here is: Does the promise of defendant that the Barstow property 'shall be immediately assigned and transferred' to plaintiff amount to a covenant to deliver possession of that property to plaintiff or is it a promise to do some other act which, when performed, but not before, will give plaintiff the right of possession and special property necessary to maintain this action? The answer to this question depends upon the meaning to be given to the words 'assigned' and 'transferred' which are used in the contract as the measure of defendant's immediate duty under it.

[4] "The word assign, in the ordinary legal sense, means to transfer title or ownership of property. Burkett v. Doty, 176 Cal. 89, 167 P. 518. The word is usually, but not always, used in connection with the transfer of a thing in action. It may be used to indicate an act whereby title to property is conveyed by one living person to another. 3 Cal.Jur. 233 et seq.; Offer v. Superior Court, 194 Cal. 114, 228 P. 11.

[5, 6] "Section 1039 of the Civil Code provides that, 'Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another'. See Scholle v. Finnell, 173 Cal. 372, 159 P. 1179; Chambers v. Lamb, 186 Cal. 261, 199 P. 33; Estate of Potter, 188 Cal. 55, 204 P. 826. In legal phraseology it is commonly used to denote the passing of title in property, usually realty, or an interest therein from one person to another. In re Okahara, 191 Cal. 353, 216 P. 614; Estate of Steehler, 195 Cal. 386, 233 P. 972. In Estate of Peabody, 154 Cal. 173, 97 P. 184, it was said that while the word 'transfer' as used in the Civil Code indicates the passing of title from one person to another, in its ordinary use it has a very general meaning, including the removal of a thing from one place or person to another, the changing of its control or possession or the conveyance of title to it. It is also true that a 'transfer' of property may be effected by delivery of its possession to another. Estate of Dunphy, 147 Cal. 95, 81 P. 315.

"Applying these definitions to the words used in the contract before us we find, if we regard the words 'transferred and assigned', as used in their legal sense, that defendant promised to execute a conveyance of title to the property in question to plaintiff and not to deliver immediate possession to it. Under such circumstances, the right of possession usually follows, but ordinarily does not precede the passing of title. If we adopt the meaning of the words when used in their legal sense we find that defendant promised to execute a document conveying the title of the property to plaintiff, but did not promise to deliver immediate possession to it. On the other hand, if we give to the word 'transfer' its meaning in ordinary use, it might mean either the delivery of possession to plaintiff or the conveyance of title to it.

[7] "A further rule of construction of assistance to us is announced in Estate of Spreckels, 162 Cal. 559, 123 P. 371, where it is held, in effect, that when a document is prepared by one skilled in the law the word 'transfer' may be synonymous with the word 'convey' and connote the passing of title by a legal instrument. Cheda v. Bodkin, 173 Cal. 7, 158 P. 1025. The contract in question was evidently prepared by one skilled in the law. * * *

"Here, the trial judge construed the contract to mean, not that defendant would give immediate possession of the Barstow property to plaintiff for the purpose of sale and liquidation, but that he would execute an instrument conveying title to plaintiff; and that the right of possession would not precede the execution of this document. * * *

[8] "Support is given the construction put upon the contract by the trial judge by the demand served on defendant by the attorney for plaintiff. He did not demand the immediate possession of the property, but made a demand 'for an immediate delivery to said company of your duly executed bill of sale covering the Barstow business'. Where the terms of a contract are uncertain and capable of more than one reasonable construction, the practical construction put upon it by the parties furnishes one of the most reliable means of arriving at their intention when executing it. Skousen v. Herz, 135 Cal.App. 116, 26 P.2d 498."

[9, 10] Under the circumstances, we are satisfied that the trial court correctly construed the contract. The right to the immediate possession of the property in question was a condition precedent to maintaining this action. Plaintiff had no such right of immediate possession. The judgment must therefore be, and it is, affirmed.

18 Cal.2d 575

COTTEN et al. v. PERISHABLE AIR CONDITIONERS et al.

L. A. 17943.

Supreme Court of California.
Sept. 3, 1941.

1. Partnership 🔑277

Generally, a dissolution of a partnership operates only with respect to future transactions, and as to everything past the partnership continues until all pre-existing matters are terminated.

2. Partnership 🔑278

The dissolution of a partnership does not destroy authority of a partner to act for his former associates in matters in which they still have a common interest and are under a common liability.

3. Partnership 🔑296(1), 325(4)

The service of summons and complaint upon one of partners, after dissolution but prior to termination of partnership, in an action for injuries allegedly sustained in course of employment for partnership prior to its dissolution, was sufficient to give court jurisdiction to enter judgment against partnership, notwithstanding that partnership was in hands of a receiver. Civ.Code, §§ 2423, 2424; Code Civ.Proc. § 388.

4. Partnership 🔑325(4)

That receiver was appointed for partnership, did not prohibit prosecution of an action against partners and partnership for injuries allegedly sustained by an employee of partnership in course of his employment prior to appointment of receiver, and obtaining a judgment establishing validity of his claim.

5. Judgment 🔑148

Where, upon dissolution of partnership, a receiver was appointed, and thereafter receiver refused to appear in an action for injuries allegedly sustained in course of employment for partnership prior to its dissolution and defend on behalf of partnership, receiver was "estopped" from thereafter intervening by motion for purpose of attacking default judgment against partnership which was valid on its face. Civ.Code, §§ 2423, 2424; Code Civ.Proc. § 388.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

In Bank.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Charles D. Cotten, etc., and another against Perishable Air Conditioners, a copartnership, and others, to recover for injuries sustained by minor plaintiff, while working for defendant copartnership, wherein a default judgment was entered in favor of plaintiffs. From an order granting a motion to vacate a default and default judgment, the plaintiffs appeal.

Order reversed.

For prior opinion, see 110 P.2d 1010.

August J. O'Connor and George J. Hider, both of Los Angeles, for appellants.

R. R. Sleeper and Monta W. Shirley, both of Los Angeles, for respondents.

PULLEN, Justice pro tem.

The defendant, Perishable Air Conditioners, was a co-partnership composed of Cross and Carroll. Plaintiff, Charles D. Cotten, a minor, was an employee of said partnership, and on November 13, 1937, was severely injured while acting in the course of his employment.

Thereafter, an action was filed by Carroll against his partner Cross for a dissolution of the partnership, for an accounting, and for the appointment of a receiver. A receiver was appointed December 15, 1937, and on January 17, 1938, an order was made dissolving the partnership. On March 18, 1938, Charles D. Cotten applied to the superior court in the receivership proceedings for permission to sue the receiver. The receiver appeared and opposed the application on the ground that the liability arose prior to the receivership. The court thereupon denied permission to sue.

On the following day, an action was filed by Charles D. Cotten against Perishable Air Conditioners, a copartnership, and Cross and Carroll, individually, to recover for the injuries sustained, and summons and complaint were served upon Cross individually and on behalf of the partnership, the other partner being out of the jurisdiction. Default was entered against the partnership and Cross, followed by a judgment on April 14, 1938.

The receiver then moved to vacate the default judgment against the partnership. This motion was denied "without prejudice". Thereafter, and after first obtaining an order of court for permission so to do, the receiver again moved the court to vacate the judgment against the partnership, on the principal ground that service on the partnership by service on a partner after the partnership had been dissolved did not give jurisdiction over the partnership. This motion was granted. Plaintiffs have appealed from the order granting it, and vacating the default and default judgment.

The question for decision is whether the service of process upon one of the former partners, after dissolution of the partnership and appointment of a receiver, was sufficient to vest the court with jurisdiction to render a valid and binding judgment against the partnership. Defendants take the position that as the partnership was dissolved by order of court prior to service of summons and complaint upon one of the partners, the court acquired no jurisdiction over the partnership because it no longer existed.

This position is untenable. Section 2423 of the Civil Code defines dissolution as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business", and section 2424 of said code particularly declares that "on dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed".

[1-3] In general a dissolution operates only with respect to future transactions; as to everything past the partnership continues until all pre-existing matters are terminated. Griswold v. Waddington, 16 Johns., N.Y., 438, 493; Castle v. Marks, 50 App.Div. 320, 63 N.Y.S. 1039; Stem v. Warren, 96 Misc. 362, 161 N.Y.S. 247, 249; National Surety Co. v. George E. Breece Lumber Co., 10 Cir., 60 F.2d 847, 849. The dissolution does not destroy the authority of a partner to act for his former associates in matters in which they still have a common interest and are under a common liability. Gates v. Beecher, 60 N.Y. 518, 19 Am.Rep. 207; Hawn v. Land & Water Co., 74 Cal. 418, 16 P. 196. There is no reason, therefore, why the statute authorizing a judgment against a partnership by service upon one partner (Code Civ.Proc. § 388) should not be just as effective and applicable during the period subsequent to dissolution but prior to termination of the partnership as it is during the period before dissolution. Sanger Bros. v. Overmier & O'Neil, 64 Tex. 57; Harford, etc., Co. v. Street, 46 Iowa 594; Thomas v. Nathan, 65 Fla. 386, 62 So. 206. It follows that in this cause the service of summons and complaint upon the partner Cross individually and on behalf of the partnership vested the court with jurisdiction to render a valid and binding default judgment against the partnership, and the trial court erred in granting the receiver's motion to vacate such judgment.

[4] This appeal involves only the jurisdictional point above decided. No question is presented concerning the right to levy upon the partnership assets which are in the possession of the receiver but to which he holds no title. Stokes v. Hoffman House of New York, 167 N.Y. 554, 60 N.E. 667, 53 L.R.A. 870; Clark on Receivers, Second Ed., Vol. 2, p. 341, § 920. The fact that a receiver was appointed did not prohibit plaintiffs from prosecuting an action against the partners and the partnership, and obtaining a judgment establishing the validity and amount of their claim. Their action in no way interfered with the jurisdiction of the court in which the receivership was pending, or with the receiver's possession of partnership assets. As stated in Chicago Title & Trust Co. v. Fox Theatres Corporation, 2 Cir., 69 F.2d 60, 62, 91 A.L.R. 991, "New York cases have recognized that the appointment of a receiver does not preclude a plaintiff from thereafter starting suit against the receivership defendant, if subject to service, although collection of the judgment is another matter. See Pringle v. Woolworth, 90 N.Y. 502; Gaboury v. Central Vermont Ry. Co., 225 App.Div. 145, 231 N.Y.S. 630, reversed on other grounds 250 N.Y. 233, 165 N.E. 275; Jacobs v. Central Vermont Ry. Co., 132 Misc. 144, 228 N.Y.S. 705, 708; City of New York v. Illinois Surety Co., 180 App.Div. 513, 167 N.Y.S. 752". See, also, Riehle v. Margolies, 279 U.S. 218, 49 S.Ct. 310, 73 L.Ed. 669; 53 C.J. page 124; 23 R.C.L. page 48.

[5] Plaintiffs first sought to bring their action against the receiver but he successfully resisted their attempts to sue him independently or as a co-defendant herein. Can it be said that this procedure, coupled with the permanent absence of one of the

partners from the jurisdiction, left plaintiffs without redress, notwithstanding the partnership and its assets were still within the jurisdiction of the court? We think not. Plaintiffs were entitled to pursue their cause, and the refusal of the receiver to appear and defend on behalf of the partnership forced them to proceed independently against it and the individual partners. Having resisted joinder as a party to this suit, the receiver was estopped to thereafter attempt to intervene by motion and attack a judgment valid on its face.

The order is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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18 Cal.2d 579

HORTON v. HORTON.

L. A. 16139.

Supreme Court of California.

Sept. 3, 1941.

1. Husband and wife 🔑299(1)

Where complaint in action for separate maintenance alleged that husband was capable of and actually earning in excess of $500 per month and community property was described in detail as to kind, location and value, and prayer specifically demanded reasonable sum for support and maintenance of wife, reasonable sum for attorney's fees and costs, and an order restraining dissipation of assets by husband, default judgment awarding wife $200 per month together with family home and one automobile as her proper share of listed community property, measured in terms of monetary equivalents, as well as $400 for attorney's fees, was directly responsive to the prayer for relief and was not violative of statute providing that relief granted to a plaintiff, if there be no answer cannot exceed that which he shall have demanded in his complaint. Code Civ. Proc. § 580.

2. Husband and wife 🔑298(1), 300

In separate maintenance action, purpose of which is to enforce specifically husband's obligation to furnish support to his wife, the amount to be granted is largely within the discretion of the trial court, subject to revision only in case of abuse.

3. Judgment 🔑443(1)

Only proof of extrinsic and collateral fraud will entitle a plaintiff to equitable relief from a judgment.

4. Judgment 🔑443(1)

A showing of fraud practiced at hearing of original action, which fraud is characterized as "intrinsic fraud", is not sufficient to entitle a plaintiff to secure equitable relief from a judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrinsic Fraud".

5. Judgment 🔑443(1)

A husband was not entitled to equitable relief from a separate maintenance judgment on ground that in original complaint for separate maintenance, wife made fraudulent allegations respecting husband's financial condition and earning capacity and that by reason of such representation, court was induced to grant wife separate maintenance, since charged fraud and misrepresentation did not relate to matters collateral to original proceeding but were issues determined in original proceeding.

6. Judgment 🔑443(1)

Mere false allegations by plaintiff do not constitute such fraud as justifies equitable interference with judgment, since truth or falsity of allegations is conclusively determined by judgment in absence of some other ground for relief.

7. Judgment 🔑273(1)

Where interlocutory decree of divorce entered in separate maintenance action on husband's default was set aside on husband's motion and the court entered a judgment nunc pro tunc for separate maintenance, husband could not complain of the court's action in entering the nunc pro tunc judgment on ground that court was without jurisdiction to correct its original judgment by a nunc pro tunc amendment, since after prior judgment was set aside, case was before court on complaint of wife and default of husband and there was nothing for court to amend and judgment nunc pro tunc was properly entered.

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In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by John F. Horton against Callie Ella Horton to set aside a decree for separate maintenance. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Talbot & Hornaday and Franklin P. Bull, all of Los Angeles, for appellant.

Joseph W. Ryan and Frank J. Ryan, both of Los Angeles, and Harvey H. Myers, of Orange, for respondent.

CURTIS, Justice.

In this action in equity to set aside a decree for separate maintenance theretofore entered in an independent action between the parties hereto, defendant prevailed, and plaintiff brings this appeal upon the judgment roll. For convenience and brevity in this opinion John F. Horton, the plaintiff and appellant herein, will be called the husband, and Callie Ella Horton, the defendant and respondent herein, will be designated as the wife.

The essential facts giving rise to the present controversy are as follows: On October 6, 1930, the wife, as plaintiff, brought the first suit for separate maintenance. She did not specify any amount, but requested the court to allow her "a reasonable sum" for support, as well as for attorney fees and costs. The wife did not ask for a divorce in that complaint. It having appeared to the court that the husband, as defendant, was duly served with process and that his default for failure to appear or answer had been entered on October 22, 1930, an "Interlocutory Judgment of Divorce" was entered on December 2, 1930, awarding the wife $200 per month "for separate maintenance and support," $400 for attorney fees, $10 for costs of suit, and certain property described in the complaint. About three months later the husband filed a motion to set aside the purported interlocutory decree of divorce entered against him and for permission to answer the complaint, on the ground that he had not been served with summons and that he had a good defense. On March 4, 1931, the court, having heard the matter upon affidavits, vacated the interlocutory decree as the husband asked, but denied his application to set aside the default. On May 8, 1931, the wife procured the court to render a "Judgment and Decree for Separate Maintenance" nunc pro tunc as of the date of the original entry of the divorce decree on December 2, 1930. The later decree contained precisely the same provisions and its language was identical in every respect with that of the earlier decree, except that the amended judgment eliminated entirely all reference to the interlocutory decree of divorce. On May 29, 1931, the husband again moved the court to set aside his default and to vacate the nunc pro tunc judgment, and after full presentation and argument of the matter by counsel for both the husband and the wife, the court on June 3, 1931, denied the husband's motion.

On August 17, 1931, the husband brought the present action in equity to set aside the modified judgment in the aforementioned separate maintenance suit. Three causes of action were stated: (1) that the judgment for separate maintenance awarded relief in excess of the demand in the complaint; (2) that the judgment was obtained by fraud and misrepresentation practiced by the wife upon the court in the absence of the husband; and (3) that the court, after having entered the interlocutory decree of divorce and refused the husband's motion to set aside the default, was without jurisdiction or power to correct its judgment by the nunc pro tunc amendment. To this complaint the wife, as defendant, interposed a demurrer, which was overruled. Then on October 14, 1931, she filed an answer denying specifically the abovementioned three grounds on which the husband predicated his claim to relief, and upon the issues thus framed the wife on August 11, 1936, was awarded judgment, from which the husband now appeals.

In his attack on the validity of the judgment for separate maintenance the husband, as appellant, presents for our consideration the same three aforementioned contentions that he advanced at the trial in the lower court, and the question to be determined on this appeal is whether the judgment in controversy is vulnerable to any of these objections and therefore void. We shall discuss these arguments in the order in which they appear in the pleadings, as above noted.

It is first insisted by the husband that the judgment for separate maintenance is void for the reason that the relief therein granted was in excess of that demanded in the complaint. The claim is based on the fact that the complaint did not ask for property or for any designated amount for attorney fees, or for any specified sum for maintenance, and that the judgment included provisions awarding the wife $200 per month for support, $400 for attorney fees and certain property. This decree is alleged to be in contravention of the following provision of section 580 of the Code of Civil Procedure: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint." The husband also cites numerous decisions in support of his contention, such as Lang v. Lang, 182 Cal. 765, 190 P. 181; Benton v. Benton, 122 Cal. 395, 55 P. 152; Brooks v. Forrington, 117 Cal. 219, 48 P. 1073; Von Der Kuhlen v. Hegel, 51 Cal.App. 416, 196 P. 913; and Bennett v. Bennett, 50 Cal. App. 48, 194 P. 503. Examination of these cases reveals that they were concerned with awards referable to matters which the respective complaints either failed entirely to mention or included in limited terms narrower in range than the pertinent provisions of the decree. He also places special reliance upon Staacke v. Bell, 125 Cal. 309, 57 P. 1012, for its holding that the prayer for general relief does not enlarge the power of the court to grant relief not specifically demanded against the defaulting defendant. While all these cases correctly state the rule that in such circumstances the allowance of relief beyond the scope of the pleading is a nullity, for a defendant has the right to assume that the judgment which would follow a default on his part would embrace only the issues presented by the complaint and the relief therein asked, these authorities are not in point here because the wife's pleading amply sustains the amended decree as rendered.

[1, 2] The wife's complaint expressly put in issue the reasonableness of the sum necessary for support and maintenance by the allegation that the husband was "capable of and actually earning in excess of $500 per month" and the itemization of the community property, described in considerable detail as to kind, location and value. These averments in conjunction with the specific demands of the prayer for "a reasonable sum" for support and maintenance, for "a reasonable sum" for attorney fees and costs, and for an order restraining dissipation of the assets by the husband were sufficient to notify him that the disposition of the community property and his ability to make the payments requested were issuable facts. On this basis the court, after determination of the amount necessary for her maintenance, awarded to the wife $200 per month, together with the family home and one automobile as her proper share of the listed community property measured in terms of monetary equivalence. At this point it should be noted that the court also by its decree confirmed in the husband "all right, title and interest of the community in all other property", which, as itemized, included stocks, bonds and business holdings of considerable value. In such an action for separate maintenance, the purpose of which is to enforce specifically the husband's obligation to furnish support to his wife, it is well settled that the amount to be granted is largely within the discretion of the trial court, subject to revision only in case of abuse, which does not appear to be present here. Accordingly, it is our opinion that the judgment awarding to the wife $200 per month and the above-mentioned property, as well as $400 for attorney fees, was directly responsive to the wife's prayer for reasonable sums for support and maintenance, attorney fees and costs, and as so framed this judgment cannot be said to transgress the limitation of section 580 of the Code of Civil Procedure.

[3, 4] It is next contended by the husband that the judgment for separate maintenance is void because "obtained by fraud and misrepresentation practiced by defendant wife upon the Court". An examination of the authorities upon the question of what fraud will warrant the aid of equity discloses that only upon proof of *extrinsic* and *collateral* fraud can a plaintiff secure equitable relief from a judgment. A showing of fraud practiced at the hearing of the original action will not suffice. This is characterized as *intrinsic* fraud and since there must be an end to litigation and such fraud was part of the case presented in the former suit, equity will not reopen the matter. Pico v. Cohn, 91 Cal. 129, 133, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159. In the leading opinion of United States v. Throckmorton, 98 U.S. 61, 66, 25 L.Ed. 93, the court in an extended discussion of the rationale of this almost universally accepted rule based upon the distinguishing features of these two types of fraud, concluded that equitable aid will be granted where it appears that "by some fraud *practised directly upon the* *party seeking relief* against the judgment or decree, that party has been prevented from presenting *all* of his case to the court". (Italics added.) Thus, the question to be decided is whether the husband has stated a case of extrinsic rather than intrinsic fraud.

[5, 6] The husband avers here that in the original complaint for separate maintenance the wife made fraudulent allegations respecting his financial condition and earning capacity, and that by reason of such representations the court was induced to award her the $200 per month and part of the community property for maintenance. From this statement it is apparent that the charged fraud and misrepresentation of the wife did not relate to matters collateral to the original proceeding, but in fact bore on the precise issues there in controversy. The rule is well settled in this state that mere false allegations by the plaintiff in her pleading do not constitute such fraud as justifies equitable interference since the truth or falsity of the matters alleged is conclusively determined by the judgment, in the absence of some other ground for relief. Hanley v. Hanley, 114 Cal. 690, 46 P. 736; Fealey v. Fealey, 104 Cal. 354, 38 P. 49, 43 Am.St.Rep. 111; Harvey v. Griffiths, 133 Cal.App. 17, 23 P.2d 532. Analogous in principle to the situation prevailing here was that in the case of Hanley v. Hanley, supra, where it was said, 114 Cal. at page 693, 46 P. at page 737, that "it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony". The allegations of the husband in the present complaint disclose, at best, intrinsic fraud, going to the merits of the first action, and which the husband should have exposed at the original hearing. Instead he permitted a default to be taken against him and so admitted the truth of the material facts averred in the wife's pleading. In this connection it is significant to note that the husband's assertion of not having been served with summons in the separate maintenance suit, a ground urged in support of his aforementioned two motions to vacate the judgment and set aside the default, has been abandoned in this proceeding as a basis for equitable intervention, presumably an acknowledgement by him that such claim lacked merit and that he was not prevented from having his day in court by any conduct attributable to the wife. Under these circumstances the following language from Harvey v. Griffiths, supra, 133 Cal.App. at pages 22, 23, 23 P.2d at page 534, is particularly applicable:

> "It is immaterial that the judgment which is assailed was procured by default. The defendants in that action had an opportunity to appear and protect their interest. They deliberately waived the right to their day in court by failing to appear and answer the complaint. A default judgment is an estoppel as to all issues necessarily litigated therein and determined thereby exactly like any other judgment provided the court acquired jurisdiction of the parties and subject-matter involved in the suit. Hutchings v. Ebeler & Trout, 46 Cal. 557; Strong v. Shatto, 201 Cal. 555, 258 P. 71; 3 Freeman on Judgments (5th Ed.) 2690, § 1296."

Since the procuring of a judgment by mere intrinsic fraud will not justify the court in setting it aside, it is plain that the husband has failed to state on this ground a cause of action for equitable interposition.

[7] This leaves as the only remaining problem the question as to whether the court in the default action had the right to enter a judgment nunc pro tunc for separate maintenance in accordance with the pleadings. The husband contends that the court, after having entered the interlocutory decree of divorce and refused his motion to set aside the default, was without jurisdiction or power to correct its judgment by a nunc pro tunc amendment. The difficulty with this contention of the husband is that he mistakes the action of the court in rendering its later judgment. This judgment was not an amendment of its previous judgment. That judgment had been set aside upon motion of the husband. He could not therefore complain of the court's action, which was prompted by his own motion. After the prior judgment was set aside there was nothing for the court to amend. The case was then before the court upon the complaint of the wife and the default of the husband. It was just like any other default action in which the defendant had failed to answer the complaint, and the court in this action proceeded just as it would have done in any ordinary action under like circumstances. No question is raised as to the power of the court to direct the entry of the later

judgment nunc pro tunc as of the date of the former. The judgment was in our opinion a proper and valid judgment.

The judgment from which this appeal was taken is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

18 Cal.2d 599

STANTON v. PRATT et al.

L. A. 16071.

Supreme Court of California.

Sept. 3, 1941.

1. Contracts 🔑333(1)

In action by assignee of contract to recover amounts expended to equip and maintain a laboratory studio, complaint based upon breach of agreement by defendants was not demurrable on ground that it did not state facts sufficient to constitute cause of action in that it failed to allege condition claimed to have been agreed upon as a prerequisite to plaintiff's right to return of money.

2. Assignments 🔑131

In action by assignee of contract to equip and maintain a laboratory studio against complaint expressly alleging assignment to plaintiff of agreements which formed main basis of cause of action, which allegation defendants denied, was not demurrable on ground that complaint failed to allege an assignment except by inference in designation of plaintiff's predecessor as plaintiff's assignor.

3. Appeal and error 🔑907(2)

Where trial court found that defendant was indebted to plaintiff in certain amounts, in the absence of record of testimony, appellate court was required to assume that evidence fully supported finding and that appellant was not prejudiced because of rulings on demurrers to complaint.

4. Trial 🔑397(5)

In action by assignee of contract to recover amounts expended to equip and maintain laboratory studio, where plaintiff's right to recover was based upon breach of agreement by defendants and not upon happening of a condition, judgment was not erroneous on ground that findings of fact failed to support judgment against defendant as there was no finding of condition prerequisite to plaintiff's right to return of money.

5. Appeal and error 🔑704(2)

In action for recovery of money collected by defendant for plaintiff, and for other relief, defendant on appeal could not properly urge error in court's findings as to amounts collected by defendant for plaintiff, in absence of record of testimony.

6. Costs 🔑18

Statute prohibiting recovery of costs when judgment could have been rendered by municipal or inferior court within same county or city and county did not prevent recovery, in an action by assignee of a contract against other party to contract, of amounts paid by plaintiff as compensation and expenses to receiver appointed by court to take charge of business and equipment in which both parties to contract were interested. Code Civ.Proc. § 1032.

7. Costs 🔑18

Where court appointed receiver to take charge of business owned by two parties to suit and plaintiff paid compensation and expenses to receiver, assessment of such amounts against defendant was part of plaintiff's principal recovery against defendant, and not assessment of "costs of the suit" which was prohibited by statute when judgment could have been rendered by municipal or inferior court within same county or city and county. Code Civ.Proc. § 1032.

See Words and Phrases, Permanent Edition, for all other definitions of "Costs of the Suit".

8. Receivers 🔑200

A receiver looks primarily to fund of which he was made custodian for reimbursement of expenses and payment of his compensation, but if fund be insufficient he may look to parties at whose instance he was appointed, and to those for whose benefit receivership was created.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Henry Stanton against Othello F. Pratt and others to recover amounts of money furnished by him and his assignor, for damages and losses, to have studio properties and equipment restored, to enjoin the defendants from disposing of the property and for appointment of a receiver to take charge of property and business. From judgment for plaintiff, Othello F. Pratt appeals.

Affirmed.

Michael F. Shannon, Thomas A. Wood, and Charles W. Wolfe, all of Los Angeles, for appellant.

Perry F. Backus and Roger S. Page, both of Los Angeles, for respondent.

SHENK, Justice.

This appeal from a judgment for the plaintiff is submitted on the judgment roll and the appellant's opening brief.

The judgment roll shows the following facts:

The defendant Leonard G. Nicoll was the inventor of a method of making photographic reproductions in color, for which a United States patent had issued, of a "one-shot" color camera, and various parts, processes and secret formulae in connection therewith. In August, 1935, Nicoll entered into an agreement with Harry G. Bowman, Jr., wherein Nicoll agreed to make such reproductions and Bowman agreed to equip a laboratory studio and to pay the expenses thereof, including salaries to Nicoll and his assistant Tracey for their services in making and marketing commercial photographic reproductions in color with the use of the invention and secret formulae. The defendant Pratt had a laboratory studio in Hollywood which he represented to Bowman was suitably equipped for the purpose, and which was selected by Bowman as the place in which Nicoll and his assistant should conduct the work. Bowman and Pratt, by agreement, were to divide the profits equally. Bowman furnished funds to transport Nicoll, his assistant, and their equipment from New York to Hollywood. Nicoll and his assistant performed services at the laboratory in Hollywood. The plaintiff became the owner of Bowman's interest in the agreements by assignment. He furnished funds for installing certain improvements, facilities and equipment in the laboratory, for salaries and expenses in connection with an additional photographic and demonstrating studio, and for the cost of forming a corporation. A large amount of actual and potential business was obtained.

About February 21, 1936, without notice or warning, Pratt locked the door of the studios, refused admittance to all except Nicoll and Tracey, and removed cameras and other property, including books of account.

The plaintiff commenced this action to recover from the defendants Pratt, Nicoll and Tracey, the amounts furnished by him and his assignor, and the damages and losses on account of the actions of the defendants, and to have restored the studio properties and equipment; also to enjoin the defendants from disposing of the property, and for the appointment of a receiver to take charge of the property and business. The court appointed a receiver. A demurrer to the complaint, filed on behalf of all of the defendants, was overruled. On the trial of the issues joined by the answer, the court found that the total amount due from the defendant Pratt to the plaintiff pursuant to the claims alleged in the complaint was the sum of $1579.95; that the plaintiff had also paid the expenses and costs incurred by the receiver in the sum of $683.70; and that $200 was a reasonable fee to be allowed the receiver for his compensation. It ordered the return of the studio and personal property to the defendants, the recovery by the plaintiff from the defendant Pratt of "(1) the sum of $1579.95; (2) the costs of the receivership fixed in the sum of $683.70, (3) fee of the receiver hereby taxed in the sum of $200.00, and (4) plaintiff's costs of suit herein taxed at $126.25", and terminated the receivership.

[1-3] The defendant Pratt appealed from the judgment. He contends first that the court erred in overruling the demurrer interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action in that it failed to allege a condition claimed to have been agreed upon as a prerequisite to the plaintiff's right to the return of money furnished. The plaintiff's right to recover, as disclosed by the judgment roll, was not based upon the happening of the condition, but on the breach of the agreement by the defendants. Th

appellant also contends that the demurrer should have been sustained because, so he claims, paragraph VIII of the complaint failed to allege an assignment except by an inference to be drawn from the designation of Bowman as the plaintiff's assignor. However, said paragraph of the complaint also expressly alleged an assignment to the plaintiff of the agreements which form the main basis of the cause of action. We think the allegation was sufficient as against the demurrer. Furthermore, the defendants denied this allegation. The court found that the appellant was indebted to the plaintiff in the amounts above recited. In the absence of the record of the testimony, it must be assumed that the evidence fully supported the finding and that the appellant was not prejudiced because of the ruling on the demurrer.

[4, 5] The appellant next contends that the findings of fact fail to support the judgment. This contention is based on the absence of any finding that the condition hereinabove referred to had materialized. For the reason hereinabove stated, a finding of the existence of the condition was not necessary to support a judgment for the plaintiff. Also, in the absence of the record of the testimony, the appellant may not properly urge error in the court's findings as to the amounts collected by the defendant Pratt for the plaintiff's account.

[6-8] The appellant asserts that the court erred in allowing costs to the plaintiff because section 1032 of the Code of Civil Procedure prohibits the recovery of costs "when the judgment is one which could have been rendered by a municipal or inferior court within the same county or city and county". He contends that costs of receivership are such costs as are referred to in said section. Neither the section nor the judgment may so be construed. Those expenses were not taxed by the court as costs of suit. They were allowed to the plaintiff as a part of his principal recovery against the defendant Pratt. The statement in the case of Ephraim v. Pacific Bank, 136 Cal. 646, 69 P. 436, 438, that the amount allowed the receiver as compensation and expenses was properly "costs of the suit", does not justify a decision in this case in accord with the appellant's contention. In that case the plaintiff was suing to recover sums of money allowed to him as expenses and fees incurred and earned by reason of his appointment as receiver in another action. It was held that the defendant, an insolvent bank, was liable for such costs and fees. The court there designated the sums as "costs of the suit" for the purpose of determining the preferences in the matter of payments of costs and in terminating the affairs of the corporation. It concluded that such costs were preferred as against the claims of general creditors. The same result would have followed no matter what designation had been given them. The court in describing them as "costs of the suit" could not have had in mind the "costs of suit" as contemplated by section 1032 of the Code of Civil Procedure. As shown by the earlier case of Ephraim v. Pacific Bank, 129 Cal. 589, 62 P. 177, the receiver looks primarily to the fund of which he was made the custodian for reimbursement of his expenses and for payment of his compensation. It was there said that if the fund be insufficient, he may then look to the parties at whose instance he was appointed. It may also transpire that liability to pay the expenses and fees of a receivership rests upon any or all of the parties for whose benefit the receivership was created. Meili v. Crane, 102 Cal. App. 144, 282 P. 960. The present appears to be such a case. We find no error in the record which would justify a reversal.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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18 Cal.2d 557

IRELAN–YUBA GOLD QUARTZ MINING CO. et al. v. PACIFIC GAS & ELECTRIC CO. et al.

Sac. 5444.

Supreme Court of California.

Aug. 29, 1941.

As Modified on Denial of Rehearing Sept. 26, 1941.

1. Electricity ⚷13

A rule of Railroad Commission providing that an electric company does not assume duty of inspecting consumer's lines, or apparatus, or any part thereof, and assumes no liability thereof, would not relieve company of responsibility of maintenance of a line owned by consumer which had been adopted by company as means of delivering power to the consumer, since in such a case line was at least under joint control of both company and consumer.

2. Electricity 🔑11

Proof that electric company delivered power to one consumer at beginning of his private line and to another over and at end of consumer's line and at consumer's premises would not establish a "discrimination" between consumers within prohibition of Railroad Commission's rule.

See Words and Phrases, Permanent Edition, for all other definitions of "Discrimination".

3. Electricity 🔑13

Where defendant electric company, pursuant to contract to deliver current at convenient place to be designated by defendant mining company, subject to approval of electric company, installed its transformer and meter at mining company's mine and used line owned by mining company to transmit electricity to mine, electric company had at least joint control over line and therefore owed a duty of care with respect to inspection and maintenance of the line and right of way.

4. Electricity 🔑14(1)

The standard of care to be attained by one supplying electricity over a pole line under its control is that of "ordinary and reasonable care", meaning care which reasonably careful and prudent person, having in view dangers to be avoided and likelihood of injury therefrom, would exercise under the circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary and Reasonable Care".

5. Appeal and error 🔑996
Negligence 🔑136(9)

Where reasonable men might fairly differ on question whether defendant, with ordinary care, could have anticipated injury, issue is for jury, and, if jury finds in favor of plaintiff, its verdict will not be disturbed.

6. Electricity 🔑16(7)

An electric company, which permitted tree to stand so close to pole line that if tree fell it would fall across wires, and which permitted combustible material such as grass and brush to accumulate on right of way, was bound to anticipate the existence of a wind even of high velocity, where such winds were not unusual, that the tree might fall across and break one of the wires, and that a short circuit would result in igniting the combustible material.

7. Evidence 🔑8

It is common knowledge that once a fire commences in a forest it may well consume thousands of acres of forest and everything else in its path before it can be brought under control.

8. Electricity 🔑16(3)

An electric company, which permitted tree to stand so close to pole line that if tree fell it would fall across wires, and which permitted combustible material such as grass and brush to accumulate on right of way, was not excused from liability for damages resulting from fire caused by tree breaking and falling across wires because tree was not within limits of portion of company's right of way over federal government land which had been cleared, where permits authorizing construction of line across government land did not specify width of right of way, and it appeared that trees could be cut down or trimmed whenever necessary for proper maintenance of line even though such trees might be beyond point of original clearing for the right of way.

9. Electricity 🔑16(3)

If a tree is in such close proximity to a pole line that wind may cause it to fall across the wires, the failure of owner of line to provide against such eventuality is "negligence".

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

10. Negligence 🔑3

The required degree of care is always graduated according to danger attending activity being pursued.

11. Electricity 🔑14(1)

An electric company, in performance of its duty to maintain its right of way safe for transmission of electricity, is bound to exercise a degree of care commensurate with highly dangerous commodity being conveyed

12. Electricity 🔑16(3)

Conformity by electric company to general custom of electric companies with relation to manner of maintaining power lines and rights of way would not excuse company from liability for damages resulting from fire caused by tree breaking and falling across wires unless practice was consistent with due care.

13. Electricity 🔑19(5)

In action for damages resulting from fire caused by tree breaking and falling across power line, evidence supported finding of negligence on part of electric company in permitting a tree to stand so close to pole line that if tree fell it would fall across wires and in allowing grass and brush to accumulate on the right of way.

14. Trial 🔑253(3)

In action against electric company and consumer for damages resulting from fire caused by tree breaking and falling across power line, refusal of instruction requested by defendant electric company that, if jury found that defendant electric company neither owned nor controlled the line, then it was under no duty to inspect or maintain it and its failure to do so was not negligence, was not error, as instruction did not definitely include element of liability predicated upon defendant electric company's joint right of control of the line, especially where instruction given by trial court predicated liability of defendants for negligence upon finding that they used the line for transmission of electrical current.

15. Electricity 🔑19(13)

In action against electric company and consumer for damages resulting from fire caused by tree breaking and falling across power line, an instruction that rule of Railroad Commission providing that an electric company is not responsible for maintenance of consumer's facilities applies to electric energy only after its delivery to consumer, and that rule was to be considered only if delivery took place between substation of electric company and point of origin of fire, was proper.

16. Evidence 🔑507

In action against electric company and consumer for damages resulting from fire caused by tree breaking and falling across power line, trial court did not err in refusing to admit expert testimony as to why defendant electric company's transformer was placed at consumer's mine, since issue of point of delivery of electricity by company was one for jury upon which expert testimony was not required.

17. Appeal and error 🔑151(2)

An appeal will not lie from an order denying plaintiff's motion for a new trial or retrial in the alternative as to a defendant regarding whom no finding was made by the jury.

18. Trial 🔑327

A verdict against one of two defendants, but which is silent as to other defendant, is not a verdict in favor of latter but is merely a failure on part of jury to find upon all of the issues; however, rule is subject to qualification that a verdict may be construed with reference to the instructions pursuant to which it was rendered.

19. Trial 🔑327

The intention of the jury must not be left to inference or presumption, but it must be expressly declared, and, where it is not expressly declared in reference to any one of several defendants who have separately answered, it must be taken that jury has failed to pass upon that particular issue.

20. Trial 🔑345

Where jury returned verdict against only one of two defendants who answered separately and was silent as to the other, plaintiffs, by not requesting trial court to instruct jury to retire and make its finding with respect to other defendant, merely "waived" the objection in so far as it might have been effectual as an attack on the verdict returned, and plaintiffs were not "estopped" from objecting to jury's failure to find against one of defendants. Code Civ. Proc. § 619.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Waive".

21. Trial 🔑345

If all issues are not determined by a verdict, but no objection is made thereto, then the verdict stands as to issues included therein, but as to remaining issues the matter is set at large and further proceedings should be had in trial court to adjudicate such issues.

22. Trial 🔑327

Where four forms of verdict were submitted to jury, one, a verdict for both defendants, one, for plaintiffs and against both defendants, and the others for plaintiffs and against each of the two defendants, and jury were instructed that if their verdict was for plaintiffs it was not necessary that it be against both of the defendants, but that if they found only one of the defendants was negligent the verdict should be only against such defendant, and jury returned a verdict against one defendant but returned no verdict against the other defendant, failure to find against one of defendants was not a verdict in favor of such defendant, and plaintiffs were entitled to have the issues of the case retried as to such defendant.

EDMONDS, J., dissenting.

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In Bank.

Appeal from Superior Court, Sierra County; Raymond McIntosh, Judge.

Action by the Irelan-Yuba Gold Quartz Mining Company and others against the Pacific Gas & Electric Company, the Socorro Mines, Incorporated, and others, for damages resulting from fire which was caused by tree breaking and falling across high-power electric wires. From a judgment for plaintiffs against defendant Pacific Gas & Electric Company, the defendant Pacific Gas & Electric Company appeals, and from an order denying motion for a new trial as to defendant Socorro Mines, Incorporated, the plaintiffs appeal.

Judgment against defendant Pacific Gas & Electric Company affirmed; appeal from order denying motion for retrial dismissed.

For prior opinion, see, Cal.App., 105 P.2d 616.

Rehearing denied; EDMONDS, J., dissenting.

Thos. J. Straub, W. H. Spaulding, John J. Briare, and Frederick Searls, all of San Francisco, for appellant Pacific Gas & Electric Co.

Wm. M. Maxfield, of San Francisco, A. J. Just, of Downieville, and Joseph F. Aleck, Jr., of San Francisco, for respondents.

White & Harber and Clinton E. Harber, all of Sacramento, and Lynne Kelly, of Grass Valley, for respondent Socorro Mines, Inc.

CARTER, Justice.

Plaintiffs recovered judgment entered on the verdict of a jury for damages against defendant, Pacific Gas & Electric Company for the loss suffered by them as the result of the destruction of their property by fire alleged to have been caused by the negligence of defendants. The jury returned a verdict against defendant and appellant, Pacific Gas & Electric Company in favor of each plaintiff aggregating slightly in excess of the sum of $20,000. No verdict was returned in respect to defendant, The Socorro Mines Incorporated, also known as O'Brien Mines, Inc., and plaintiffs' motion for a retrial or new trial as to that defendant was denied; plaintiffs appeal from that order of denial. Defendant, Pacific Gas & Electric Company, hereinafter referred to as appellant, appeals from the judgment entered on the verdict against it. The action was dismissed as to all other defendants except the Croesus Gold Mining Company, a nonsuit having been granted as to the latter. Plaintiffs in their complaint charged defendants with so negligently operating and maintaining a power line that the electric energy escaped therefrom and kindled a fire which spread to and destroyed real and personal property belonging to plaintiffs.

The rural area of Sierra county at the scene of the fire in question is mountainous and timbered. Appellant owns a power substation at the town of Alleghany, known as the Alleghany substation, from which it distributes electric power to various consumers. One power distribution line known as the "Alleghany-Spanish Mine Line", owned by appellant, extends from the substation to the Spanish Mine. From a point on that line about three-quarters of a mile from the Plumbago Mine, and near the property of plaintiff, Irelan-Yuba Gold Quartz Mining Company, a power line known as the "Plumbago Line" extends to the Plumbago Mine. The fire started on the right of way of the last-mentioned line.

The Plumbago Mine and Plumbago Power Line are owned by the Croesus Gold Mining Company. The Plumbago Line was constructed by Yuba-Sierra Development Company, a lessee of the Plumbago Mine about the year 1933, and was used for a time by it to transmit electricity to said mine. Thereafter the Yuba-Sierra Development Company abandoned its lease. In 1935, defendant, O'Brien Mines, Inc., came into possession of the Plumbago Mine by an assigned lease which covered the mining claims "together with the improvements, equipment and appurtenances", and were operating the mine at the time of the fire. Appellant was selling electricity to O'Brien Mines Inc., the same being delivered over the Alleghany-Spanish Mine Line and the Plumbago Line. The right of way of the latter line where the fire occurred had been cleared to a width of ten to eleven feet on each side of the center line when first constructed, but at the time the fire occurred was covered with brush, grass and undergrowth. There were trees within ten feet of the pole line, the branches of which in many instances extended to and over the wires. The fire started in leaves and grass on the ground on the right of way and quickly reached the brush nearby. Appellant had never inspected the line or right of way except immediately after it was constructed at which time it found that it did not meet its standards of construction. The three wires of the line were strung on poles there being fuses at the Alleghany-Spanish Mine Line end and a transformer and meter at the Plumbago Mine.

At about 11 o'clock on the morning of October 16, 1936, during a wind which was of considerable velocity, but not unusual for that time of year in that neighborhood according to plaintiffs' evidence, a pine tree between fifty and sixty feet in height broke off at about twenty-five to thirty feet from the ground and fell across the transmission wires on the Plumbago Line, breaking two of them, but one end of the tree remained suspended by the third wire. The wires being charged with electricity, the result was that sparks therefrom ignited the grass, leaves and brush on the right of way and the fire thereby kindled, spread over an area of 2200 acres, destroying in its path, buildings, timber, and personal property owned by plaintiffs. The wires on the Plumbago Line carried 6900 volts, which was reduced to 2300 volts by the transformer at the Plumbago Mine. The tree which fell was a live growing tree located about twenty-four feet from the wires of the Plumbago Line. The point of commencement of the fire on the Plumbago Line right of way was on United States Government land in the national forest about eight hundred feet from the Plumbago Mine toward the junction of the Alleghany-Spanish Mine Line and the Plumbago Line. The Plumbago Line traverses national forest lands by virtue of a permit from the United States forest service. Appellant's substation was equipped with a circuit breaker designed to break automatically the flow of electricity into the Alleghany-Spanish Mine Line whenever there was a short circuit on the line.

Plaintiffs present in support of the judgment several theories of appellant's negligence causing the fire including either the failure of the circuit breaker or fuses to function, or the manual closing of the circuit too soon and without investigation after the breaker operated. Also that appellant, allegedly being under a duty to so maintain the Plumbago Line that electricity could not escape therefrom, was negligent in permitting brush and inflammable material to accumulate and remain on the right of way and in permitting trees to stand in such close proximity to the power line that a falling tree would contact the wires. Appellant's main contention is that the evidence is not sufficient to support the judgment on any theory and that it was under no obligation to inspect or maintain the Plumbago Line. In view of the conclusion which we have reached, we will concern ourselves only with the last abovementioned theory of negligence.

Appellant denies that it is under any duty with respect to the maintenance and inspection of the Plumbago Line, asserting that a person supplying gas or electricity is not responsible for the condition of the conductors or right of way when he does not own or control them. Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 283 P. 353; Ray v. Pacific Gas & Electric Co., 3 Cal.App.2d 329, 39 P.2d 812. As we have seen, the Croesus Gold Mining Company is the owner of the Plumbago Line and O'Brien Mines Inc. is the lessee of the Plumbago Mine and its appurtenances. Nevertheless, it appears that on December 1, 1935, appellant entered into an agreement to sell to The Socorro Mines Incorporated (the predecessors of the O'Brien Mines, Inc.), electric power with a motive force of 2300 volts. It was under that agreement that appellant was supplying the electricity which escaped and caused the fire. The significant portions of that agreement are as follows: Appellant promises to "sell *and deliver to the* Consumer (The Socorro Mines Incorporated), and the Consumer hereby promises to purchase from the Power Company, (appellant) * * * all of the electric energy which shall be required for the operation of the Consumer's electric machinery and apparatus, and in the conduct of the Consumer's business *upon the Consumer's premises* situate near Alleghany, Sierra Co. * * * All electric energy * * * shall be * * * *delivered* and metered at an electromotive force of * * * 2300 volts. * * * Consumer hereby grants Power Company a right of way over the shortest practicable route for any pole lines which it may be necessary to build over Consumer's premises for the purpose of making delivery hereunder. * * * *Such energy shall be delivered by the Power Company to the Consumer from the Power Company's Transformers at a convenient place to be designated by the Consumer, subject, however, to the approval of the Power Company.* * * *"

Pursuant to that agreement appellant installed its transformer and meter at the Plumbago Mine, the premises of the Consumer, O'Brien Mines Inc., and at a point on the Plumbago Line beyond where the fire commenced. Under the circumstances here presented we believe the reasonable inference is that the appellant was using the Plumbago Line for its purposes and had at least joint right of control thereof with O'Brien Mines Inc. The agreement calls for the delivery of the power from the transformer at a place designated by the Consumer. Up to the time of reaching and passing through the transformer appellant was engaged in delivering the electricity and for that purpose was using and controlling the Plumbago Line with the implied consent of O'Brien Mines Inc.

[1, 2] While Rule 9 of the Railroad Commission, which it is conceded is made a part of the agreement between the appellant and O'Brien Mines, Inc., provides that "The company does not assume the duty of inspecting the consumer's lines, appliances, or apparatus, or any part thereof, and assumes no liability therefor," this provision of the agreement would not exempt the appellant from liability for injuries sustained by third persons through the negligent maintenance of said line. If, as we have seen, the appellant by its contract has adopted the line as its means of delivering the power to the consumer, then to that extent the line is not the consumer's or not under his entire control; it is at least under the joint control of both the seller and consumer of the electric energy. Appellant points out that under a contract with another consumer, Tightner, the loss on the latter's tap line is borne by him, and that under the above rule of the Railroad Commission there would be forbidden discrimination between Tightner and the consumer here involved. There is no discrimination merely because power is delivered to one person at the beginning of his private line and to another over and at the end of the consumer's line and at the consumer's premises.

[3] Reference is made to the case of Roberts v. Pacific Gas & Electric Co., supra. There the city of Chico owned the power line and right of way and the action was by a third party against the defendant, Pacific Gas & Electric Company for injuries suffered from negligence in the maintenance thereof. However, the contract between defendant and the city reserved to defendant the right to transmit power over the line to one of its independent customers. The court held that the defendant power company had such joint control as to impose upon it a duty of care in the inspection and maintenance of the line. In the case at bar the use by appellant of the Plumbago Line to deliver a certain amount of power to Plumbago Mine at the transformer coupled with its ownership and control of the transformer at the mine shows that it had control of the line. By its ownership and control of the transformer and meter it was controlling the flow of the electricity and all facilities therefore between the transformer and its substation. Roberts v. Pacific Gas & Electric Co., supra. For the above reasons it is manifest that this is not a case like Ray v. Pacific Gas & Electric Co., 3 Cal.App.2d 329, 39 P.2d 812; and Hill v. Pacific Gas & Electric Co., 22 Cal.App. 788, 136 P. 492, where the appliances causing the injury were entirely owned and controlled by the plaintiff and were beyond the point of delivery by the one supplying the commodity. We must conclude therefore that appellant owed a duty of care with respect to the inspection and maintenance of the Plumbago Line and right of way where the fire occurred.

[4-9] The duty of care imposed upon one supplying electricity over a pole line under its control is stated in McCormick

v. Great Western Power Co., 214 Cal. 658, 663, 8 P.2d 145, 147, 81 A.L.R. 678 as follows: "'The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury.' * * * 'If,' therefore, says the court in Minter v. San Diego Consol. Gas, etc., Co., 180 Cal. 723, 182 P. 749, 750, 'guided by those considerations which ordinarily regulate the conduct of human affairs, an ordinarily prudent person would have had reasonable ground to suspect that the wires so placed would cause injury, the plaintiff can be said to have proved a breach of duty.' And where the evidence is such that reasonable men might fairly differ as to the answer to the above question, the issue is one of fact for the jury to determine, and, if it finds in favor of the plaintiff, its verdict will not be disturbed." Appellant never did inspect the Plumbago Line. The falling wire ignited dry grass permitted to exist upon the right of way, which in turn quickly kindled brush permitted to accumulate and remain under the wires. Although the tree which was broken by the wind was about twenty-four feet from the center line of the right of way, which had been cleared about eleven feet each side of the pole line, and was a live and growing tree, there rested against it at the point where it broke, about twenty-two feet from the ground, a limb of another tree. The effect of the rubbing of that limb against the tree which fell probably could not be observed, but the existence of the contact surely could have been seen by a reasonable inspection. It is not unreasonable to require appellant to anticipate that with high winds usually blowing in the vicinity in which the fire occurred, the tree might fall across and break one of the wires. Under the circumstances here presented, appellant was bound to anticipate the existence of a wind even of high velocity where such winds were not unusual. Rocca v. Tuolumne County Elec., etc., Co., 76 Cal.App. 569, 245 P. 468. It should anticipate that once a wire did break the probabilities would indicate that a short circuit would result in igniting the combustible material such as grass and brush which it permitted to accumulate and remain on the right of way. It is common knowledge that once a fire commences in a forest it may well consume thousands of acres of forest and everything else in its path before it can be brought under control. It is not decisive that the tree was not within the limits of the portion of the right of way which had been cleared. The permits from the United Forest Service authorizing the construction of the line across government land did not specify the width of the right of way. The Forest Supervisor who had to do with the giving of permits testified that trees could be cut down or trimmed whenever necessary for the proper maintenance of the power line even though such trees might be beyond the point of the original clearing for the right of way. It has been held that even though a tree near a power line running along a street is upon private property, the owner of the line may be guilty of negligence when a limb from the tree falls on the wires. Rocca v. Tuolumne County Elec., etc., Co., supra. If a tree is in such close proximity to a pole line that wind may cause it to fall across the wires, the failure to provide against such eventuality is negligence; or as said in Smith v. San Joaquin, etc., Power Corp., 59 Cal.App. 647, 649, 211 P. 843, 844: "The defendant pleaded in its answer, and thereafter offered to prove, facts showing or tending to show that the wire which the plaintiff touched was properly in place the night before, that a wind arose, and the leaves of a large palm were blown over against the wire and broke it, and that such facts constituted an act of God. If the facts stated constituted an act of God the defendant should have been permitted to show the same as a defense. However, the respondent contends that the alleged facts do not show an act of God within the proper meaning of that rule. Fay v. Pacific Improvement Co., 93 Cal. 253, 26 P. 1099, 28 P. 943, 16 L.R.A. 188, 27 Am.St.Rep. 198. In this behalf he contends that, if the palm tree stood in such a position as to endanger the defendant's wire, the defendant should have properly protected its wire therefrom, and in failing to do so the omission was an act of neglect on the part of the defendant, and not an act of God. This contention is supported by the authorities. Chidester v. Consolidated Ditch Co., 59 Cal. 197." In the case of Sullivan v. Mountain States Power Co., 139 Or. 282, 9 P.2d 1038, 1044, a growing sixty foot tree was located about twenty-five to thirty feet from the defendant's power line traversing timbered country. A high wind blew it across the wires with the result that a fire was kindled which destroyed plaintiff's property. Liability was imposed on the defendant, and in so doing the court stated the degree of care to be as follows:

[10] "The required degree of care is always graduated according to the danger attendant upon the activity one is pursuing. The standard does not vary—it is the conduct of an ordinarily prudent person. But such an individual exercises care commensurate with the dangers to be avoided and the likelihood of injury to others. Such being true, it may be well to take note of the harmful quality of electricity. Electricity is a dangerous force whose destructive qualities are greatly facilitated by its subtle, invisible, and mysterious nature. Since the plant where it is generated is often many miles distant from the place of consumption, the transmission lines frequently pass over country roads, city streets, through forests, and other places where danger to life or property lurks if the electrical current escapes from the conduit. The length of the transmission wires renders impossible the character of supervision generally bestowed upon other dangerous substances." And again at page 1046 of 9 P.2d:

[11] "Accordingly, we conclude that the defendant, in the performance of its duty to maintain its right of way safe for the transmission of electricity, was bound to exercise a degree of care commensurate with the highly dangerous commodity which it was conveying over its wires. This duty remained unperformed so long as it permitted trees to grow in such close proximity to its uninsulated wires that it, in the exercise of the judgment of a reasonably prudent person, should have known that the tree and the wires would come into contact in a manner that would endanger the safety of others or their property."

[12] Appellant points to evidence that the right of way was cleared and maintained the same as was customarily done with other power lines traversing national forest lands. Conformity by defendant to general custom of power companies with relation to the manner of maintaining power lines and rights of way does not excuse defendant unless the practice is consistent with due care. Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 265 P. 487; McCormick v. Great Western Power Co., 134 Cal.App. 705, 26 P.2d 322; Lim Ben v. Pacific Gas & Electric Co., 101 Cal.App. 174, 281 P. 634.

[13] Under the circumstances this court cannot therefore set aside the implied finding of negligence by the jury and determine as a matter of law that permitting a tree to stand in such close proximity to the power line and allowing grass and brush to accumulate on the right of way as was shown to exist in this case, did not constitute negligence.

[14] Appellant complains of the giving and the refusal to give certain instructions to the jury. Appellant's offered but refused instruction was to the effect that if the jury found that the appellant "neither owned nor controlled the Plumbago Tap Line"—then appellant was under no duty to inspect or maintain that line and its failure to do so is not negligence. The court instructed the jury in respect to the control of the Plumbago Line as follows:

"If you find from the evidence that the fire in question was set ablaze by an ember from a tree which the defendants, or any specific defendant, had been authorized either to trim or cut down and the fire was caused by contact between the tree's branches and the uninsulated wires of said defendant, or over which said defendants, *or any of them, were transmitting electrical current,* and that said defendant, or defendants, knew of said condition, or might have known had it or they exercised ordinary diligence, of the existence of said tree in proximity to said electric wire, then their failure, or the failure of any of them, *to keep the right of way used* by the power line cleared of such tree or trees, or of anything which might make the presence of said power line a hazard in a forest area, constituted negligence on the part of said defendants, or any said defendants so doing." We do not believe that the appellant was prejudiced. Its offered instruction was not strictly accurate in that it did not definitely include the element of liability being predicated upon joint right of control with the lessee of the Plumbago Mine. The instruction given with respect to control, while possibly not wholly accurate, would not necessarily mislead the jury. It may be construed to mean that the "transmission" of electricity over and "use" of the Plumbago Line right of way, included the element of joint control of the line by appellant, or the adoption of the line by it for its use in delivering electricity to O'Brien Mines Inc. In any event, as we have seen, the evidence does show that appellant did have at least joint right of control of the Plumbago Line by reason of the inference flowing from the circumstances.

[15] Appellant also objects to an instruction advising the jury that the rules and regulations of the Railroad Commission admitted in evidence apply to electric energy only after its delivery to the Consumer and that they are to be considered only if the delivery took place between appellant's substation and the point of origin of the fire. That instruction is in accordance with the views herein expressed, the particular rule involved, stating that appellant is not responsible for the maintenance or condition of the Consumer's facilities, is heretofore discussed. There were not two deliveries as claimed by appellant, the only delivery was from the transformer at the Plumbago Mine.

[16] Finally appellant asserts that error was committed in the refusal of the court to admit expert testimony as to why the transformer was placed at the Plumbago Mine. It is very doubtful that such inquiry is properly within the field of opinion evidence. The answer that presumably would be forthcoming would be only the conclusion of the witness that the position of the transformer had nothing to do with the *point* of delivery of electricity by appellant. That issue was one for the jury, and concerning a subject on which the jury did not need expert assistance. If the purpose was to elicit evidence on the function of a transformer, appellant was not prejudiced by the ruling because other evidence was introduced to show that the electro-motive force of 6900 volts was reduced by means of the transformer to a net delivery of 2300 volts after the energy passed through the transformer.

In view of the foregoing conclusions it is unnecessary to discuss the evidence relating to the other claims of negligence upon which plaintiffs relied.

[17] At the close of the trial the jury returned a verdict for all of the plaintiffs but against the appellant, Pacific Gas & Electric Company, only. No verdict was returned as to defendant O'Brien Mines Inc. Four forms of verdict were submitted to the jury. One, a verdict for all defendants, one for plaintiffs and against defendants Pacific Gas & Electric Company and O'Brien Mines Inc., one for plaintiffs and against defendant O'Brien Mines Inc., and one for plaintiffs and against defendant Pacific Gas & Electric Company. The jury used and returned its verdict upon the last-mentioned form only. The jury were instructed that if their verdict was for plaintiffs it is not necessary that it be against all of the defendants, but if it was found that *only one of the defendants* was negligent then the verdict should be *"only against said defendant"*; and further that several forms of verdict were handed to the jury *"one* of which you will cause to be signed by your foreman". Plaintiffs moved for a new trial or retrial in the alternative as to defendant O'Brien Mines Inc. The trial court denied plaintiffs' motion, and they have appealed from such order of denial. We think it is clear that no appeal lies from such an order, but inasmuch as the record before us discloses what took place in the trial court with respect to the action of the jury, we will review the same for the guidance of the trial court in connection with any further proceedings which may be taken in this case.

[18-21] It is well settled that a verdict against one of two defendants but which is silent as to the other defendant is not a verdict in favor of the latter but is merely a failure on the part of the jury to find upon all of the issues. Fennessey v. Pacific Gas & Elec. Co., 10 Cal.2d 538, 76 P.2d 104; Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948; Rankin v. Central Pacific Railroad Co., 73 Cal. 93, 15 P. 57; Benjamin v. Stewart, 61 Cal. 605. This rule is subject to the qualification that a verdict may be construed with reference to the instructions pursuant to which it was rendered. Fennessey v. Pacific Gas & Electric Co., supra; Snodgrass v. Hand, 220 Cal. 446, 31 P.2d 198; Crain v. Sumida, 59 Cal.App. 590, 211 P. 479. But we do not believe that the instructions here given with reference to the verdict may necessarily be construed as to indicate a verdict in favor of defendant, O'Brien Mines Inc. It is equally probable that they merely omitted to make any determination as to that defendant. As stated in the case of Keller v. Smith, 130 Cal.App. 128, 132, 19 P.2d 541, 543, in passing upon a similar situation: "The rule of construction suggested in the case of Crain v. Sumida [supra], could not be exactly applied here, since nowhere did the jury in this case express any finding in favor of the petitioners. To hold that they so found re-

quires an inference that they intended to do something they have not expressly done. Even though the court instructed the jury that it might find against one and at the same time in favor of the other defendants, while such an instruction strengthens the inference suggested, it is by no means conclusive in the absence of some expression showing the intention of the jury. There is a wide difference between drawing the only possible conclusion, where there is an expressed finding against one defendant and another in favor of the only other defendant although the name of the other is not inserted, and drawing an inference, probable though it may be, as to the intention of a jury in regard to a matter that has been entirely omitted from its verdict. It is just as possible to draw the inference that the jury in this case read and rejected the proposed verdict next following the one it caused to be signed as that it read and considered those preceding it. In this particular case an inference or presumption could be drawn either way. While it may be true that the greater probability lies with the view that this jury intended to find in favor of these petitioners, if the question of the intention of the jury could be left to inference or presumption, the established rule seems to be that the intention of the jury must not be left to inference or presumption, that it must be expressly declared, and that where it is not expressly declared in reference to any one of several defendants who have separately answered, it must be taken that the jury has failed to pass upon that particular issue." In the case of Fennessey v. Pacific Gas & Electric Co., supra, the court questioned the jury after their verdict against only one defendant was returned, and they specifically stated that they were not bringing in a verdict against the defendants not mentioned in the verdict returned. Nor can it be said that the plaintiffs are estopped to object to the failure to find against defendant, O'Brien Mines Inc., because they waived the objection by not requesting the court to instruct the jury to retire and make its finding with respect to that defendant pursuant to Section 619 of the Code of Civil Procedure. The doctrine of waiver under the circumstances here involved means merely that if no objection is made to the verdict when it is returned, that objection is waived insofar as it may have been effectual as an attack on the verdict returned. If all the issues are not determined by the verdict, but no objection is made thereto, then the verdict stands as to the issues included therein, but as to the remaining issues the matter is set at large and further proceedings should be had in the trial court to adjudicate those issues. Portman v. Keegan, 31 Cal.App.2d 30, 87 P.2d 400.

[22] In view of what we have said, it is obvious that plaintiffs are entitled to have the issues in this case retried as to defendant O'Brien Mines Inc., also known as The Socorro Mines Incorporated.

The judgment against the appellant, Pacific Gas & Electric Company, is affirmed. The appeal from the order denying plaintiffs' motion for a retrial as to defendant, O'Brien Mines Inc., is dismissed.

SHENK, CURTIS, and TRAYNOR, JJ., and SPENCE, Justice pro tem., concurred.

EDMONDS, Justice (dissenting).

A power company which transmits electric energy over wires or appliances which it does not control is under no obligation to inspect them and is not liable for injuries sustained by reason of their defective condition. Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 283 P. 353. It is conceded that the appellant Pacific Gas & Electric Company did not own the line upon which the short circuit occurred; therefore the question of controlling importance is whether the utility had such control of this line as to make it liable for the damages caused by the fire.

Under the contract of the power company with the consumer and the testimony concerning the facilities employed in delivering the electrical energy, this question was one of fact for the jury. However, the evidence, as I read it, would support a verdict either for or against the power company, and under such circumstances, the failure to give the jury an instruction clearly stating that the power company is not liable for the damage occasioned by the fire if it did not have some control of the line to the mine constitutes reversible error. Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675. Certainly the instruction quoted in the opinion of my associates as justifying the refusal to give the instruction concerning control does not clearly state the rule of law upon which the power company relies. The fact that the appellant utility was transmitting electrical current over the

Plumbago Mine line does not compel the conclusion that it had any control of the line; the rule stated in the refused instruction applies to those situations in which a power company is transmitting electrical energy over a line which it does not control.

For these reasons, in my opinion, the judgment should be reversed.

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18 Cal.2d 540

O'DAY et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 17598.

Supreme Court of California.

Aug. 29, 1941.

Rehearing Denied Sept. 25, 1941.

1. Descent and distribution 🔑71(7)

When a decree in proceedings for determining heirship becomes final, the decree is conclusive upon matters determined. Probate Code, §§ 1080–1082.

2. Descent and distribution 🔑71(1)

That detailed items of procedure were omitted from new sections upon enactment of Probate Code did not show an intention to dispense with procedural steps in hearings to determine heirship, but an intention was manifested that essential matters of procedure not expressly covered by language of sections should be governed by rules of practice for civil actions contained in Code of Civil Procedure. Probate Code, §§ 1080–1082; Code Civ.Proc. § 581.

3. Descent and distribution 🔑71(1)

The Probate Code provisions concerning proceedings for determining heirship manifest an intention to state the applicable rules of procedure in general terms rather than by particular specification in order that they may conform as nearly as is consistently possible to those for civil actions. Probate Code, §§ 1080–1082, 1230, 1233.

4. Descent and distribution 🔑71(1)

The rules of civil practice could not be deemed inapplicable to a proceeding to determine heirship on ground that such a proceeding was not adversary, or in nature of a civil action, but was a proceeding in rem to determine those entitled to inherit assets of an estate. Probate Code, §§ 1080–1082, 1230, 1233; Code Civ.Proc. § 581.

5. Courts 🔑198

Jurisdiction of the probate court is a jurisdiction in rem, the res being decedent's estate.

6. Executors and administrators 🔑1
Wills 🔑203

The object of probate and administration proceedings is to secure distribution to persons entitled to share in decedent's estate.

7. Wills 🔑222

Certain probate proceedings, such as a will contest, are commonly denominated as "adversary proceedings" and partake of nature of a "civil action" requiring a limited application in probate of rules of civil practice.

See Words and Phrases, Permanent Edition, for all other definitions of "Adversary Proceedings" and "Civil Action".

8. Descent and distribution 🔑71(1)

A "proceeding to determine heirship" is in essence a "proceeding in rem" and also constitutes, to a certain extent, an "adversary contest". Probate Code, §§ 1080–1082.

See Words and Phrases, Permanent Edition, for all other definitions of "Adversary Contest", "Proceeding in Rem" and "Proceeding to Determine Heirship".

9. Descent and distribution 🔑71(1)

In a proceeding to determine heirship, the claimant to heirship must first take affirmative action to establish his relationship to decedent and his right, flowing from that relationship, to inherit the estate, and claimant may then contest claims of other alleged heirs in the same or a closer degree of relationship. Probate Code, §§ 1080–1082.

10. Descent and distribution 🔑71(1)

When conflicting claims are involved in a proceeding to determine heirship, the proceeding becomes an "adversary proceeding" and partakes of nature of a "civil action". Probate Code, §§ 1080–1082.

11. Descent and distribution 🔑71(7)

A judgment of dismissal entered against claimants during their absence in proceedings to determine heirship could not be attacked by claimants on theory that statute only authorized entry of a judgment of dismissal when either party failed to appear on trial, and that trial had not commenced when judgment was entered, where judgment was rendered after trial court had commenced to examine evidence that was to be presented to jury and to make rulings upon its admissibility, since a "trial", within statute, had commenced when judgment was entered. Probate Code, §§ 1080–1082; Code Civ.Proc. § 581, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

12. Trial ⚷1

Generally, a "trial" includes all rulings of a court in proceedings before it made in furtherance of decisions upon issues in the case which form basis of judgment.

13. Descent and distribution ⚷71(7)

Denial of claimants' motion to vacate judgment of dismissal entered against claimants in proceedings to determine heirship was not an abuse of discretion, where trial court, in effort to conduct trial in orderly manner, had ordered that no attorney or claimant should absent himself from trial without permission, and claimants, who had notice of order, were not present in person or by counsel when judgment was thereafter entered, and claimants did not appeal from judgment or show facts excusing their failure to comply with requirements concerning attendance at trial or offer satisfactory explanation for claimants' delay in waiting five months before seeking to be relieved from default. Probate Code §§ 1080–1082; Code Civ.Proc. § 473.

14. Descent and distribution ⚷71(7)

Where judgment of dismissal, which was rendered against claimants in proceedings to determine heirship when claimants failed to respond to roll call after trial court had ordered that no attorney or claimant should absent himself from trial without permission, had become final, the judgment amounted to a determination of claimants' rights to same extent and in same manner as if there had been an adjudication upon merits. Probate Code, §§ 1080–1082.

CARTER, J., dissenting.

◆

In Bank.

Petition by Henry J. O'Day and others against the Superior Court of Los Angeles County, and others, for writ of mandate commanding the Probate Court to hear and determine petitioners' claims to heirship.

Alternative writ of mandate discharged and proceeding dismissed.

For prior opinion, see 108 P.2d 889.

Claud B. Andrews, John Leo Harris, and W. Earl Shafer, all of Los Angeles (Mosher & Shafer, of Los Angeles, of counsel), for petitioners.

J. H. O'Connor, Co. Counsel, J. F. Moroney, Deputy Co. Counsel, Frank J. Mackin, Faries & McDowell, David R. Faries, Bailie, Turner & Lake, Richard A. Turner, Salisbury, Robinson & Himrod, William B. Himrod, Freston & Files, Wayne R. Hackett, and Charles A. Loring, all of Los Angeles, for respondents.

EDMONDS, Justice.

Petitioners are two of the numerous claimants to the estate of Michael F. O'Dea, deceased. Estate of O'Dea, 15 Cal. 2d 637, 638, 104 P.2d 368; Marlow v. Superior Court, 17 Cal.2d 393, 110 P.2d 11. In a proceeding to determine heirship, which is pending and undecided, a judgment of dismissal was entered against them. They did not appeal but some five months after its entry they moved under section 473 of the Code of Civil Procedure that the judgment be vacated. Their motion was denied and the order was held to be nonappealable. Estate of O'Dea, supra. They now seek a writ of mandate commanding the probate court, notwithstanding the judgment of dismissal, to hear and determine their claims to heirship.

It appears that after the judgment of dismissal was rendered, the petitioners attempted to file a second claim to heirship. This claim is in exactly the same terms as the one which was dismissed by the judgment. The clerk, acting under an order of court, refused to file it. In the present proceeding the petitioners charge that there is no statutory authority for a judgment of dismissal in an heirship proceeding, hence it is an act in excess of the jurisdiction of the court and does not bar their further participation in that proceeding. As a second ground for the issuance of the writ, the petitioners contend that the court must permit them to file the second claim to heirship and present evidence thereon.

[1] The procedure for determining heirship is contained in chapter XVII of

the Probate Code, which includes sections 1080–1082, based upon former section 1664 of the Code of Civil Procedure. These sections provide that when the time to file claims against an estate has expired but the estate is not in a condition to be closed, any person claiming to be an heir may file a petition setting forth his claim. The clerk shall set the matter for hearing and any person may appear and file a written statement setting forth his interest in the estate. No other pleadings are necessary. At the time appointed the court shall hear the petition and any objection to it, and shall determine who are the heirs, specifying their interests. When this decree becomes final, it is conclusive upon the matters determined.

By another section of the Probate Code in a different chapter "all issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions". Sec. 1230. These "rules of practice" are more particularly specified in section 1233, which reads: "Except as otherwise provided by this code, the provisions of part II of the Code of Civil Procedure are applicable to and constitute the rules of practice in the proceedings mentioned in this code with regard to trials, new trials, appeals, records on appeal, and all other matters of procedure." One of the provisions of the Code of Civil Procedure authorizes a dismissal "by the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal". Code Civ.Proc. § 581.

The language of section 1233 is broad and all inclusive. It not only refers to "trials" but also to "all other matters of procedure". Therefore a determination of the question concerning the authority of the court to dismiss a claim to heirship turns upon whether sections 1080–1082 contain within themselves a complete and exclusive procedure for determining heirship, or whether they should be construed as being in pari materia with sections 1230–1233, supra, thus making applicable the general rules of practice, including the provision for a judgment of dismissal.

[2] Former section 1664 of the Code of Civil Procedure, which was enacted in 1885, and upon which sections 1080–1082 of the Probate Code are based, outlined a detailed procedure for the conduct of heirship hearings, including provision for notice, appearance, entry of defaults, limitation of time for filing pleadings, appeals, costs, and other matters. Upon enactment of the Probate Code in 1931, most of these detailed items of procedure were omitted from the new sections 1080–1082. That fact, however, is not indicative of an intention to dispense with these procedural steps in hearings to determine heirship, but rather of an intention that essential matters of procedure not expressly covered by the language of sections 1080–1082 should be governed by the rules of practice for civil actions contained in the Code of Civil Procedure, made applicable by sections 1230–1233, supra. Other considerations compel that conclusion.

[3] Prior to 1931, the court unquestionably had the right to enter judgments of nonsuit or dismissal in proceedings to determine heirship. Hitchcock v. Superior Court, 73 Cal. 295, 14 P. 872; Estate of Kasson, 141 Cal. 33, 74 P. 436; former § 1664, Code Civ.Proc. The provisions of the new enactment clearly show an intention to state the applicable rules of procedure in general terms rather than by particular specification in order that they may conform, as nearly as is consistently possible, to those for civil actions.

[4-7] No weight should be accorded the argument that the rules of civil practice should not govern an heirship hearing because such a proceeding is not adversary, or in the nature of a civil action, but is essentially a proceeding in rem to determine those entitled to inherit the assets of an estate. It is true that jurisdiction of the probate court is a jurisdiction in rem. The res is the decedent's estate, and the object of the probate and administration proceedings is to secure distribution to the persons entitled to share in the estate. Edlund v. Superior Court, 209 Cal. 690, 289 P. 841; Lilienkamp v. Superior Court, 14 Cal.2d 293, 298, 93 P.2d 1008. But certain probate proceedings, such as a will contest, are also commonly denominated as adversary proceedings and partake of the nature of a civil action, requiring a limited application in probate of the rules of civil practice. Estate of Morrison, 125 Cal.App. 504, 507, 14 P.2d 102.

[8-10] Such is a proceeding to determine heirship, which is in essence a proceeding in rem but also constitutes, to a certain extent, an adversary contest. First of all the claimant to heirship must take

affirmative action to establish his own relationship to the decedent and his right, flowing from that relationship, to inherit the estate, the res. Second, he may then contest the claims of other alleged heirs in the same or a closer degree of relationship. When conflicting claims are involved the proceeding becomes an adversary one and partakes of the nature of a civil action. Estate of Kasson, supra; Estate of Friedman, 173 Cal. 411, 160 P. 237, 238. This dual character was recognized in the Friedman case, which was a proceeding to determine the heirship and succession to the estate of a decedent, where the court said:

> "Each person filing a complaint or answer in the proceeding and setting up title to the whole estate by a distinct line of kinship is necessarily an actor for himself and against all other persons who also claim the entire estate. His claim is antagonistic to that of all the others and the claim of each of the others is antagonistic to him. With respect to every other claimant so alleging an interest, the case stands precisely the same as if the contest was between him and that person alone. 'His hand will be against every man, and every man's hand against him.' * * * The case does not stand precisely in the same position as an ordinary case where the defeat of one necessarily results in a victory for the other. In cases of the kind here presented the defeat of one claimant merely eliminates him from the contest, leaving the others to fight it out to the finish, but none the less, each is an adverse party to the other and is entitled to attack the appeal of the other."

[11, 12] Petitioners further contend that as section 581, subdivision 3, of the Code of Civil Procedure only authorizes entry of a judgment of dismissal "when either party fails to appear on the trial", the judgment here entered was invalid because at the time of its entry the "trial" had not commenced. A construction of the word "trial" which would support that conclusion gives it much too limited a meaning. Generally speaking, a "trial" includes all rulings of a court in proceedings before it made in furtherance of the decisions made upon the issues in the case which form the basis of the judgment. Stow v. Superior Court, 178 Cal. 140, 172 P. 598; see, also, Green v. Duvergey, 146 Cal. 379, 80 P. 234; Goldtree v. Spreckels, 135 Cal. 666, 67 P. 1091.

The petitioners take the position that a trial has not commenced until the jury has been impaneled and the introduction of evidence begun. Among other decisions upon which they rely is Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 56 P.2d 950, in which it was held that the case had not been brought to trial within the meaning of section 583 of the Code of Civil Procedure by a hearing upon a preliminary injunction. But in the present proceeding the judgment of dismissal was rendered after the court had commenced to examine the great volume of evidence that was to be presented to the jury and to make rulings upon its admissibility. These determinations were decisions on questions of law and were made in furtherance of the trial upon the merits. The trial had, therefore, begun and the court was authorized to render a judgment of dismissal against petitioners for their failure to attend.

The next question is whether the trial court abused its discretion in denying petitioners' motion under section 473 of the Code of Civil Procedure to vacate the judgment. The undisputed facts show that from May 8th to July 24, 1939, petitioners, duly represented by counsel, participated in preliminary proceedings in the heirship hearing. On the date last mentioned, while they were so represented in court, a motion previously made for an order dismissing the claims of all persons who had not appeared in person or through counsel was renewed. The court, in an effort to conduct the trial in an orderly manner, granted the motion, and further directed that no attorney or claimant absent himself from the trial without permission, or without providing a substitute, or stipulating to be bound by all that transpired in his absence.

The attorneys representing petitioners then gave notice in open court of their intention to withdraw and that petitioners would thereafter appear in the proceeding in propria persona. On July 25, 1939, a substitution in writing to that effect was filed. On the same day judgments of nonsuit or dismissal were entered against all claimants who were not present or represented by counsel and who failed to respond to the roll call, petitioners being among them. Petitioners did not appeal from the judgment of dismissal. Following its entry, and until after December 26, 1939, the court was engaged almost continuously in reviewing depositions and documentary evidence which had been filed in the proceeding on behalf of the various claimants. On December 26th, petitioners appeared by new counsel and gave formal notice of their intention to move under section 473, supra, to vacate the dismissal. Such motion was subsequently made and denied. It was renewed on April 15, 1940, and again denied.

[13] No facts are shown which would excuse petitioners' failure to comply with the requirements of the court concerning attendance at the trial and no satisfactory explanation is given for their delay in waiting for five months before seeking to be relieved from default. There were in all more than 460 claimants to heirship, and the estate is of an approximate value of $5,000,000. During the period of petitioners' non-appearance, the trial court ruled upon objections made by the different claimants to testimony contained in the depositions, which were read in open court, and to the documentary evidence which was offered. The purpose of these preliminary proceedings was to shorten and simplify the trial of the issues of fact which it was proposed to submit to a jury. To have permitted petitioners to re-enter the proceeding and demand a hearing de novo of all these preliminary matters which had been decided in their unexplained absence, would have been manifestly unfair to the other claimants. In refusing to vacate the judgment of dismissal the court exercised a wise discretion and its order must be upheld.

[14] Concerning the second claim of heirship, the judgment rendered against the petitioners has become final and it amounts to a determination of their rights to the same extent and in the same manner as if there had been an adjudication upon the merits. King v. Superior Court, 12 Cal.App.2d 501, 56 P.2d 268; 9 Cal.Jur., p. 524, sec. 16.

The alternative writ of mandate is discharged and the proceeding dismissed.

GIBSON, C. J., SHENK, and TRAYNOR, JJ., concurred.

CARTER, J., dissenting.

CARTER, Justice (dissenting).

I dissent.

I do not agree with the conclusion reached in the majority opinion or the reasons upon which it is based. In view of the superficial treatment of both the facts and the law in the majority opinion, I feel constrained to review the entire proceeding before us and express my view of the law applicable to the factual situation presented by the record before us.

This is an original proceeding in mandamus to compel the Superior Court of Los Angeles County to permit petitioners to participate in a proceeding to determine heirship pending in said court in the matter of the estate of Michael O'Dea, deceased. It appears from the petition and answer thereto that Michael F. O'Dea died intestate on January 22, 1938. He was a resident of Los Angeles County and left an estate valued at approximately $5,000,000. Proceedings for the probate of his estate were promptly instituted in the Superior Court of Los Angeles County. On August 11, 1938, Maria McCarthy and others filed in said estate proceeding a petition for the determination of heirship in accordance with the provisions of section 1080 of the Probate Code. Said petitioners claimed to be first cousins and related to decedent in the fourth degree. A hearing on said petition was set for December 5, 1938, and the clerk gave notice thereof in accordance with the provisions of section 1200 of the Probate Code. Prior to said last-mentioned date, numerous claimants appeared and filed their written statements of heirship wherein they respectively claimed to be heirs at law of the decedent and interested in his estate. A demand was made for a jury trial on the issues raised by said petition and statements, and the trial judge announced that said demand would be granted. Thereafter, the hearing on the petition and statements so filed was regularly continued from time to time until July 17, 1939. Between December 5, 1938, and May 8, 1939, several hundred depositions were regularly taken in Ireland, Canada and in the eastern portion of the United States on behalf of claimants who had filed their statements prior to December 5, 1938. On May 8, 1939, Henry J. O'Day and Genevieve O'Day Jensen, petitioners herein, first appeared and filed their statement in said proceeding and thereafter regularly participated in the proceedings had therein between that date and the 24th day of July, 1939. On July 17, 1939, the hearing of the issues raised by the original petition to determine heirship and all statements by other claimants theretofore filed in said proceeding, aggregating more than 460 claimants in number, was commenced in the trial court. At said hearing the names of all claimants who had theretofore appeared were called, and petitioners herein, through their then attorneys of record in said proceeding appeared and participated therein. On that date attorneys for the petitioners named in the original petition to determine heirship, moved the court for an order defaulting all persons who had not appeared in person or through counsel in said heirship proceeding. Said motion was continued to July 18, 1939, and on that date to July 24, 1939. On July 24, 1939, said motion was renewed, and while the petitioners herein were represented by their attorneys then in attendance, the court, in an effort to conduct the trial in an orderly manner, granted said motion. Likewise, while petitioners herein were so represented, the court made another order in open court, ordering that no attorney or claimant absent himself from the trial without permission of the court, or providing for a substitute, or stipulating to be found by all that transpired in his absence, and furthermore, that no statements of heirship be filed after July 24, 1939, except upon a showing under section 473 of the Code of Civil Procedure. On July 24, 1939, the attorneys then representing petitioners herein gave notice in open court of their intention to withdraw as attorneys for said petitioners, and that petitioners would thereafter appear in said proceeding in propria personae, and on July 25, 1939, substitution in writing to that effect was filed in said proceeding. On the same date and following the roll call of claimants in said proceeding, the attorneys for the petitioners named in the original petition to determine heirship moved the court to enter the default of all claimants who had not at that date appeared in said proceeding, and said motion was granted. Following the granting thereof the same counsel moved the court for a judgment of nonsuit against all claimants who had theretofore appeared in said proceeding, but who were not present or represented by counsel at the trial on July 25, 1939, and who had failed to respond upon said roll call on that date. Petitioners were among those who so failed to respond to their names. Said motion was granted and a judgment of nonsuit was, on said date, duly entered against all such claimants, including said petitioners. Following the granting of said motions, and until after the 26th of December, 1939, the court was engaged almost continuously in reviewing the various depositions and documentary evidence which had been filed in said proceeding on behalf of the various claimants. The depositions were read in open court and documentary evidence was offered in support of some of the claimants, and the court made its rulings on the objections made to the admissibility of the documentary evidence and the oral testimony contained in the various depositions. The announced purpose of this preliminary proceeding was to shorten and simplify the trial of the issues of fact before a jury subsequently to be impaneled. On December 26, 1939, petitioners herein appeared in the trial court by other counsel and gave formal notice of intention to move under section 473 of the Code of Civil Procedure to vacate said judgment of nonsuit as to them. A written notice of such motion was thereupon filed. On January 5, 1940, this motion was heard and denied by the trial court. On April 15, 1940, petitioners herein made a second motion under said section 473 to vacate said judgment of nonsuit, which motion was denied.

Petitioners contend that the trial court acted in excess of its jurisdiction in directing the entry of a judgment of nonsuit and dismissal against them and that said judgment is therefore void and of no effect and does not constitute a bar to their participation in the proceeding to determine heirship in said estate.

Petitioners assert in support of their contention that there is no authority or power in the respondent court under any of the provisions of the Probate Code to grant a default or nonsuit in a proceeding to determine heirship and that section 581 of the Code of Civil Procedure is not applicable because the trial of the proceeding had not commenced at the time the judgment of nonsuit and dismissal was granted.

Respondent Superior Court contends that the trial of said proceeding had commenced and that the provisions of section 581 of the Code of Civil Procedure are made applicable to proceedings of this character by virtue of sections 1230 and 1233 of the Probate Code.

I think it is clear that in enacting sections 1080, 1081 and 1082 of the Probate Code, it was the obvious intention of the legislature to provide a simple and expeditious method of determining who are the rightful heirs of an estate and entitled to distribution thereof. The proceeding contemplated by said sections is somewhat in the nature of a civil action wherein the respective claimants are adverse to each other but they are not necessarily adverse parties to each other in the sense that they are seeking redress of any grievance arising out of the violation of any right enuring to the respective claimants. Such proceeding is essentially one in rem to determine who is entitled to the assets of the estate. It is conceivable that the trial court might determine that none of the claimants who have filed petitions or statements of heirship are the rightful heirs to the estate and are therefore not entitled to the distribution of any portion thereof; in other words, the court is not required to decide in favor of any claimant who does not prove to the satisfaction of the court that he is a relative of the deceased and entitled to distribution of a portion of his estate under the laws of descent of this state. It is possible therefore that the result of such a proceeding might be a determination that deceased left no living heirs and his estate would escheat to the state of California.

It cannot be denied that the ultimate aim and purpose of administration proceedings, including proceedings to determine heirship, is to ascertain the persons entitled to share in the estate of the decedent and to decree distribution accordingly. Every consideration of justice and public policy dictates that estates of decedents be distributed to persons rightfully entitled thereto and that every concern and endeavor of a probate court should be directed to the accomplishment of this purpose. Edlund v. Superior Court, 209 Cal. 690, 289 P. 841.

With the foregoing consideration in mind let us proceed with an analysis of the provisions of sections 1080, 1081 and 1082 of the Probate Code in their application to the accomplishment of the above-mentioned object and purpose. Said sections contain no provision for the entry of defaults, dismissals or nonsuits which are characteristic of civil actions. In this respect proceedings under these sections are somewhat analogous to a proceeding under former section 1668 of the Code of Civil Procedure which authorized the filing of objections to a petition for distribution by one claiming the right to have a share of the estate distributed to him differently from that proposed in the petition for distribution. It was held by this court that since no provision was contained in section 1668 authorizing the entry of a default against such a claimant, he was not barred even if he failed to file his objections prior to the actual commencement of a hearing on a petition for distribution. Estate of Ross, 185 Cal. 8, 195 P. 674. While section 1080 provides that the clerk shall set the petition to determine heirship for hearing by the court, the only notice required to be given prior to such hearing is a ten days' notice by posting in the manner required by section 1200 of the Probate Code. After the original petition to determine heirship is filed, any person claiming to be an heir to the estate may appear and file a written statement setting forth his interest in the estate. The petition and statements so filed constitute the pleadings in such a proceeding.

Section 1081 provides for a hearing on the petition and any objection thereto that may have been presented. While no reference is made in said last-mentioned section to a hearing on the statements of heirship filed subsequent to the petition, it may be assumed that it was the intention of the legislature that all claimants whether by petition or statement are entitled to have their claims heard by the court before the court determines who are the heirs of the decedent and entitled to distribution of his estate. Section 1082 provides that when the decree determining heirship becomes final, it shall be conclusive upon the matters determined during the remainder of the administration of the estate and upon any subsequent proceeding for distribution.

Turning to section 1230 of the Probate Code we find that provision has been made for the framing of the issues to be tried, if not already sufficiently made up; also as to who are to be regarded as plaintiffs and who defendants; that if no jury has been demanded the issues of fact are to be tried by the court "in conformity with the requirements of the rules of practice in civil actions", and "the court must * * * sign and file its decision in writing, as provided in civil actions". It is also provided in section 1233 of the Probate Code that when not otherwise provided by said Code, "the provisions of part II of the Code of Civil Procedure [sec. 307–1060a] are applicable to and constitute the rules of practice in the proceedings mentioned in this code with regard to trials, new trials, appeals, records on appeal, and all other matters of procedure". Obviously, these last-mentioned sections of the Probate Code are applicable to proceedings to determine heirship under sections 1080, 1081 and 1082 of said Code.

The problem presented, however, is whether or not the provisions of section 581 of the Code of Civil Procedure are applicable to a proceeding of this character and may be relied upon to sustain the order of the trial court attacked by petitioners herein. I am of the opinion that said section 581 is not applicable to proceedings of this character, and that a nonsuit may not be granted against a claimant who has regularly appeared and filed a statement of heirship in such proceeding pursuant to the provisions of section 1080 of the Probate Code. As I have heretofore stated, it is the duty of the probate court to determine who are the rightful heirs of an estate, and this duty exists whether or not such heirs actually make an appearance in the estate proceeding and file a statement of heirship; in other words, if it should appear from competent evidence produced in an heirship proceeding that one or more persons other than those filing statements of heirship are the next of kin and lawful heirs of decedent and entitled to the distribution of his estate pursuant to the laws of descent of this state, it is the duty of the probate court to make distribution of said estate to such persons to the exclusion of all claimants who may have filed statements of heirship but who have failed to establish their right as next of kin and heirs at law of the decedent.

In view of the peculiar nature of a proceeding to determine heirship, it should not be said that any of the participants are either plaintiffs or defendants, but each is an independent actor asserting his claim to share in the assets of the estate either in common with or to the exclusion of all other claimants. When such a proceeding comes on for hearing it is the obvious duty of the trial court to direct the conduct of the trial and require the respective claimants to present their proof in the order which the trial court deems will best facilitate the disposition of the case. It necessarily follows that if a claimant is not present and ready to proceed when directed by the trial court to present evidence in support of his claim, such claimant may be barred from the further prosecution of such claim. It likewise follows that a claimant who absents himself from the proceeding is barred from raising any objection to any of the proceedings which have taken place during his absence; in other words, he must accept the proceedings as he finds them after his return and he cannot be heard to complain as to what has taken place during his absence.

In the case at bar petitioners participated in the proceeding through counsel employed by them from the time they filed their statement of heirship on May 8, 1939, until July 24, 1939. On the last-mentioned date their counsel withdrew and they thereafter appeared in propria personae. It does not appear that at the time the court granted the motion for a judgment of nonsuit and dismissal against petitioners, they had been called upon to present any evidence in support of their statement of heirship or otherwise participate in the proceeding except to be present in court since the commencement of the hearing on July 17, 1939. The absence of petitions from the courtroom thereafter would not preclude the trial court from determining that they were the next of kin and therefore the rightful heirs of decedent if the evidence subsequently presented disclosed this to be the situation.

An analogous situation might be said to exist in an eminent domain proceeding where several separate parcels of land are involved, title to which is held in severalty. The mere fact that one of the owners who had appeared in such proceeding and filed an answer was absent during a portion of the trial would not justify the trial court in granting a nonsuit as to him and denying him compensation for his land if evidence was produced from which the court could determine the amount of compensation and damages to which he was entitled; in other words, the court would have no authority in such a case to grant a nonsuit or dismissal against such defendant in the event of his failure to appear at the trial.

In view of the above discussion it seems obvious to me that the provisions of section 581 of the Code of Civil Procedure are not applicable to an heirship proceeding under sections 1080, 1081 and 1082 of the Probate Code, and it necessarily follows that the order of the trial court granting a judgment of nonsuit and dismissal against petitioners was unauthorized and petitioners should be permitted to participate in such proceeding notwithstanding such order.

However, even if we assume that section 581 of the Code of Civil Procedure is applicable to heirship proceedings, the result would be the same. Accepting the conclusion that such a proceeding is in the nature of a civil action in which the position of the parties is adverse to each other, it must be conceded then that each party is in a sense either a plaintiff or a defendant, or a defendant and a cross-complainant. The one who initiates the proceeding by first filing the petition to determine heirship, is a proponent of a claim, and in that sense a plaintiff, but if other claims are filed in the proceeding which conflict with his, he is also a defendant as to such claims—that is, he is defending against them. As to claimants other than the ones initiating the proceeding, they are defendants in the sense that they are resisting the claims of the ones initiating the proceeding and also, possibly, claims of other claimants. They are plaintiffs, or it may be said, cross-complainants in that they are affirmatively urging their claim to the estate.

With these thoughts in mind let us turn to section 581 of the Code of Civil Procedure which provides for involuntary dismissals for failure to appear on the trial. Petitioners' claim of heirship was dismissed for their failure to so appear. Section 581 provides in part:

"An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * * 3. By the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal * * *." It may be assumed that the appearance on trial to which reference is made, is the actual physical presence in court in person or by counsel. The difficult question is the meaning and scope of the words "either party". Reasonableness and practicality, which is the foundation of all law, compels the following conclusions as to the proper interpretation of those words. In an ordinary civil action it is obvious that the plaintiff would not ask or desire a dismissal of his action if the defendant did not appear on the trial. If he desired such a dismissal he would proceed to a voluntary abandonment of the action as prescribed by section 581(4) of the Code of Civil Procedure. If he did not desire a dismissal, which in the great majority of instances would be the case, he would proceed to prove his case and obtain judgment against the defendant; in fact, in order to obtain a judgment it would be necessary for him to prove the elements of his case. On the other hand, the defendant, in the event of the nonappearance on the trial of the plaintiff, would desire that the action be dismissed or a nonsuit entered, and thus he would wish to and could avail himself of subdivision 3 of section 581. He might wish to proceed with his proof negating plaintiff's claims in the action, in which case he could obtain a judgment on the merits which would bar plaintiff from prosecuting a new but similar action against him. It follows that the only occasion on which a dismissal for nonappearance on the trial might be desired by both plaintiff and defendant, would be where defendant had demanded affirmative relief in his answer such as by counterclaim or cross-complaint. Under those circumstances the plaintiff would desire a dismissal of defendant's request for affirmative relief when defendant failed to appear, and if plaintiff failed to appear defendant might demand a dismissal of plaintiff's action. That brings us to the query as to what time during the trial a failure to appear may justify a dismissal under subdivision 3 of section 581 of the Code of Civil Procedure. The only reasonable interpretation of section 581(3) is that that time is the point when it becomes the duty of the party asking affirmative relief to proceed with his case, if he intends to prosecute his claim. A plaintiff's failure to appear at the opening day of the trial would be a justifiable ground for granting defendant's motion to dismiss, because the burden is upon plaintiff to go forward at that time. The defendant, at that time, however, is on the defensive, and the only prejudice that would be suffered by him would be a waiver of any objection to the proceedings taken in his absence. When it became the duty of the defendant to proceed with his affirmative case, then plaintiff could have a dismissal of the same if defendant were not present, and if he is present and does proceed, the absence of the plaintiff while he was so proceeding would not entitle defendant to a dismissal of plaintiff's action. To interpret section 581(3) otherwise would mean that in a case where defendant sought affirmative relief and failed to appear at the trial when the plaintiff was proceeding with his case, the defendant's counterclaim or cross-complaint could be forthwith dismissed. In my opinion such a harsh rule should not be invoked. Defendant may not be particularly concerned about plaintiff's action, his reliance being placed on his cross-complaint. Surely it cannot be said that in a case where defendant seeks no affirmative relief, that by the dismissal provisions of section 581(3), he is in effect defaulted and prevented from defending against plaintiff's action by not being present when plaintiff commences to prove his case. He may appear later but before the action is submitted, being bound, of course, by all that has occurred in his absence. Warden v. Lamb, 98 Cal. App. 738, 277 P. 867.

As we have seen, the parties are both plaintiff and defendant or plaintiff and defendant and cross-complainant in an heirship proceeding. It does not appear that the occasion had yet arisen at the hearing when petitioners were required to go forward with proof of their claim of heirship; the court did not direct them to do so. It merely ordered them to be present in court. Under the test heretofore stated, the dismissal of petitioners' claim was prior to the time that they were under a duty to proceed to prove their claim. Therefore, the court exceeded its jurisdiction in dismissing petitioners' claim of heirship.

It has been held that the only exception to the general rule confining appeals from orders or judgments in probate to those specified in section 1240 of the Probate Code is, that an appeal will lie from an order granting or denying a motion for a new trial in those proceedings in probate in which such motion is proper. Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368. An order granting a nonsuit or judgment of dismissal in an heirship proceeding is not one of those orders mentioned in said section 1240. Therefore, petitioners have no remedy by appeal. However, an attempt was made by petitioners to appeal from an order of the trial court denying them relief from such order under section 473 of the Code of Civil Procedure, but such appeal was dismissed by this court. See Estate of O'Dea, 15 Cal.2d 637, 104 P. 2d 368, 369, wherein this court said:

"Section 1240 of the Probate Code is simply the reenactment of subsection 3 of section 963 of the Code of Civil Procedure, and this court has on numerous occasions held that no appeal will lie from an order in probate denying relief under section 473 of the Code of Civil Procedure, or from any other order not specified in subsection 3 of section 963 of the Code of Civil Procedure, with the one exception above mentioned."

From what I have said in the foregoing opinion, it follows that petitioners are entitled to the relief prayed for in their petition herein, and a peremptory writ of mandate should issue directing the respondent court to permit petitioners to participate in the proceeding to determine who are the rightful heirs to the Estate of Michael F. O'Dea, deceased, pending in said court.

46 Cal.App.2d 681

ADAMS et al. v. HINER et al.

HINER et al. v. GREENWOOD et al.

Civ. 11688.

District Court of Appeal, First District, Division 2, California.

Sept. 3, 1941.

1. Appeal and error 🔑907(3)

Where trial court in action for breach of contract, by which defendants sold premises to plaintiffs and agreed to construct a residence thereon according to specifications, made extensive findings covering defects in construction of residence, and appeal from judgment in favor of plaintiffs was based on judgment roll alone, defendants could not contend on appeal that plaintiffs were not entitled to damages, nor that award of damages was excessive.

2. Vendor and purchaser 🔑351(1)

A contract, providing for sale of real estate and erection thereon by vendors of a specified kind of residence, was not a simple real estate sales agreement, for the breach of which the proper measure of damages would be the difference between actual value of property and its value had the property been as represented, but damages were properly based on vendors' failure to complete residence according to contract.

3. Appeal and error ⟹907(3)

Where judgment, awarding damages to purchasers for breach of contract under which vendor sold realty and agreed to construct residence thereon in accordance with specifications, rested on damages found to have resulted from vendors' failure to complete construction of residence in accordance with contract, and appeal was based on judgment roll alone, vendors could not contend that award of damages was not reasonable and proper under circumstances, since it must be assumed that trial court's findings with respect to vendors' failure to construct residence in accordance with contract were supported by substantial evidence.

4. Vendor and purchaser ⟹344

Where vendors failed and refused to complete contract under which they sold realty and agreed to construct a residence thereon in accordance with specifications, and purchasers offered to do all that was required of them under the contract, purchasers were entitled to sue for damages without further performance on their part. Civ. Code, § 1440.

5. Appeal and error ⟹907(3)

Where court in purchasers' action for breach of contract, under which vendors sold realty and agreed to construct a residence thereon in accordance with specifications, found that damages for failure to complete residence amounted to $4,000 and damages for personal injuries suffered by one of purchasers because of defective condition of residence amounted to $200, but judgment was for $4,000 only, whether damages for personal injuries could be recovered in such an action was purely academic question on appeal by vendors based upon judgment roll, since it must be assumed that judgment covered damages relating to building alone.

6. Appeal and error ⟹907(3)

On appeal based on the judgment roll alone, trial court's findings as a whole must be given such construction as will uphold the judgment rather than defeat it.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Ejectment suit by D. Grace Adams and others against Clara B. Hiner and others, which was consolidated for trial with action by Clara B. Hiner and others against Judson J. Greenwood and others for damages for breach of contract under which defendants in action for damages allegedly sold premises and agreed to construct a residence thereon according to specifications. From a judgment in favor of plaintiffs in action for damages, plaintiffs in ejectment suit and defendants in damage suit appeal.

Judgment affirmed.

Alfred E. Cate, of Los Angeles, for appellants.

Wallace & Crandall, of Los Angeles, for respondents.

NOURSE, Presiding Justice.

This appeal comes to us on the judgment roll alone. The appellants sued to eject respondents from certain real property. The respondents set up by way of answer an affirmative defense pleading that they were in possession under an express contract under which appellants sold the premises to them and agreed to construct a residence thereon according to agreed plans and specifications; that respondents had paid the sums called for under the contract, but that appellants had failed to complete construction of the building according to these plans and specifications, or otherwise. Thereafter respondents as plaintiffs commenced another action alleging appellants' breach of the contract in more detail and seeking damages for the breach in the sum of $5,300. The cases were consolidated for trial and respondents had judgment for $4,000 which was ordered to be applied upon the unpaid balance due appellants under the contract.

[1, 2] The trial court made extensive findings covering a great number of defects in the construction of the building, and the appellants concede that on their appeal based upon the judgment roll they may not contend that respondents are not entitled to damages. It should also be conceded that, for the same reasons, they may not contend that the award of damages is excessive. It is their contention that the trial court adopted the improper measure of damages. That is to say, they contend that since the contract is a simple "real estate sales agreement" the proper measure of damages is "the difference between the actual value of the property and its value had the property been as represented", citing Hines v. Brode, 168 Cal. 507, 510, 143 P. 729; Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380, and sim-

ilar authorities. The argument would bear weight if it were based upon a sound premise. But this is not an action for rescission, fraud, or deceit; and it is not one based upon a simple real estate sales agreement. To the contrary, the agreement recites that "The first party is now erecting a residence on this property which is to be finished according to plans and specifications except there is to be a room added on according to a supplemental drawing". The trial court found true respondents' allegations. "That said residence has never been completed in accordance with the plans and specifications thereof and said written agreement or otherwise although defendants have from time to time demanded of plaintiffs that the same be completed in accordance with the terms of said plans and specifications and the said written agreement. That said residence building in so far as the same is built is in numerous instances at variance with the said plans and specifications and the said written agreement and that said variances constitute material defects in said building". It also found that the appellants "have failed and refused and still fail and refuse to complete, alter or repair said residence building in accordance with said written agreement, plans and specifications or supplemenal drawing of added room".

[3] Under these findings, which we must assume on this appeal to be supported by substantial evidence, the judgment rests upon damage found to have resulted from appellants' failure to finish the construction of the residence building in accordance with the terms of the written contract. The appellants cannot contend that the award made to cover such damage was not reasonable and proper under the circumstances.

[4] Appellants question whether such a contract can "be specifically enforced by a purchaser in default where no fraud or mistake is at issue?" No argument is made upon the inquiry other than that based upon the statement of fact that respondents were in default. But the respondents have not sought specific performance and were not found to be in default. To the contrary it was found that appellants failed and refused to complete the contract and that respondents offered to do all that was required of them under the contract. Such a repudiation by one party entitles the other to sue for damages without further performance on his part. § 1440, Civ.Code; Alderson v. Houston, 154 Cal. 1, 12, 96 P. 884.

A similar inquiry is made by appellants as to whether such a contract can be reformed. The inquiry is not pertinent because an action for damages for breach of contract has no relation to a proceeding in equity for reformation. No interpretation and no alteration of the contract was sought. The respondents were content to let the contract stand as written and sought and recovered damages for the breach.

[5, 6] Finally the question is presented "can personal injuries be recovered in such an action?" On this appeal the question is purely academic. It is true that respondents pleaded personal injuries suffered by one of them because of the defective condition of the residence into which they had moved by special permission of the appellants. But the record does not disclose that the judgment included such injuries in the award. The findings are that the damages for appellants' failure to complete the building amounted to $4,000. The court also found that the damages to Mrs. Hiner personally amounted to $200. The judgment, however, is for the sum of $4,000. We must assume on this appeal that the judgment covered the damages relating to the building alone because the findings as a whole must be given such construction as will uphold the judgment rather than defeat it. Anglo-California T. Co. v. Oakland Rys., 193 Cal. 451, 460, 461, 225 P. 452.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

46 Cal.App.2d 697

PEOPLE v. CAMPANELLA.

Cr. 2178.

District Court of Appeal, First District,
Division 2, California.
Sept. 3, 1941.

1. Homicide 🔑273

In murder prosecution, evidence of direct admission of accused that he stabbed deceased with a knife dispelled presumption of innocence and left to jury question of whether killing was excusable or justifiable or such as to constitute crime of manslaughter rather than that of murder.

2. Homicide 🔑101

In murder prosecution, where there was evidence of direct admission of accused that he had stabbed deceased, with a knife, contention that homicide was excusable or justifiable or such as to constitute the crime of manslaughter rather than that of murder was a matter of defense.

3. Homicide 🔑273

In murder prosecution where there was evidence of a direct admission of the accused that he had stabbed the deceased with a knife, whether the admitted killing was either justifiable or excusable was an issue of fact which could be established in the same manner that an ordinary issue of fact may be proved in either a civil or criminal case.

4. Homicide 🔑250

Where accused was charged with murder and there was evidence of a direct admission of accused that he had stabbed deceased with a knife, and there was no evidence justifying or explaining the conduct of accused, presumption that accused intended ordinary consequences of his voluntary act and evidence that he had ample time and opportunity to avoid encounter with deceased, supported inference by jury that accused did nothing to avoid encounter, but that he voluntarily lay in wait for deceased with intention of inflicting upon him bodily harm, and warranted conviction of manslaughter. Pen.Code, §§ 192, 195, 197, 1096, 1105, 1159.

5. Criminal law 🔑1144(15)

On appeal from conviction of manslaughter, reviewing court must assume in support of the judgment that jury accepted whatever presumption or inference might be necessary to support verdict. Pen.Code, § 1096.

6. Homicide 🔑145

Where an accused is charged with murder and admits the fact which is the body of the crime charged, the question whether his act was justifiable or excusable depends wholly upon the intent with which the act was committed, and the presumption is that he intended death or great bodily harm. Pen.Code, § 1096.

7. Homicide 🔑250

Where evidence and presumptions in murder prosecution were sufficient to sustain verdict of murder, conviction of lesser offense of manslaughter was supported by evidence. Pen.Code, § 1159.

8. Homicide 🔑145, 146

The effect of the statute providing that upon a trial for murder the commission of homicide by the accused being proved, burden of proving circumstances of mitigation or that justify or excuse it is always upon defendant unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justified or excused, is to relieve the prosecution in cases of murder alone of the burden of proving malice and willful intent. Pen.Code, § 1105.

9. Criminal law 🔑561(2)

In a murder prosecution where the homicide was admitted and the evidence was sufficient to prove murder, prosecution to convict accused of manslaughter had no greater burden than to prove essential elements beyond a reasonable doubt. Pen. Code, § 1105.

10. Criminal law 🔑1144(15)

Where trial court properly charged jury on question of reasonable doubt, presumption of innocence and essential elements of offense charged, as well as upon essential elements of plea of self-defense, reviewing court would assume on appeal that jury followed instructions.

11. Homicide 🔑195

In murder prosecution where evidence tending to show that accused had means to have avoided combat and made no effort to do so was fully covered by instructions on issue of self-defense, there could be no implication from admission of evidence that accused could have avoided combat that trial court assumed position unfavorable to accused on that issue. Pen.Code, §§ 192, 195, 197, 1105.

12. Criminal law ⚷829(1)

The refusal to give a proposed instruction subject matter of which was fully covered in instructions given was not error.

◆

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Charles Campanella was convicted of manslaughter, and he appeals.

Affirmed.

Bernard Nugent and Daniel F. Hogan, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener and Dennis Hession, Deputy Attys. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant went on trial to a jury upon an information charging murder and was found guilty of the crime of manslaughter. His motion for a new trial was denied, and this appeal is taken from the judgment on the verdict and from the order denying a new trial.

A former conviction of the defendant of murder in the second degree was before this court on appeal, and the conviction was reversed because of errors in instructions particularly those relating to defendant's plea that the homicide was committed in self-defense. People v. Campanella, 39 Cal.App.2d 384, 103 P.2d 193. Upon the second trial the defendant declined to take the stand in his defense and for this reason there is a marked and material difference in the two transcripts on appeal—particularly in respect to the evidence tending to support defendant's plea which, on the former appeal, came principally from his own testimony of the events leading to the homicide. On this appeal it should be borne in mind that we must confine our review to the evidence found in the transcript of this record, and we are not permitted to indulge in counsel's explanations and colorful elaborations of this record from the stories told on the previous trial, nor are we permitted to treat as evidence in this case portions of the transcript of evidence of a proceeding in the municipal court which were read to a witness for the purpose of refreshing his recollection and not put in evidence.

Our record discloses that the defendant was living in the apartment of Mrs. Hattie Jensen, the estranged wife of the deceased. Three children of Mrs. Jensen, two sons aged fourteen and eleven by a previous marriage, and a daughter by a still previous marriage, were living in the same apartment. The defendant helped care for the two boys when the mother was away from the apartment and did some work about the place to help Mrs. Jensen. The Jensens had been separated for about fourteen months, but were on friendly terms, seeing each other all the time, usually at the home of the deceased. On the day of the homicide Mrs. Jensen had planned to go to her husband's home for dinner, but she came to her own apartment at about 5:30 p.m. to make arrangements for her children's meal. A few minutes prior to that time her husband had come to the apartment and found the defendant sitting in the living room with the eleven-year-old son of Mrs. Jensen. He called to the boy to go back to the kitchen with him and there asked who the strange man was. The boy told him that he was living there and helping his mother. The deceased, who was drunk at the time, became very angry and returned to the living room where he and the defendant had some altercation. At this time Mrs. Jensen came in and saw the defendant seated in a chair and the deceased leaning over him with one hand on each arm of the chair. She called to her husband: "Jim, come in here. I want to talk to you." Her husband preceded her to the kitchen where she told him that he should leave and go to his own home. The deceased answered: "Before I let that Dago son of a bitch get you I will kill him." Mrs. Jensen started to remove her coat and the deceased left her to return to the living room. A period of about four minutes elapsed while the two were in the kitchen and when Mrs. Jensen had removed her coat she immediately followed her husband to the living room. There she saw the two men scuffling in the middle of the room; the deceased had a hold on both of the defendant's wrists extending his arms upward. The defendant had a pocket knife in one of his hands. She called "Jim" and the men broke away. The deceased was vomiting blood from four knife wounds all of which produced a hemorrhage from which he died before help could be summoned. The defendant admitted that he inflicted the wounds. There is no evidence that the deceased carried or used any kind of weapon, no evidence that he struck or threatened the defendant in any way other than the evidence relating to what was said in the kitchen.

[1–7] Upon this evidence the jury found the appellant guilty of manslaughter. His first point on the appeal is that the verdict is contrary to and unsupported by the evidence. A former jury had found appellant guilty of murder in the second degree. Two trial judges denied his motions for a new trial. Immediately following the death of deceased the appellant stated to the ambulance attendant that he had killed the deceased. He did not take the witness stand in his own defense; hence, there is no evidence of what occurred between the two men between the time when the deceased returned to the living room and the time when Mrs. Jensen saw the deceased bleeding from his wounds. The presumption of innocence of the homicide was dispelled by the direct admission of the appellant that he had stabbed the deceased with his knife. The single question then left to the jury was whether the killing was excusable or justifiable or such as to constitute the crime of manslaughter rather than that of murder. This of course was a plain matter of defense. Whether the burden of proof was upon the prosecution, or upon the appellant is not pertinent at this time. The controlling matter is that proof that the admitted killing was either justifiable or excusable went directly to an issue of fact, and such proof could be made in precisely the same manner that an ordinary issue of fact may be proved in either a civil or a criminal case. Thus, in the absence of any explanation of his conduct, the appellant, having been charged with murder, must be presumed to have intended "the ordinary consequences of his voluntary act," and this presumption taken with the evidence that he had ample time and opportunity to avoid the encounter, would support an inference by the jury that the appellant did nothing to avoid it, but that he voluntarily lay in wait for the deceased with the intention of inflicting upon him bodily harm. People v. Jones, 160 Cal. 358, 370, 371, 117 P. 176. Upon an appeal of this character this court must assume in support of the judgment that the jury accepted whatever presumption or inference may be necessary to support the verdict. This is so because section 1096 of the Penal Code declares that "the effect of this presumption [of innocence] is only to place upon the state the burden of proving him guilty beyond a reasonable doubt". When, therefore, a defendant is charged with murder and admits the fact which is the body of the crime charged, the question whether his act was justifiable or excusable depends wholly upon the intent with which the act was committed—and in such a case the natural presumption is that he intended death or great bodily harm. People v. Jones, supra. With this presumption and the reasonable inference that appellant voluntarily lay in wait and attacked the deceased in anger because of the vile epithets he had heard from the deceased, the evidence as a whole was sufficient to support a verdict of murder. Under the accepted rule announced in section 1159 of the Penal Code the conviction of the lesser offense of manslaughter was proper and is fully supported by the evidence.

[8-10] Appellant's second ground of attack is thus stated: "The proof on the part of the prosecution tended to show that the offense if any amounted to manslaughter and not murder, therefore the burden of proof remained with the prosecution to show that the defendant did not kill deceased in self-defense. This the prosecution failed to do." Though we should concede the statement it is no ground for reversal. Appellant relies upon section 1105 of the Penal Code which reads: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." The effect of the section is to relieve the prosecution, in cases of murder alone, of the burden of proving malice and willful intent. People v. Jones, supra. The last portion of the section merely leaves the burden on the prosecution of proving manslaughter "beyond a reasonable doubt". But, when, as here, the killing is admitted and the evidence is sufficient to prove murder the prosecution has no greater burden than if the original charge was manslaughter—the burden of proving the essential ele-

ments beyond a reasonable doubt. In the absence of the testimony to the appellant which was before us on the former hearing the record discloses nothing more than that the appellant attacked the deceased with a dangerous weapon, while the deceased was wholly unarmed, immediately after the deceased had uttered some vile epithets and threats regarding the appellant. It disclosed that the killing was the result of a "sudden quarrel or heat of passion". Penal Code, section 192. It disclosed that it was not "committed by accident and misfortune" and that if it were committed "in the heat of passion * * * or upon a sudden combat" it was accomplished by an undue advantage taken and with the use of a dangerous weapon. Penal Code, section 195. It disclosed that, if the defendant believed that it was necessary to commit the act in defense of his person, or his habitation, he did not in good faith endeavor "to decline any further struggle before the homicide was committed". Penal Code, section 197. To the contrary the evidence discloses that the appellant attacked the deceased with a dangerous weapon while the latter was unarmed and in a drunken condition, that he made no attempt to retreat, or to avoid the combat; but that he apparently lay in wait for the deceased for the express purpose of committing the homicide. The trial court properly charged the jury on the question of reasonable doubt, the presumption of innocence, and the essential elements of the offense, as well as upon the essential elements of the plea of self-defense, and we must assume on this appeal that the jury followed those instructions.

[11] The appellant complains of the rulings of the trial court upon his objections to questions tending to show that he had ample means to have avoided the combat and made no effort to do so. If, under section 1105 of the Penal Code, the burden is on the prosecution to prove that the killing was not justifiable or excusable, evidence of this character tending to show that the appellant sought the combat is admissible as a part of the State's case. The whole subject matter was fully covered by the instructions given on the issue of self-defense and there can be no implication, from the admission of the evidence alone, that the trial court assumed a position unfavorable to the appellant upon that issue.

[12] Finally the appellant complains of the refusal to give one of his proposed instructions relating to the plea of self-defense. The proposed instruction was incomplete and confusing. The whole subject of the plea of self-defense was covered by elaborate instructions running from page 115 to page 119 of the transcript and the jury was told that "The burden is upon the prosecution to show that the homicide was not done in self-defense and therefore if you entertain a reasonable doubt as to whether the homicide was lawful or unlawful, if you entertain a reasonable doubt that the killing was done in self-defense you must find the defendant not guilty". The proposed instruction was refused because the subject matter was fully covered in these other instructions. There is no error here.

The judgment and order are affirmed.

STURTEVANT and SPENCE, JJ., concurred.

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46 Cal.App.2d 672

YOUTZ v. THOMPSON TIRE CO. et al.

Civ. 11454.

District Court of Appeal, First District,
Division 2, California.

Sept. 3, 1941.

Rehearing Denied Oct. 3, 1941.

Hearing Denied Oct. 30, 1941.

1. Negligence ⚷27

Where rim on inflated truck tire allegedly repaired by tire company's employee was not properly locked and truck driver in attempting to properly lock rim so that it could be placed on truck wheel struck a hammer held by plaintiff on end of rim, as result of which rim was violently thrown out of the tire causing injuries to plaintiff, in action for injuries against tire company and employee there was no presumption that defendants willfully and knowingly delivered to truck owner a defective tire which they must have known was not usable.

2. Negligence ⚷27

Where a manufacturer or seller of an article which is not inherently dangerous but which is rendered dangerous by a defect therein has knowledge of the defect and of the danger and fails to give notice or warning thereof to the purchaser or conceals the defect or represents the article to be safe and sound or is guilty of fraud or deceit, manufacturer is liable for an injury to a third person arising from the defect.

3. Negligence ⚷27

Where manufacturer or seller of an article which is not inherently dangerous but which is rendered dangerous by defect therein had no knowledge of defect or danger and made no false representations to conceal the defect, or where manufacturer or seller gave notice of defect to purchaser or the purchaser had knowledge of the defect before sustaining injury arising from the defect, manufacturer or seller is not liable for injuries arising from the defect.

4. Negligence ⚷27

Where rim on inflated truck tire allegedly repaired by tire company's repairman was not properly locked and truck driver, who had knowledge of defective and dangerous condition of tire, in attempting to properly lock rim so that it could be placed on wheel struck a hammer held on end of rim by plaintiff with another hammer as result of which rim was violently thrown from tire causing injuries to plaintiff and there was no evidence that tire company had knowledge of defective condition and knowingly delivered defective tire, tire company was not liable for injuries sustained by plaintiff.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Albert Youtz against the Thompson Tire Company and others for injuries sustained as result of alleged negligent repair of a tire by defendants. From an order granting defendants' motion for nonsuit, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Elmer P. Delany, of San Francisco, for appellant.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an appeal from an order granting defendants' motion for nonsuit in a personal injury action.

The evidence showed that in January, 1937, the Cleveland Wrecking Company made arrangements with defendant company whereby the latter would repair its truck tires and rims and would replace defective parts with new ones; subsequently all flat or damaged tires or rims were sent to defendant for repairs. Plaintiff was employed by the wrecking company as a timekeeper and toolman with headquarters in a small shack on what was known as "Terminal Site". On July 26, 1937, Walker, the maintenance man for the wrecking company, sent a flat tire to defendant company; the tire was one for an International Truck, nine by twenty-five in size and carrying 90 to 110 pounds of air per cubic inch. The rims on which such tires were mounted were constructed so that they collapsed into a smaller circumference to facilitate removal and replacement of the tires; the tire could be placed on the collapsed rim which was then forced back into a perfect circle by a spreading machine and locked into position by a small lock consisting of a steel bar which kept the rim from collapsing; there was also a solid metal hoop lying between the cut rim and the tire forming an edge to keep the tire on the inner main rim. The flat tire mentioned above was repaired by defendant Smith, an employee of the tire company, and sent back to the wrecking company at 2:30 P. M. on July 27, 1937. Mr. Walker saw defendants' employee roll the tire up to the door of one of the wrecking company's tool rooms located at 260 Spear Street. That afternoon Robl, a truck driver for the wrecking company, had a flat tire on his dump truck at about 5:15 P. M.; he went to the Spear Street tool room and placed a tire which he found there on the fender of his truck. Robl then proceeded over to plaintiff's tool house to procure some wrenches; he removed the flat tire from his truck but found that the spare would not go on; he noticed that the rim lock was not properly locked and that the two ends of the collapsible rim were not flush at the point of meeting. Plaintiff, who was standing nearby, stated that Robl would need a couple of hammers, and the two men walked into the tool house and each procured a hammer. Robl placed the tire and rim flat on the ground and plaintiff extended his arms over and across the tire placing his hammer on the ends of the rim which were not flush. Robl struck plaintiff's hammer with his larger one, and on the second or third blow the inner rim of the wheel collapsed suddenly causing the pressure from the inflated tire to violently throw out the freed steel hoop which struck both men. Plaintiff suffered compound comminuted fractures of both arms necessitating several operations. The result is a permanent limitation of motion in his arms. The court granted defendants' motion for nonsuit on the ground that Robl's action in hammering on the tire and in asking plaintiff's assistance was the proximate cause; plaintiff appeals from the judgment of nonsuit.

[1] Preliminarily the respondents urge in support of the judgment that there was no evidence that a contract for the repair of tires existed between the tire company and the wrecking company; no evidence that the tire repaired by Smith and delivered to the wrecking company was the one that caused the accident; no evidence that the tire repaired by Smith was negligently assembled, that the rim was defective or negligently attached; and no evidence that Smith or the respondent company had any knowledge of the alleged defect. For the purposes of this appeal we may assume that all these matters (except that relating to the respondents' knowledge of the defective condition of the tire) were proved, or that the jury might have drawn inferences favorable to the appellant. The appeal rests upon the single question of proximate cause, and we will confine the discussion to that issue with the observation that, though appellant contends that respondents had knowledge of the defective condition of the tire, he does not direct our attention to any portion of the record which tends to prove that fact. We know of no presumption that the respondents should be deemed to have wilfully and knowingly delivered a defective tire, which they must also have known was not usable. It is more reasonable to infer that the defect arose from the careless and negligent manner of assembling it, but with no facts of any kind tending to prove respondents' knowledge, there is no room for an inference that such knowledge was had.

[2, 3] The controlling factor is therefore the extent of liability of a manufacturer or repairman for defects in workmanship when the defect is known to the purchaser or third person and not known to the manufacturer. Assuming, therefore, that the same rule of liability applies to a repairman as applies to a manufacturer, it is appropriate at this time to state that rule, which is given with its exceptions and limitations in 45 Corpus Juris p. 892, as follows: "A manufacturer or seller of an article which is not inherently dangerous, but which is rendered dangerous by a defect therein, is liable for an injury to a third person arising from the defect, where he had knowledge of the defect and of the danger, and failed to give notice or warning thereof to the purchaser, or concealed the defect, or represented the article to be safe and sound, or, in other words, was guilty of fraud or deceit. Conversely, the manufacturer or seller is not liable where he had no knowledge of the defect or danger, and made no false representations, or where he gave notice of the defect to the purchaser, or the purchaser had knowledge thereof before the injury. * * *"

The authors of Ruling Case Law treat the question under the subject of "Sales" and state the principle as follows: (24 Ruling Case Law p. 510) "The ground of liability is the seller's superior knowledge of the dangerous characteristics of the article sold; and where it appears that the person injured was as fully cognizant of the peril as was the defendant seller or manufacturer there can be no recovery." California Jurisprudence treats it under the head of "Negligence". Thus we find the same principle of legal liability stated: (19 Cal.Jur. pp. 612, 613) "But liability attaches where one delivers an article, which he knows to be dangerous, to another person, who has no notice of its nature and qualities, and injury results to such other person through no negligence of his own. * * * Likewise, if one who buys from a tradesman knows the dangerous character of the substance purchased, he alone is liable to third persons for injuries subsequently incurred." In Restatement of the Law of Torts, Vol. II, p. 1047, treating specially the subject of chattels known to be dangerous for intended use, the following statement appears: "One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him or of facts which to his knowledge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved therein. It is not necessary for the supplier to inform those for whose use the chattel is supplied of a condition which a mere casual looking over will disclose unless the circumstances under which the chattel is supplied are such as to make it likely that even so casual an inspection will not be made." The qualification of the general rule of liability found in the passage quoted from Corpus Juris is well stated in Gutelius v. General Electric Co., 37 Cal.App.2d 455, 458, 99 P.2d 682, 683, from which we quote: "But the rule holding the manufacturer liable for negligence in construction is subject to the qualification that the user of the manufactured article must be without knowledge of its defective condition. In Bohlen's Studies in the Law of Torts at page 116, the author says: 'It seems quite clearly established that where the purchaser, actually knowing the defective nature of the article, puts it to a use for which it is unfit and unsafe, any injury received therefrom is due to his misuse and not to the act of him who created the defect.' The qualification of the general rule was recognized in Stultz v. Benson Lumber Co., 6 Cal.2d 688, 689, 694, 59 P.2d 100, 103, where Mr. Justice Shenk, speaking for the court, said: 'Furthermore the pertinent principles hereinbefore referred to are predicated on the knowledge or duty of awareness of the defect on the part of the manufacturer or seller and his failure to warn the purchaser of such defect, and the absence of similar knowledge or duty on the part of the purchaser. 45 Cor.Jur. p. 892, § 331, and cases cited.'" The authority most frequently cited to the point, because the opinion covers the rule in its various phases, is Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S.W. 1047, at pages 1049-1052, 37 L.R.A.,N.S., 560, Ann.Cas.1913B, 689, where the court said: "But in the other class of cases, where the article itself is not inherently or intrinsically dangerous to health or life, a third party, seeking to hold the maker liable for injuries suffered by him in the use of the article, must show that the maker knew it was unsafe and dangerous, and either concealed the defects, or represented that it was sound and safe. But even when this is shown, the maker will not be liable, if it is made to appear that the purchaser had knowledge of the defects at and before the third party was injured in using it. [Citing numerous cases.] * * * The rule seems to be that, where the purchaser of an article knows that it is unsafe or dangerous, and with knowledge of this fact invites or permits a third party to use it, and the third party is injured, he cannot maintain an action for tort against the maker. The reason for this is that the action against the maker proceeds on the theory, and is founded on the fact, that in selling the article he practiced fraud and deceit in concealing the defects that made its use unsafe and dangerous; and, of course, when it is admitted or proven that he has not practiced any concealment, and that the purchaser was well informed as to the defects, the bottom drops out of the case against the maker, and the liability is shifted to other shoulders. Another reason is that the maker's wrongful act in such a case is not the proximate cause of the injury, when it is shown that there was the intervention of a new agent, to wit, the purchaser, who, with knowledge of the danger used and permitted others to use the article."

[4] Appellant's knowledge of the defective condition of the tire comes from his own testimony. After observing Robl remove the flat tire from his truck and endeavor unsuccessfully to mount the repaired tire he saw Robl looking at the inside of the repaired tire where the rim was unlocked. He then stated to Robl that he "guessed he would have to have a couple of hammers, so we walked into the tool shop and I gave him one and took one myself". Appellant also put in evidence the testimony of Robl which disclosed in detail his full knowledge of the defective and dangerous condition of the tire as the agent or employee of the one to whom the chattel was supplied. This evidence brings the case squarely within the rule above noted, and the order granting the nonsuit was proper.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

46 Cal.App.2d 694

BATHKE v. RAHN.

Civ. 11731.

District Court of Appeal, First District,
Division 2, California.
Sept. 3, 1941.

1. Limitation of actions ⚿104(1)

Where the statute of limitations is sought to be tolled on ground that existence of a cause of action was fraudulently concealed from plaintiff, if it appears that plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, plaintiff will be deemed to have actual knowledge of those facts since the means of knowledge are equivalent to "knowledge".

See Words and Phrases, Permanent Edition, for all other definitions of "Knowledge".

2. Limitation of actions ⚿179(2)

An action for malpractice arising out of alleged unskillful performance of an operation of double vasectomy which physician allegedly represented would produce sterility in plaintiff was barred by limitation where pleaded facts disclosed that alleged falsity of representation must have been brought home to the plaintiff within the statutory period and there were no facts showing why plaintiff did not sooner pursue inquiries which existence of pleaded facts would naturally have suggested. Code Civ. Proc. § 340.

◆

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by George R. Bathke against Paul Rahn for malpractice. From a judgment for the defendant, plaintiff appeals and also purports to appeal from the order sustaining a demurrer to the complaint.

Purported appeal from order sustaining demurrer dismissed and judgment affirmed.

Philip O. Solon, of Oakland, for appellant.

Myron Harris, William H. Older, and John Jewett Earle, all of Oakland, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment for defendant entered after the sustaining of a demurrer to a second amended complaint on the ground that the action is barred by the statute of limitations, Code of Civil Procedure, section 340. There is also a purported appeal from the order sustaining the demurrer.

The complaint is against a physician for malpractice and alleges the negligent and unskillful performance of an operation of double vasectomy upon plaintiff by defendant.

The complaint alleges that plaintiff, a married man, consulted defendant to obtain medical and surgical information which would avoid any future pregnancy of the wife through the couple's marital relations, the wife having theretofore borne four children with such difficulty that she had suffered a complete physical and nervous breakdown; and that defendant had advised the double vasectomy upon plaintiff which he warranted would prevent any future pregnancy of the wife through her relations with plaintiff. It is further alleged that plaintiff upon the advice and solicitation of defendant submitted to such operation on or about October 15, 1938; and that the operation was so negligently and unskillfully performed that "plaintiff ever since the performance of said operation has suffered pain at the location of said operation and has suffered impairment in his health and physical activity and well being in this:

"That plaintiff ever since said operation * * * has suffered and does continue to suffer pain at the region of said operation and is informed and believes that he will permanently suffer a nervous disorder which is now suffered by plaintiff, that he rendered plaintiff unable to write in ordinary handwriting for that the said nervous disorder caused plaintiff's hands to so shake that he cannot execute ordinary handwriting."

To toll the statute of limitations plaintiff alleged, so far as here material, that immediately following the operation defendant made the following representations to plaintiff: "(i) That defendant has permanently, by the performance of said operation, rendered the plaintiff sterile; (j) * * * that neither the said operation or the effects thereof would in any manner injure or impair the ability of plaintiff to follow his occupation of traveling salesman"; and that plaintiff believed and relied upon all of such representations until October, 1939, when he discovered that his wife had again become pregnant.

Appellant cites and relies upon Kane v. Cook, 8 Cal. 449; Kimball v. Pacific Gas & Electric Co., 220 Cal. 203, 30 P.2d 39; Denson v. Pressey, 13 Cal.App.2d 472, 57 P.2d 522 and Petersen v. Beckwith, Cal. App., 289 P. 895. Those cases support the rule that where the existence of a cause of action is fraudulently concealed from plaintiff by false representations made by defendant for that purpose the commencement of the running of the statute of limitations is postponed until the plaintiff discovers that he has a cause of action. Were the allegations on that subject limited to the warranty of sterility, plaintiff's reliance thereon and the subsequent pregnancy of the wife, the complaint would seem to fall within the rule announced in those cases. But the complaint is not so limited.

It contains the other allegations quoted above of a representation that the operation would not in any manner injure or impair the ability of plaintiff to follow his occupation of traveling salesman and the constant contradiction of that representation "ever since the performance of said operation" by plaintiff's pain and nervous disorder causing his hands to shake so that he cannot execute ordinary handwriting.

[1] This brings into play the rule so frequently announced in this state that "as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts". Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 45 P. 809, 810.

[2] It was incumbent upon plaintiff having pleaded a representation and facts showing that the falsity of that representation must have been brought home to him within the statutory period to plead further facts, if any existed, showing why he did not sooner pursue the inquiries which the existence of the pleaded facts would naturally suggest. Lady Washington Consolidated Co. v. Woods, supra; Johnson v. Ehrgott, 1 Cal.2d 136, 34 P.2d 144; Myers v. Metropolitan Tr. Co., 22 Cal.App.2d 284, 70 P.2d 992; Haley v. Santa Fe Land Imp. Co., 5 Cal.App.2d 415, 42 P. 2d 1078.

The purported appeal from the order sustaining the demurrer is dismissed and the judgment appealed from is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

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46 Cal.App.2d 678

REMILLARD–DANDINI CO. v. DANDINI et al.

Civ. 11537.

District Court of Appeal, First District, Division 2, California.
Sept. 3, 1941.

1. Torts 🔑12

A third party's unjustifiable interference with contractual relations is actionable.

2. Torts 🔑12

One who, without a privilege to do so, induces or otherwise purposely causes a third person not to perform a contract with another, or enter into or continue a business relation with another is liable to the other for the harm caused thereby.

3. Torts 🔑26(1)

A complaint which charged defendants with acts tending to induce third parties to break their contractual obligations and relationships with plaintiff stated a cause of action in tort for damages thereby resulting.

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by the Remillard-Dandini Company against Lillian R. Dandini and others for damages for interference with plaintiff's business. From a judgment for defendants on the pleadings on ground that complaint did not state a cause of action, the plaintiff appeals.

Reversed.

George P. Tobin, of Oakland, for appellant.

Johnson & Harmon, of San Francisco, for respondents.

NOURSE, Presiding Justice.

The plaintiff sued for damages for interference with its business. Before a ruling was had on the defendants' demurrer it was stricken from the files and they filed their answer. They thereafter made a motion for judgment on the pleadings which was granted upon the sole ground that the complaint did not state a cause of action. The appeal is taken on the judgment roll and presents the single question whether a cause of action in tort is stated where plaintiff sues for the defendants' "intentional interference with contractual rights and relationships of plaintiff". Before consideration of the appeal it should be stated that the plaintiff does not defend any of the other allegations of damage and that the ruling of the trial court as to those allegations was sound. For this reason they should be eliminated from the complaint, by amendment or motion, before the cause goes to trial upon the merits.

The pertinent allegations of damage, which we hold to be sufficient, relate to the acts charged to the defendants tending to induce third parties to break their contractual obligations and relationships with the plaintiff. These are in part that the defendant Lillian R. Dandini "called upon a number of the creditors of plaintiff and sought to and did induce such creditors of plaintiff to break the contractual relationships which existed between such creditors and plaintiff, all of which was done for the purpose and with the intention of bringing about the destruction and failure of plaintiff as a business and going concern". Also "That by reason of the foregoing acts, statements and conduct of defendants, plaintiff has sustained damage in the following manner and amounts: That by reason of the interference by defendants in the relationships between plaintiff and its creditors, materials, supplies and services which had been contracted for by plaintiff were not delivered or supplied by such creditors and suppliers in accordance with the terms which had originally been arranged between such creditors and suppliers and plaintiff, and as a direct result of which plaintiff's plants were damaged and the operation of plaintiff's plants, and of its trucks, were curtailed, as a direct result of which plaintiff has sustained damage in the sum of not less than one thousand ninety-five ($1,095) dollars; that the credit theretofore extended to plaintiff was curtailed and creditors of plaintiff demanded immediate payment of their accounts and refused to furnish further or other materials, supplies or services on credit as they had done previously, and plaintiff was required to pay cash therefor."

[1, 2] That a third party's unjustifiable interference with contractual relations is actionable is now the settled law in this state. This court so held in California Grape Control Board v. California Produce Corporation, 4 Cal.App.2d 242, 40 P.2d 846. The holding was approved in Imperial Ice Company v. Rossier, 18 Cal.2d 33, 112 P.2d 631. Both of these cases involved the question whether the plaintiff had a cause of action for injunctive relief where monetary damages would not afford an adequate remedy. Here the appellant sues in tort for damages, and no suggestion is made that the damage is not provable, or that the damages would not be adequate. But it would seem to follow necessarily that if the acts complained of may be restrained because damage would result, recovery may likewise be had for the injuries suffered. The legal duty of the party to refrain can be no greater than his legal liability for the acts already accomplished. This appears to be the view expressed in Vol. 4 Restatement of the Law of Torts, section 766, where it is stated: "Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby." The exception in section 698 is not pertinent.

[3] Since the portions of the complaint relating to alleged interference with appellant's contractual rights and relationships were sufficient to raise the issue of respondents' liability for the acts complained of it must follow that some cause of action was pleaded and the cause should therefore go to trial upon the merits of that issue.

The judgment is reversed.

STURTEVANT and SPENCE, JJ., concurred.

BRUNTON et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY. *

Civ. 13032.

District Court of Appeal, Second District, Division 1, California.

Aug. 30, 1941.

Hearing Granted Oct. 27, 1941.

1. Injunction 🔑223(1)

Before officers of municipality could be adjudged guilty of contempt for violation of order enjoining them from enforcing provisions of certain ordinances by adopting and enforcing new ordinances, it was required to affirmatively appear that officers' action directly violated express terms of the injunction.

2. Contempt 🔑54(4), 63(1), 67

In proceedings for constructive contempts, the affidavit constitutes the complaint, and, unless it contains a statement of facts which shows that a contempt has been committed, the court is without jurisdiction to proceed in the matter, and any judgment of contempt based thereon is void, and will be so declared upon certiorari.

3. Certiorari 🔑64(1), 68

Although a "writ of certiorari" is not a "writ of error", it nevertheless extends to whole of the record of the court below, and even to the evidence itself where necessary to determine jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Writ of Certiorari" and "Writ of Error".

4. Contempt 🔑67

In certiorari proceeding to review jurisdiction of superior court in contempt proceedings, the charge, the evidence, the findings and the judgment were all to be strictly construed in favor of accused, and no intendments or presumptions could be indulged in aid of their sufficiency.

5. Contempt 🔑63(3)

If record of contempt proceedings fails to show affirmatively upon its face the existence of all necessary facts upon which jurisdiction depended, order finding accused guilty of contempt must be annulled.

6. Injunction 🔑230(2, 4)

Where order in injunction suit enjoined municipal officers from enforcing ordinances which regulated oil drilling operations, an affidavit charging officers with constructive contempt as result of adopting and enforcing new ordinances regulating such operations failed to show that officers' acts in adopting and enforcing new ordinances violated injunction order, and hence judgment of contempt based thereon was void.

Proceeding in certiorari by William J. Brunton and others to review a judgment of the Superior Court of Los Angeles County, Emmet H. Wilson, Judge, adjudging petitioners guilty of contempt.

Judgment of contempt annulled.

For prior opinion, see 114 P.2d 45.

Irving M. Smith, City Atty., and Roy J. Brown and Frank C. Charvat, Deputy City Attys., all of Long Beach, for petitioners.

J. H. O'Connor, Co. Counsel, W. B. McKesson, Deputy Co. Counsel, and George H. Emerson, all of Los Angeles, for respondent.

YORK, Presiding Justice.

By this proceeding petitioners seek to review the judgment of the respondent court holding them in contempt for violating the terms of a permanent injunction issued in the cause of Continental Corporation, a corporation, and the Los Angeles Flood Control District, a body politic and corporate v. The City of Long Beach and certain named officials thereof.

Said injunction restrained petitioners from enforcing against the plaintiffs in the original action certain city ordinances which regulated oil drilling operations, and provided for the issuance of permits therefor and the payment of permit fees.

In said injunction suit it was found by the trial court under date of October 6, 1939, as follows:

"V. That plaintiff Los Angeles county Flood Control District and its agent, the plaintiff corporation, are entitled to have issued any permits required by ordinances numbers C-1549 as amended by C-1739, H. D. number 22 as amended by H. D. number 38, and C-927 as amended by C-1383 and C-1742, without the payment of any of the fees prescribed by said ordinances."

The affidavit in re contempt made by Robert V. New, as vice president of Continental Corporation, averred that on June

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* Subsequent opinion 124 P.2d 831.

28, 1940, while said permanent injunction was in full force and effect, the City Council of the City of Long Beach passed ordinance No. C-1814 seeking to amend ordinance No. C-1549, and also passed ordinance No. C-1815; that on July 5, 1940, the Board of Harbor Commissioners of said city passed ordinance H. D. No. 55, which by its terms sought to amend ordinance H. D. No. 22. In other words, the City Council enacted new ordinances to take the place of those ordinances the enforcement of which was restrained by said injunction.

It appears that on January 15, 1941, said New on behalf of the Continental Corporation and, as agent for the Los Angeles County Flood Control District, presented to the Board of Harbor Commissioners, and on January 25, 1941, presented to the city clerk of the city of Long Beach, applications for a permit for an oil well, neither of which was accompanied by payment of fees.

Said affidavit in re contempt averred on information and belief that the city attorney of the city of Long Beach on January 25, 1941, and ever since, with intent to disobey the injunction, advised the members of the city council, the city clerk and the members of the board of harbor commissioners not to issue the permits so applied for without the payment of fees required by ordinance No. C-1549 (as amended by No. C-1814), by ordinance No. H. D. 22 (as amended by H. D. 55), or by ordinance No. C-1815, and that said members and said clerk have ever since refused to issue a permit for said oil well without the payment of such fees.

When the order to show cause in re contempt came on for hearing, petitioners were adjudged guilty, whereupon they presented to this court their petition in certiorari to review such action of respondent court. That petition was denied. Brunton v. Superior Court, —— Cal.App.2d ——, 114 P.2d 45. The matter is again before this court upon the granting of petitioners' application for a rehearing of said cause.

Petitioners seek determination of the question "as to whether a municipal corporation and its officers, enjoined from enforcing the provisions of certain ordinances, committed a violation of the injunction order by the adoption and enforcement of new ordinances differing substantially from the former ordinances and believed in good faith to omit the objectionable provisions in the former". They urge in connection with this question that the injunction restrains them "from 'enforcing, seeking or threatening to enforce * * * the provisions relating to the payment of fees' in certain specified ordinances. It does not purport to enjoin the City of Long Beach or any of the officers thereof from collecting from the plaintiffs in said action fees that may be prescribed in any other ordinances than those specifically mentioned, whether such ordinances were then in existence or thereafter adopted".

Respondent contends that the injunction order enjoined the enforcement of the fee provisions of certain existing ordinances, and that "the contempt of the Council and the Harbor Board constituted the attempt to provide the machinery by which the executive branch of the city government was compelled to exact the fees which the court had enjoined them from collecting".

From a columnar analysis of the ordinances considered by the court on the contempt proceedings which has been submitted by petitioners at the request of this court upon reargument of the cause, it appears that the injunction enjoined the enforcement of the provisions relating to the payment of fees contained in ordinance No. C-1549 (as amended by No. C-1739) and ordinance H. D. No. 22 (as amended by H. D. No. 38), which will hereinafter be referred to as the "old ordinances". Ordinances C-1549 and C-1739 adopted by the city council were identical with ordinances H. D. 22 and H. D. 38 adopted by the board of habor commissioners, the purpose of such dual legislation being to avoid any question as to the power of either body to adopt such measures with respect to the harbor district.

The affidavit in re contempt in the contempt proceeding does not charge an attempt by petitioners to enforce the fee provisions of the "old ordinances", but charges as violations of the injunction order (a) the acts of the members of the council in adopting a new ordinance C-1815 and in enacting an amendment to C-1549, i. e., C-1814; (b) the act of the members of the board of harbor commissioners in adopting an amendment to H. D. 22, i. e., H. D. 55; (c) the act of the city clerk in enforcing the new ordinances; (d) the acts of the city attorney and his deputy in advising that the enforcement of the new ordinances was legally proper.

The said analysis indicates that the "old ordinances" were (1) effective only in the harbor district of Long Beach; (2) required the fees provided thereby should be paid to the board of harbor commissioners and become part of the harbor revenue fund, a fund created by the charter; (3) and provided that such fees could be expended only by such board exclusively for harbor purposes, and could not be used to furnish service and regulation for the benefit of permittees.

The "new ordinances" (1) required payment for permits for oil operations anywhere in the city of Long Beach; (2) the fees provided thereby were payable to the city clerk and became part of the general fund of city; (3) since the general funds of city enable it to furnish services and regulation, i. e., police and fire protection, street maintenance, building inspection, health and sanitary facilities, etc., the fees paid under "new ordinances" are therefore used directly to furnish special services and regulations for benefit of permittees.

[1] Before petitioners can be adjudged guilty of contempt, it must affirmatively appear that the legislative action of the members of the council and board of harbor commissioners in enacting amendments and in adopting new ordinances directly violated the express terms of the injunction.

[2] It is established law that in proceedings for constructive contempts of court, that is, contempts committed without the presence of the court, "the affidavit which is made the basis for the proceeding should show upon its face the acts which constitute a contempt. The affidavit constitutes the complaint, and, unless it contains a statement of facts which show that a contempt has been committed, the court is without jurisdiction to proceed in the matter, and any judgment of contempt based thereon is void, and will be so declared upon certiorari". Frowley v. Superior Court, 158 Cal. 220, 222, 110 P. 817, 818, and cases there cited. See, also, Mattos v. Superior Court, 30 Cal.App.2d 641, 646, 86 P.2d 1056.

[3-5] "While the writ of certiorari is not a writ of error, it nevertheless extends to the whole of the record of the court below, and even to the evidence itself where necessary to determine jurisdiction. Schwarz v. Superior Court [111 Cal. 106, 43 P. 580]; McClatchy v. Superior Court [119 Cal. 413, 51 P. 696, 39 L.R.A. 691]; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35. In reviewing this proceeding, the charge, the evidence, the findings and the judgment are all to be strictly construed in favor of the accused (Schwarz v. Superior Court, supra), and no intendments or presumptions can be indulged in aid of their sufficiency (Frowley v. Superior Court, 158 Cal. 220, 110 P. 817). If the record of the proceedings, reviewed in the light of the foregoing rules, fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled. Frowley v. Superior Court [supra], In re McCarty [154 Cal. 534, 98 P. 540], and other cases above cited." Hotaling v. Superior Court, 191 Cal. 501, 506, 217 P. 73, 75, 29 A.L.R. 127.

The order in the injunction suit enjoined the enforcement of the ordinances which regulated oil drilling operations, but it did not prohibit the city of Long Beach and its duly constituted officers from adopting new legislation which might have as its object a different system of regulating such operations within its boundaries, including the issuance of permits and the payment of fees therefor.

[6] The affidavit in re contempt directly charged petitioners with violations of the injunction by adopting new ordinances, enacting amendments to existing ordinances, and by enforcing and advising the enforcement thereof. These acts were not within the purview of the injunction order, and the judgment of contempt based thereon was void.

The judgment of contempt is annulled.

DORAN and WHITE, JJ., concurred.

46 Cal.App.2d 665

BLAIR v. SECURITY TRUST & SAVINGS BANK OF SAN DIEGO et al.

Civ. 2717.

District Court of Appeal, Fourth District, California.

Sept. 2, 1941.

Hearing Denied Oct. 30, 1941.

1. Brokers 🔑43(1)

An agreement authorizing or employing an agent to sell real estate for a compensation, which agreement was not in writing, was invalid under statute of frauds. Civ. Code, § 1624.

2. Brokers 🔑3

It is unlawful under statute for any person to engage in the business or assume to act as a real estate broker or salesman without having obtained a proper license therefor. St.1919, p. 1252.

3. Brokers 🔑8(3)

Evidence established that oral agreement, if any, between plaintiff, who was not licensed as real estate broker or salesman, and bank, which held trust deed and chattel mortgage on all the property of private military school, constituted an agreement for employment of plaintiff to sell real estate belonging to private school subject to trust deed, and that the agreement, if any, was invalid so that recovery of compensation therein provided for was barred under statute of frauds, requiring such agreement to be in writing, and statute making it unlawful to act as real estate broker or salesman without proper license. Civ.Code, § 1624; St.1919, p. 1252.

4. Brokers 🔑8(3)

Evidence that bank, which held trust deed and chattel mortgage on property of private military school, had orally agreed to pay plaintiff $10,000 if he could get bank out of school business, was insufficient to establish that agreement was merely for employment of plaintiff to secure the refinancing of school's indebtedness to the bank, so that plaintiff's recovery of agreed upon compensation would not be barred by statute of frauds and statute making it unlawful to act as real estate broker or salesman without proper license. Civ.Code, § 1624; St.1919, p. 1252.

5. Brokers 🔑42, 43(1)

Alleged oral agreement whereby bank, which held trust deed and chattel mortgage on all property of private military school and had a representative on board of directors of corporation operating school, agreed to pay third person $10,000 for services, which third person contended involved only getting the bank out of the school business, did not refer merely to removal of bank's representative from directorate of school but constituted, as was understood by both parties to agreement, an agreement for employment of third person to sell real estate, as respects applicability of statute of frauds and statute requiring one who acts as real estate broker or salesman to procure a proper license therefor. Civ.Code, § 1624; St.1919, p. 1252.

6. Contracts 🔑280(1)

Where bank, which held trust deed and chattel mortgage on all property of private school and had a representative on board of directors of corporation operating school, employed plaintiff to render certain services for $10,000, even if agreement was, as contended by plaintiff, that he should receive $10,000 if he could get bank out of school business, a sale due to plaintiff's efforts of school property, resulting in bank's receiving a new trust deed securing repayment of larger amount than had previously been loaned on security of school property, did not constitute performance of agreement entitling plaintiff to compensation thereunder.

7. Trial 🔑159

Where plaintiff failed to sustain burden of proof resting upon him, motion for nonsuit was properly granted.

8. Limitation of actions 🔑46(7)

Plaintiff's action on claim against bank under alleged oral agreement to compensate plaintiff for sale of property of private school on which bank held trust deed and chattel mortgage was barred by two-year statute of limitations, where plaintiff's action was not commenced until more than two years after sale of property to purchaser secured by plaintiff's efforts was consummated and purchaser took possession thereof, time when bank recorded new trust deed given by purchaser and secured policy of title insurance being immaterial as respects accrual of plaintiff's cause of action.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by A. G. Blair against the Security Trust & Savings Bank of San Diego and others, to recover for services alleged to have been performed for the named defendant. A motion for nonsuit was granted, and from the ensuing judgment in favor of defendants, plaintiff appeals.

Judgment affirmed.

J. A. Donnelley and B. Kenneth Goodman, both of San Diego, for appellant.

Lindley & Higgins and George A. Lazar, Jr., all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to recover $10,000 for services alleged to have been performed for the defendant bank. A motion for a nonsuit was granted and the plaintiff has appealed from the ensuing judgment. The material facts center around the sale of the land, buildings and equipment of the San Diego Army & Navy Academy, a private military school which for many years had been operated in San Diego. The property consisted of 40 acres of land with extensive buildings, and certain school equipment. The school was owned by a corporation, practically all of the stock of which was owned by two brothers named Davis, who formerly operated the school. The bank held a trust deed and chattel mortgage covering all of the school property, securing a debt of about $111,000, and there were unsecured creditors with claims totaling about $130,000.

Prior to the time here in question financial difficulties had led to the placing of representatives of the creditors upon the board of directors of this corporation. Of the eight directors, one was a representative of the bank, five were representatives of the unsecured creditors, and the other two were the Davis brothers. While the affairs of school were in this condition the Davis brothers went a few miles away and started a new military school in a building owned by the appellant, which had formerly been used as a hotel. Shortly thereafter, the appellant called on the president of the respondent bank saying that he wanted to get the facts in connection with the bank's interest in the school.

The parties differ somewhat as to what was said at that first conversation. The president of the bank testified that Blair made an inquiry about the Davises and then said he felt he could sell the school to "Cal. Tech.", and that he told Blair that if he could sell it for cash to the amount of the indebtedness they would pay him $10,000. The appellant testified that he told the president that he had come to see him about the school; that the president remarked that he wished they were out of the school business and then said: "Mr. Blair, if you can get us out of the school business it will be worth $10,000, or we will pay you $10,000 if you will get us out of the school business"; that he asked the president "how much money will it take to get you out of the school business"; that the president replied that he thought $125,000 would do it; and that he told the president that in order to get them out of their school troubles he would have to find a buyer for the school.

Shortly after this conversation the appellant procured photographs of the school buildings for the purpose of showing them to prospects whom he thought he might interest in taking over the school. He testified that he endeavored to present the matter to officials of "Cal. Tech." and of Pomona College and that he then contacted John E. Brown, who had a school in Arkansas and desired to acquire one in California. Brown inquired what the school could be bought for and the respondent told him it would take in the neighborhood of $125,000, or maybe less. At the respondent's suggestion Brown came to San Diego and took the matter up with the officers of the bank. Negotiations for the sale of the school then continued over several months. The appellant was particularly active in negotiations with the unsecured creditors. On the first of February, 1937, the president of the bank told the appellant that "Mr. Brown doesn't want to buy the property, he wrote me that he was through". The appellant then told the president that he had talked to Brown on the previous day and that he "was of the impression that if a definite deal could be made, Mr. Brown would take the place". The appellant seems to have dropped out of the negotiations at that point and he testified that he did not know until afterward when or where the deal was closed. The negotiations continued, however, and the school and its properties were sold to a corporation controlled by Brown, and the respondent bank took back a trust deed executed by that corporation securing a note for $114,000. Apparently, some arrangement was made with the unsecured creditors of the former school and the Davises were given the right to use the name "San Diego Army & Navy Academy" in connection with the new school they had started. The deal was closed on March 4, 1937, at which time the school property was all conveyed to Brown's corporation, the new trust deed for $114,000 was delivered to the bank, and Brown took possession of the property.

While on the witness stand the appellant was asked what the "deal" to which he had frequently referred was and whether it was not "the sale of the San Diego Army & Navy Academy, the land and buildings and the whole thing to John E. Brown Colleges", to which he replied: "I understood so". He further testified:

"Q. And the final result of all of it, according to your contention is that it resulted in the sale of the school to the John E. Brown College. A. Yes sir.

"Q. And when that sale was completed it is your contention that you then had earned the ten thousand dollars? A. Yes sir."

On May 7, 1937, the appellant wrote a letter to the president of the respondent bank, a part of which reads:

"For several days I have been much disturbed whenever I think of the great amount of time and money expended to bring about the sale of the S. D. Army & Navy Academy for your institution.

"When I first discussed the selling of the Academy property with you, in your second floor office, you were very anxious for me to find you a customer and you frankly stated you would pay me Ten Thousand Dollars if I found a buyer.

"As my previous experiences with bank officials has always been entirely satisfactory I did not ask you to put your offer in writing, which I now regret exceedingly. I believed you implicitly and I cannot bring myself now to believe that you desire to avoid paying me anything.

"The benefit to the bank by my securing a good buyer for the school is one that will be lasting. The community will also be benefited by the new school; therefore, it does not seem reasonable that you as president of the bank, who is so greatly benefited, should want to ignore your promise. It would seem only fitting that you should want to show your appreciation in a substantial way.

"Many times when Mr. Brown lost interest in purchasing the Academy due to changing proposals, it was through my diplomacy that he was brought back into the deal, and the sale consumated."

The letter further suggested that it was only fair that the bank should be willing to pay for this service and stated that a copy was being sent to all of the directors of the bank in the hope that they "will be more inclined to favor justice and a square deal".

It appears without conflict that the appellant went to the bank in the first place because he was interested in the Davises and in the success of their new school, and he told the banker that it would improve his own position if a deal could be made whereby the Davises could get the use of the name "San Diego Army & Navy Academy". The appellant testified that he had rented his building to the new school started by the Davises, the rental to be a percentage of the gross income. During the negotiations he told one of the witnesses that his interest in the deal was to get a tenant for his property and told several other witnesses that he was getting nothing out of the deal "except a good turn for everybody".

[1,2] This action was filed on March 20, 1939, more than two years after this deal was consummated. It is conceded that the appellant was not licensed as a real estate broker or salesman and that there was no written agreement or memorandum between him and the respondents. An agreement authorizing or employing an agent to sell real estate for a compensation which is not in writing is invalid. Civ.Code, § 1624. It is unlawful for any person to engage in the business or assume to act as a real estate broker or salesman without having the proper license. Deering's General Laws, Act 112, § 1, St.1919, p. 1252.

[3] While the appellant now contends that his activities in this connection did not consist in selling real estate, except incidentally, it clearly appears from the evidence that from the beginning and throughout that was the only thing he attempted to do and that he fully understood that this was what he was doing. The main thing that was done and the only thing that made the deal at all possible was the selling of real property, and there was incidentally involved a small amount of personal property consisting of school equipment. Aside from the other evidence, the appellant's letter of May 7, 1937, discloses that he understood from the beginning that he was to find a buyer for the school property, that he claimed to have

done so, that he was asking some compensation for having found a buyer, and that he recognized that he was not legally entitled to such compensation. It is significant that he based his request for compensation upon that ground, and that in this letter he does not refer to or claim the existence of any agreement or understanding other than in relation to his finding a buyer and selling the property. In effect, he asks the respondents to voluntarily give him something for his services, although he had no written contract, on the ground that they were of value to the bank. We think it sufficiently appears from the evidence that the agreement between these parties, if one there was, was invalid and that a recovery thereon is barred under the statutes above referred to.

The appellant now contends, however, that the oral agreement in question was not one for the sale of real property, but was an agreement "whereby the obligation owing the defendant bank by the San Diego Army & Navy Academy was to be refinanced through the efforts of the plaintiff, and whereby the bank would be relieved from the burden of sharing in the operation of the San Diego Army & Navy Academy". It is contended that the appellant merely contracted to refinance the school's indebtedness to the bank and to get the bank "out of the school business", and that "the record clearly shows that he was to receive a fixed sum on the refinancing of the bank's obligation, however that might be brought about".

[4] There is no evidence in the record that anything was said at the time the agreement was supposed to have been made about refinancing the school's debt to the bank and we can find no evidence that anything was ever later said about any such refinancing, in so far as the appellant is concerned. Moreover, when the deal was closed the respondent bank held a new trust deed on the same property for a larger amount than that secured by the old trust deed. It is hardly reasonable to suppose that the respondents would agree to pay $10,000 for such a "refinancing" which they could doubtless have secured at any time. The only thing that was said, according to the appellant's testimony, was that he was told that if he could get them out of the school business they would pay him $10,000.

[5-7] It clearly appears that what was meant by getting them "out of the school business" was to get back for them the money which had been loaned in connection with this school, amounting to $111,000 and some interest. The expression thus used did not, as appellant argues, refer to the removal of the bank's representative from the directorate of the school. The bank could have withdrawn this representative at any time without paying anyone for the privilege. It not only clearly appears what the bank official understood by getting it out of the school business, but it clearly appears that the appellant understood the same thing. When the proposition was made to him he asked how much money it would take to do that and was told that it would take about $125,000. He then told the president that the only way to accomplish this purpose was for him to find a buyer for the school. When the deal was finally closed the bank still had $114,000 tied up in this school business and the only possible advantage to the bank was that because of the sale of the property the new debtor might prove to be more satisfactory. If the agreement was as now contended for by the appellant, and not one for the sale of property, the appellant did not comply with that agreement and did not get the bank out of the school business in the sense that both parties understood and intended. The appellant failed to sustain the burden of proof resting upon him and the motion for nonsuit was properly granted.

[8] A further consideration is that in any event the action was barred by the statute of limitations. If we assume that the appellant complied with his present interpretation of the contract and by his services got the respondent bank out of the school business his services were all performed and his compensation earned when the deal was consummated on March 4, 1937, which was more than two years before this action was begun. The appellant argues that the deal was not concluded until March 22, 1937, because the respondent bank did not record its new trust deed and secure a policy of title insurance until that date. There was no escrow, the papers were passed, possession was given on March 4, 1937, and when the respondent bank chose to record its trust deed, and whether or not it ever secured a policy of title insurance, is not material. So far as the record shows, the appellant made no claim that any agreement was involved, other than for the sale of this property,

until more than two years after the transaction in which he claims to have performed services for the respondents was completed and closed

The president of the bank testified that in their first conversation when he told the appellant it would be worth $10,000 to them if he could sell the school for cash in the amount of the indebtedness the appellant replied that he did not have a broker's license, and that he could not work in that way or accept a commission. This was not denied by the appellant and his subsequent statements and conduct, to which we have referred, indicate that his real interest in the transaction was to release the Davises from their old debt and secure the name of the old school for the new one which had been started in the building he owned, and suggest that his activities were carried on with that object in view rather than in the performance of any agreement with the respondents.

The judgment is affirmed.

GRIFFIN and MARKS, JJ., concurred.

MOSS v. MOSS.

Civ. 11684.

District Court of Appeal, First District, Division 2, California.

Sept. 3, 1941.

Hearing Granted Oct. 30, 1941.

1. Pleading 🔑35, 310

In husband's suit for declaratory relief with respect to written contract entered into by husband and wife prior to divorce, where pleaded controversy rested wholly on husband's conclusions of purport and legal effect of contract and divorce proceedings, court in hearing demurrer examined written contract and record of divorce proceedings, which were made part of complaint as exhibits, and treated pleader's conclusions as "surplusage".

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

2. Divorce 🔑172

In husband's suit for declaratory relief with respect to contract entered into by husband and wife prior to divorce, where divorce decree, made a part of complaint as exhibit, recited that wife contrary to allegations of complaint had established valid ground for divorce upon a hearing at which both parties appeared and waived findings of fact, such recital in divorce decree was conclusive on question whether wife had valid ground for divorce.

3. Action 🔑6

In husband's suit for declaratory relief with respect to written contract entered into by husband and wife prior to divorce, where examination of written contract and divorce decree made part of complaint as exhibits disclosed that contrary to allegations of complaint divorce was not sole consideration for contract but that parties had been living apart and wife had commenced action for separate maintenance, that contract was executed in order to determine respective property rights of parties, that wife thereby waived certain rights against husband, and that wife, rather than husband as alleged, had valid ground for divorce, a case of "actual controversy" relating to legal rights and duties of respective parties requisite to maintenance of action for declaratory relief was not stated. Code Civ. Proc. § 1060.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Controversy".

4. Husband and wife 🔑278(1)

Written contract, providing for settlement of respective property rights between husband and wife and for support of wife until remarriage, which was executed after husband and wife had separated and were living apart and wife had commenced proceedings for separate maintenance, was not promotive of divorce but was valid. Civ. Code, § 159.

5. Action 🔑6

Where husband could not attack validity of contract, providing for settlement of property rights between husband and wife and for support of wife until remarriage, which contract was entered into prior to divorce procured by wife, without conceding husband's own fraud in procurement of such contract, husband was not entitled to declaratory relief to the effect that contract was illegal, void and against public policy. Civ. Code, §§ 3515, 3524.

6. Contracts 🔑138(1)

Where parties are in "pari delicto", courts will refuse aid to either party, and if plaintiff cannot establish his case without showing that he has broken the law, court will not assist him. Civ.Code, §§ 3515, 3524.

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Delicto".

7. Action 🔑6

State's interest in preserving the marital relation did not preclude application of principle that where plaintiff cannot establish case without showing that he has broken the law, court will not assist him, to defeat husband's right to declaratory judgment with respect to invalidity of written contract entered into by husband and wife prior to procurement of divorce by wife, where husband's action was not to set aside divorce decree and allegations of complaint did not sustain an attack upon validity of such decree. Civ.Code, §§ 158, 2235, 3515, 3524.

8. Action 🔑6

Where husband in action for declaratory relief regarding validity of contract, settling property rights between husband and wife, which was entered into prior to procurement of divorce by wife, alleged that at time of execution of contract husband had good grounds for divorce but that wife had no legal grounds therefor, it was presumed that husband obtained an advantage from divorce and that, because of confidential relation between husband and wife, contract was secured by husband through undue influence and fraud. Civ.Code, §§ 158, 2235.

9. Divorce 🔑152

Where divorce proceedings were instituted by wife through the fraud of the husband, husband instigated a fraud upon the court which "estopped" him from attacking divorce decree.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

10. Appeal and error 🔑917(1)

Where demurrer to complaint was sustained without leave to amend, upon appeal from judgment in favor of defendant allegations of complaint must be taken as true.

11. Action 🔑6

Under statute, authorizing court to refuse declaratory relief when such relief is deemed not necessary or proper, court properly refused to declare illegal contract entered into between husband and wife prior to procurement of divorce by wife, where divorce decree was unassailable by either party, wife's contractual obligations to make conveyances to husband were presumed to have been fulfilled, wife could not be restored to status quo of marital relation as of date of divorce, and husband's delay of nine years in commencing action constituted such "laches" as would bar the attack in any proceeding where principles of equity were invoked. Code Civ.Proc. §§ 1061, 1963, subds. 20, 28.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

12. Action 🔑6

Under statute, authorizing court to refuse declaratory relief in any case where declaration or determination is not necessary or proper at the time under all the circumstances, court properly denied relief where declaration would have been unconscionable or so inequitable as to result in a miscarriage of justice, since proceedings for declaratory relief are, at least, so closely akin to equity that certain equitable principles cannot be overlooked. Code Civ.Proc. § 1061.

13. Action 🔑6

Under statute, providing that court might refuse declaratory relief in any case where declaration or determination was not necessary or proper at the time under all the circumstances, trial court could deny declaratory relief upon a demurrer to complaint and without trial of the facts, where it appeared that declaration would be unconscionable or so inequitable as to result in a miscarriage of justice. Code Civ.Proc. § 1061.

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Suit by Monroe L. Moss against Emily M. Moss seeking a declaration that contract executed by plaintiff and defendant and modification thereof were illegal, void and against public policy. A demurrer to complaint was sustained without leave to amend, and from a judgment in favor of defendant, plaintiff appeals.

Judgment affirmed.

Livingston & Livingston, of San Francisco, for appellant.

Manson & Allen and Letitia R. Farber, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for declaratory relief seeking a declaration that a contract executed by plaintiff and defendant on March 21, 1928, and a modification thereof dated October 11, 1932, were "illegal, void, and against public policy". A demurrer to the complaint was sustained without leave to amend, and plaintiff's application for leave to file a proposed amended complaint was denied. A judgment for the defendant followed.

The complaint alleged the facts of the marriage of the parties on October 8, 1919, their separation on December 24, 1927, the execution of the contract on March 21, 1928, the entry of an interlocutory decree of divorce upon the wife's complaint on March 31, 1928, and the entry of the final decree on April 18, 1929. Interspersed with these allegations of facts are found conclusions of the pleader that the husband had ground for divorce against the wife, but that she had no ground for divorce against him; that he stated to the wife that he was willing that she obtain a divorce, and that she agreed to do so; that he "agreed at that time that in consideration of such divorce and for no other consideration whatsoever, he would enter into a property settlement agreement with defendant to settle and determine their respective property rights and to provide for defendant's support and maintenance until she should remarry". It is then alleged that on October 11, 1932, the parties "for a valuable consideration" executed an agreement modifying the agreement of 1928 and obligating the plaintiff to pay to defendant the sum of $200 a month instead of the sum of $250 stipulated to be paid under the original contract. The agreement of 1928, the complaint for divorce, the interlocutory and final decrees are attached to and made a part of the complaint. The agreement of 1932 is not. From the allegations of the complaint it appears that the unexecuted portions of the first agreement were all superseded by the latter so long as the plaintiff continued to abide by its terms. There are no allegations disclosing whether other terms of the agreement which were required to be executed long since have been executed or not.

[1] Appellant's pleaded "controversy" rests wholly upon his own erroneous conclusions of the purport and legal effect of the written agreement and of the divorce proceedings. But as these are all made a part of the complaint the "court in hearing the demurrer will examine the exhibits and treat the pleader's conclusions as surplusage". National Pavements Corp. v. Hutchinson Co., 132 Cal.App. 235, 238, 22 P.2d 534, 535, citing Peak v. Republic Truck Sales Corp., 194 Cal. 782, 790, 230 P. 948, and Bashford v. Levy & Zentner Co., 123 Cal.App. 204, 210, 11 P.2d 51.

[2] Turning to the exhibits, we find that, contrary to the pleading, the wife had a valid ground for divorce and the husband had none, because the decree of divorce recites that the wife had established such grounds upon a hearing at which both parties appeared and waived findings of fact. That decree is of course final and conclusive. Borg v. Borg, 25 Cal.App.2d 25, 29, 76 P.2d 218; McMickens v. McMickens, 220 Cal. 731, 734, 32 P.2d 597. Turning to the exhibit of the agreement, it appears that, contrary to the pleading that the divorce was its sole consideration, the parties had been separated and had been living apart, that the wife had commenced an action for separate maintenance, and that the agreement was executed because of "The desire of the parties hereto to settle and determine their respective property rights and the right of said party of the first part to receive support and maintenance from said party of the second part". The husband thereupon agreed to convey to the wife as her separate property described real and personal property, and the wife agreed to convey described real and personal property to the husband. As further consideration the wife surrendered all claims existing or arising in the future against the husband or against his estate, family allowance, homestead, or right of administration. The wife further waived the right, "in the event that either of the parties hereto" should apply for a divorce, to make any claim against the husband for support, alimony, counsel fees, or costs.

[3] The demand for declaratory relief is based upon this framework. It pleads a contract which is clear and unambiguous, and which requires no interpretation. It presents nothing more than an attempt to set aside a contract upon the ground of fraud where an action for that purpose would have been long since barred by the statute of limitations and where in equity the plaintiff would have been denied relief

because the alleged fraud was of his own procurement. For these reasons the pleading does not present a case of "actual controversy relating to the legal rights and duties of the respective parties" made necessary to the maintenance of the action by section 1060 of the Code of Civil Procedure.

[4] Next the appellant argues that he should be permitted under the code section to raise the question of the legality of the contract notwithstanding the lapse of time and the equities involved. If this were so we would have no hesitation in holding that the contract was valid in all respects. It is precisely the type of agreement which is authorized by section 159 of the Civil Code, and which has been approved in a long line of decisions. Brown v. Brown, 83 Cal.App. 74, 256 P. 595; Cookinham v. Cookinham, 219 Cal. 723, 28 P.2d 1045; Queen v. Queen, 44 Cal.App.2d 475, 112 P.2d 755. As in the cases cited the agreement was executed after the parties had separated and were living apart. But there is the additional circumstances here that the wife had instituted proceedings for separate maintenance, and it may be fairly inferred that the disposition of those proceedings was an added consideration for the agreement. Taking the pleading as a whole "the agreement does not indicate that it was promotive of divorce but rather incidental thereto, the means employed in the disposition of the property of the parties and the assumption of an obligation to support the wife". Queen v. Queen, supra, 112 P.2d at page 759.

[5, 6] It is apparent, therefore, that the complaint fails to state a cause of action for declaratory relief. The appellant could not attack the validity of the contract without conceding his own fraud in its procurement. "He who consents to an act is not wronged by it." "Between those who are equally in the right, or equally in the wrong, the law does not interpose." Civil Code sections 3515, 3524. Where the parties are in pari delicto the courts will refuse aid to either party, and "if the plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him". Wise v. Radis, 74 Cal.App. 765, 776, 242 P. 90, 94.

[7-9] The suggestion that these principles are not applicable in a case involving a divorce proceeding because of the state's interest in preserving the marital relation is not pursuasive. This is not a case to set aside the decree of divorce. None of the allegations of the complaint would sustain an attack upon the validity of that decree. To the contrary, since the appellant alleged that, at the time of the execution of the contract, he had good grounds for a divorce and that the respondent had no legal grounds it must be presumed that he obtained an advantage in the dissolution of the marital relation and hence, that, because of the confidential relation between husband and wife the contract was secured by him through undue influence and fraud. Civ.Code, §§ 158, 2235; McKay v. McKay, 184 Cal. 742, 746, 195 P. 385. The divorce proceedings having thus been instituted through the fraud of the appellant, by the express allegations of his complaint he instigated a fraud upon the court and is estopped from attacking the decree. Estate of Davis, 38 Cal.App.2d 579, 584, 101 P.2d 761, 102 P.2d 545.

[10-13] These circumstances require an affirmance of the judgment if all other reasons given should fail. Taking the allegations of the complaint to be true, as we must on this appeal, the decree of divorce is now unassailable by either party. The contractual obligations of the wife to make the conveyance to the appellant as partial consideration for the contract will be presumed to have been met. Code of Civil Procedure, section 1963, subdivisions 20, 28. It is not possible to restore the respondent to the status quo of the marital relation as of the date of the divorce. The delay of nine years in commencing the action discloses upon the face of the complaint such laches as would bar the attack in any proceeding where the principles of equity were invoked. If the proceedings for declaratory relief are sui generis, and not equitable, as contended by appellant, they are at least so closely akin to equity that certain equitable principles cannot be overlooked. Section 1061 of the Code of Civil Procedure provides that "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." The clear meaning of this section is that when the trial court determines that a declaration is not "proper" it may deny the relief. And certainly a declaration would not be proper if it was unconscionable or so inequitable as to result in a miscarriage of justice. That the trial court may deny the relief under such cir-

cumstances upon a demurrer to the complaint, and without trial of the facts, may not be questioned. City of Alturas v. Gloster, 16 Cal.2d 46, 49, 104 P.2d 810.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

PIPOLY et al. v. BENSON et al.

Civ. 12991.

District Court of Appeal, Second District, Division 2, California.

Sept. 11, 1941.

Hearing Granted Nov. 6, 1941.

1. Appeal and error ⇨930(1)

Upon appeal, the evidence is viewed most favorably to respondents.

2. Appeal and error ⇨173(6)

Where appellant failed to object to reception in evidence of an allegedly invalid ordinance, he "waived" right to thereafter attack it and on appeal could not urge objections on ground of invalidity of ordinance to an instruction that pedestrian crossing street other than at crosswalk in business district contrary to ordinance was guilty of negligence as matter of law.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Trial ⇨232(3)

In action for death caused by being struck by automobile, instruction that the jury had right to ask for anything they wished but that they were to take the evidence from witness stand and law as given by court, was not erroneous as directing jury not to consider presumption that deceased had used due care for his own safety at time of accident as court had previously instructed.

4. Appeal and error ⇨901

An appellate court may not presume error.

5. Appeal and error ⇨929

Where record on appeal showed that a juror asked that certain instructions be reread which the judge did reread and then asked if there was anything further the court could give jury and that a juror replied with suggestion that jury return to jury room, in absence of showing to contrary, presumption was that same juror who sought instruction was one who answered and thus it appeared that jury did not desire further instructions but was satisfied and hence judgment for defendant was not prejudicially erroneous on ground that trial judge refused to reread to jury instructions which they desired.

6. Appeal and error ⇨110

An order denying a motion for a new trial in a civil case is nonappealable.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Edna Pipoly and Eugene Pipoly, Jr., against Frank Benson and Myrtle Benson for damages for wrongful death of Eugene Pipoly, Sr., in automobile accident. From judgment for defendants after trial before jury, plaintiffs appeal. There was a purported appeal from order of trial court denying plaintiffs' motion for new trial.

Judgment affirmed. Purported appeal from order denying motion for new trial dismissed.

Laurence B. Martin, of Los Angeles (Samuel Reisman, of Los Angeles, of counsel), for appellants.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and White McGee, Jr., all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury in an action to recover damages for the wrongful death of Mr. Pipoly, the husband of plaintiff Edna Pipoly and the father of plaintiff Eugene Pipoly, plaintiffs appeal. There is also a purported appeal from the order of the trial court denying plaintiffs' motion for a new trial.

[1] The evidence being viewed most favorably to defendants (respondents), the essential facts are:

On April 6, 1940, after dark Mr. Pipoly, while crossing Central Avenue near the intersection of 78th street in Los Angeles, was struck by an automobile operated by defendant Frank Benson, at which time said Frank Benson was acting in the course of his employment as an employee of his codefendant Myrtle Benson. From injuries received in the accident Mr. Pipoly died.

Plaintiffs rely for reversal of the judgment on the following propositions:

First: The trial court committed prejudicial error in instructing the jury as follows:

(a) "An ordinance of the City of Los Angeles, in force and effect at the time and place of this accident, provided as follows:

"'No pedestrian shall cross a roadway other than by a crosswalk in the central traffic district, or in any business district.'

"It has been stipulated that the place where the accident occurred was within a business district as defined by the ordinance.

"Therefore, if you find that the deceased Eugene Pipoly violated this provision of the ordinance he was presumptively guilty of negligence as a matter of law, and such negligence, if any, proximately contributing to the happening of this accident, no matter how slightly, would bar the plaintiffs from recovering any damages in this action."

(b) "The jury, and each one of them, each member of the jury understands that they have a right to ask for anything that they wish, but also you understand that you are to take the evidence from the witness stand."

Second: The trial court committed prejudicial error in refusing to comply with the request of the jurors that an instruction regarding the presumption that the deceased used due care for his own safety at the time of the accident be reread after the jury had assumed its deliberations.

[2] Plaintiffs may not urge objection to the instruction set forth in paragraph (a) of their first proposition, for the reason that the ordinance upon which the instruction was predicated, section 80.38 of the Municipal Code of the City of Los Angeles was received in evidence without objection, and the rule is established that, if an invalid ordinance is received in evidence without objection, error may not be urged before an appellate court on the ground that the trial court read to the jury an instruction predicated upon the alleged invalid ordinance. By failing to object to the reception in evidence of such ordinance, the appealing party waives the right to thereafter attack it (Sommer v. Martin, 55 Cal.App. 603, 609, 204 P. 33; Corelis v. Chicago, B. & Q. R. Co., 244 Ill.App. 47, 51; Christianson v. Devine, 210 Ill.App. 253, 254; Deitring v. St. Louis Transit Co., 109 Mo.App. 524, 85 S.W. 140, 148).

Plaintiffs' objection to the instruction set forth in paragraph (b) of their first proposition is also without merit. After the jury had retired for deliberations, they returned to the courtroom for further instructions, and during the course of colloquy between a juror and the court the following occurred:

"The Court: The jury, and each one of them, each member of the jury understands that they have a right to ask for anything that they wish, but also you understand that you are to take the evidence from the witness stand.

"A Juror: Oh, yes, absolutely.

"The Court: And the law as given by the Court."

[3] It is apparent from the foregoing that the questioned instruction did not direct the jury not to consider as evidence the presumption that the deceased had used due care for his own safety at the time of the accident, as the court had previously instructed the jury. As set forth above, the trial judge instructed the jury to consider not only the evidence from the witness stand but also the law as given to them by the court.

Plaintiffs' second proposition is also without merit. Among other instructions read to the jury by the trial judge was the following:

"In the absence of any evidence to the contrary, the law presumes that the deceased did everything that a reasonable, prudent man would have done under the same circumstances for the protection of his own safety.

"This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence.

"At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption (and any evidence that may support the presumption), to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

After the jury had deliberated for six hours, they returned to the courtroom and the following occurred:

"The Court: Well, if you stand six to six and have all of this time do you think there is any opportunity whatever of arriving at a verdict?

"A Juror: I do not see how, your Honor.

"The Court: Well, I think if you haven't arrived at a verdict and you have stood six to six for such a long period of time that—

"The Juror: There was one point we would like to be instructed about and that is the preponderance of evidence and contributory negligence; particularly about contributory negligence.

"The Court: May I have the instructions, Mr. Clerk?

"Another Juror: And also as to the one about supposing or presuming or something.

"The Court: Supposing?

"The Juror: Why I guess that's what you would consider it, supposing or presuming. Can we suppose that something happened at the time of the accident about which there has been no evidence or must we follow the evidence and the charts?

"The Court: Very well, I will orally answer your questions as to the burden of proof. The burden of proof lies with the person asserting the affirmative of the issue. The burden of proving negligence as charged by the plaintiff on the part of the defendants, lies with the plaintiff; the burden of proving contributory negligence as charged by the defendants, lies with the defendants. Burden of proof means the greater weight of the believable evidence. That, perhaps, should answer that question.

"These are the three instructions additional that I believe you have suggested. In the instruction in reference to the ordinance of the City of Los Angeles, as to the whole ordinance perhaps I can delete that.

"A Juror: Yes.

"The Court: That is concluded with the following:

" 'Therefore if you find that the plaintiff Eugene Pipoly violated this provision of the ordinance, he was presumptively guilty of negligence as a matter of law, and such negligence, if any, proximately contributing to the happening of this accident, no matter how slightly, would bar the plaintiffs from recovering any damages in this action.' Also the further instruction:

" 'If you find that the deceased, Eugene Pipoly, violated the provisions of this ordinance, then he was presumptively guilty of negligence as a matter of law, and if you further find that such negligence, if any, contributed proximately to the accident in question, no matter how slightly, your verdict should be in favor of the defendants, and each of them.

" 'If you find that both the defendant, Mr. Benson, and the deceased, Eugene Pipoly, were negligent, and that the negligence of both proximately contributed to the accident, then you cannot attempt to determine which one was guilty of the greater negligence, for under such circumstances you cannot allow any damages whatever to Mrs. Pipoly and Gene Pipoly.

" 'You are not permitted to indulge in speculation, conjecture or guess work for the purpose of determining any issue in this case, and therefore if, after considering all of the evidence, you find that the accident might have resulted from several different causes without negligence on the part of the defendant, Mr. Benson, and you further cannot determine what was the proximate cause of the accident, then your verdict must be in favor of the defendants, and each of them'.

"The Court: Those are the only instructions that I have in mind bearing upon the matters that you requested.

"Mr. Brown: Well, your Honor, I would like to call your attention to the instruction that states the rule of law with reference to the matter of presumption of due care on the part of the decedent.

"The Court: I have just given instructions on the matters that have been requested by the jury. Otherwise I would have instructed the jury on that matter.

"Mr. Brown: I would like to ask the Court to inquire of the juror or the jury if they wish to have the instruction given with reference to the presumption of due care on the part of the decedent.

"The Court: I cannot suggest to the jury what they may want to know.

"Mr. Brown: Well, that was in the instructions and that was what was asked for by this juror with reference to the supposition, and they said supposing or presuming, and as I understand it that is what they were trying to say; I'm only asking the Court to inquire of the jury if they wish to have the instruction on the matter of presumption. In this case the presumption as stated by the Court previously in the instructions with reference to the presumption of due care on the part of the decedent is an important factor in this case.

"The Court: I am sorry, Mr. Brown, but I am not going to indulge in an argument here, and I am not going to make suggestions to the jury, none whatever. I will be glad to give heed to any particular questions the jurors may have.

"A Juror: Your Honor, may we ask now that we be instructed on that one point?

"The Court: On what one point?

"The Juror: In regard to the supposing or presuming and as regarding the preponderance or not the preponderance of the evidence, one way or the other.

"The Court: Certainly; I will be glad to read that to you again:

"'Preponderance of the evidence means the greater weight of the evidence. Negligence as charged by the plaintiffs against the defendants, the burden of proof is upon the plaintiffs to prove that negligence by a preponderance of the evidence which must be done by believable testimony.'

"The Court: Is that what you want?

"The Juror: No; no, sir, that wasn't it.

"The Court: Well, I don't know how I could make it any clearer.

"A Juror: Well, it was just as Mr. Brown stated and I can't follow his words exactly, or I can't use the exact words he did, but I believe the other lady said she wanted to have that read, too.

"The Court: Yes, she has asked, but I thought I had clearly given her an answer to her question.

"The Juror: That has been the point of contention, your Honor.

"The Court: What has been the point of contention?

"The Juror: The matter that was just mentioned by Mr. Brown, referring to the plaintiff.

"The Court: Was that matter covered in the instructions I just gave you?

"A Juror: No, not exactly; as I understand, a witness can suppose or he can assume something else other than the evidence offered implies.

"The Court: The jury, and each one of them, each member of the jury understands that they have a right to ask for anything that they wish, but also you understand that you are to take the evidence from the witness stand.

"A Juror: Oh, yes, absolutely.

"The Court: And the law as given by the Court.

"A Juror: Well, I can't say it just as he did, but that was the point anyway.

"The Court: Is there anything further the Court can give you?

"A Juror: Supposing we return to our jury room for a while.

"The Court: Very well, you may retire."

[4, 5] Plaintiffs urge that the trial judge refused to reread to the jury instructions which they desired. From the foregoing transcript of what occurred when the jury returned to the courtroom for further instructions, it would appear, since we may not presume error, that the juror who requested the rereading of an instruction relative to the presumption that the deceased had used due care for his own safety at the time of the accident was fully satisfied, for the trial judge said, "Is there anything further the Court can give you?" to which a juror, who we must presume in the absence of a showing in the record to the contrary, was the same one who sought to have the instruction reread, replied, "Supposing we return to our jury room for a while." It thus seems that the jury did not desire further instructions from the trial judge.

For the foregoing reasons the judgment is affirmed.

[6] Since an order denying a motion for a new trial in a civil case is a nonappealable order, the purported appeal from such order is dismissed.

I concur: MOORE, P. J.

I dissent: WOOD, J.

46 Cal.App.2d 651

HELMICK v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13090.

District Court of Appeal, Second District, Division 1, California.

Aug. 30, 1941.

1. Workmen's compensation ⚷1795, 1797

Where petition for rehearing, filed within statutory time, was based on claim that evidence did not justify findings of fact and that findings did not support order, decision and award, the Industrial Accident Commission was vested with jurisdiction, and it was Commission's duty to grant a rehearing, if in Commission's opinion errors of law occurred in the original hearing, or the findings of fact were unsupported by the evidence or the award was not supported by the findings.

2. Workmen's compensation ⚷1937

Where all the evidence taken by original referee in workmen's compensation proceeding was transcribed and submitted to and read by different referee to whom case was referred after rehearing had been granted and who finally acted in the matter, claimant's rights were not prejudiced by such reference to a different referee, which was authorized by statute. St.1937, p. 293, § 5310.

3. Workmen's compensation ⚷1820

The Industrial Accident Commission is required to review evidence only when the Commission disregards the findings and recommendation of the referee and makes different findings and award.

4. Workmen's compensation ⚷1939

Where findings of Industrial Accident Commission in workmen's compensation proceeding are supported by any substantial evidence, such findings are conclusive.

5. Workmen's compensation ⚷1939

Whether actions of employer amounted to willful misconduct is question of fact for determination by Industrial Accident Commission, and if record contains substantial evidence upon which to predicate a finding that employer's conduct was not such as would indicate that employer knew or ought to have known that such conduct was likely to jeopardize safety of employee, or such as would manifest a reckless disregard of the safety of employee and a willingness to inflict the fatal injury for which compensation is sought, finding and award against claimant must be upheld.

6. Workmen's compensation ⚷1939

The Industrial Accident Commission's finding that employee's death, which occurred when he slipped and fell while assisting in putting up a diffusing truss unit, was not caused by serious and willful misconduct of employer was sustained, where there was substantial evidence to the effect that the use of nets, scaffolds and life lines was not practicable in work such as that in which employee was engaged, that such safety appliances were not customarily used in such work, and that tower and truss scaffold on which employee was working constituted a safe place to work under the circumstances.

7. Workmen's compensation ⚷1939

The jurisdiction of an appellate court in reviewing an award of the Industrial Accident Commission is limited strictly to determining whether there was evidence sufficient to sustain the award, and appellate court may not determine the credibility of witnesses or the weight to be attributed to their testimony.

8. Workmen's compensation ⚷1939

Where the conclusion of Industrial Accident Commission is founded upon conflicting evidence, such conclusion is final.

◆

Certiorari proceeding by Alyce J. Helmick against the Industrial Accident Commission and others to review an award made after rehearing by the Industrial Accident Commission.

Award affirmed.

Allan L. Leonard, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco (Eldon B. Spofford, of San Francisco, of counsel), for respondent Industrial Accident Commission.

WHITE, Justice.

This case comes before us on a writ of certiorari issued upon the application of petitioner, Alyce J. Helmick, to review an award made after rehearing by respondent Industrial Accident Commission in favor of respondent Safway Steel Scaffolds Company of California, a corporation (hereinafter referred to as "Scaffolds Company"), on the application of petitioner to the commission for additional benefits and an award of $2,500 by reason of alleged serious and willful misconduct charged against the respondent employer, and which conduct was claimed to have proximately contributed to the death of petitioner's husband in the course of his employment by respondent Scaffolds Company.

Petitioner herein is the surviving wife of Norris R. Helmick and was totally dependent upon him on June 23, 1939, at which time his earnings as employee of respondent Scaffolds Company were $38.35 per week. The sole question involved in the proceeding now before us is the liability of the employer for a penalty of an additional death award in the maximum sum of $2,500, based upon the aforesaid allegations of serious and willful misconduct. All normal benefits accruing to petitioner under the act were assumed and paid by the insurance carrier.

There is no serious conflict in the factual situation which forms the basis for this litigation. Mr. Helmick, the deceased, was employed as a rigger by respondent Scaffolds Company at Culver City, California. On June 23, 1939, he sustained injuries admittedly arising out of and in the course of his employment, and which injuries proximately resulted in his death on July 8, 1939. On the day of the accident the employer was engaged in putting up a diffusing truss unit, the same being defined as a special truss that goes over the top of a process screen for lighting purposes. There were two towers, each 20 feet in height, which had been completed and braced. They had a 5 by 7 foot brace. Between the tops of these towers there was being erected a prefabricated truss 35 feet in length, attached at each end to the towers, and being further supported by extension arms as well as vertical and horizontal cross bracing. At the time of the accident decedent was engaged in coupling up the cross bracing on the truss, and was on the second cross brace from one of the towers. This coupling operation was performed by taking the wing nuts off the studs and replacing them after the cross brace was slipped off the stud by means of a hole cut in the brace. The truss was all prefabricated and cut to size, with holes cut in the cross braces so they could not slip on the bolts. Decedent was working at one end of the truss and another employee was at the other end. There were two wooden planks laid lengthwise across the tower cross bracing, near the top of such towers. There was no planking on the truss itself. At the hearing a witness stated that it was impossible to put such planking on the truss itself for the reason that the truss was so constructed that the cross bars would prevent the laying of a plank. The decedent stood part of the time on the wooden planking on the tower and part of the time on the steel tubing of the truss. Suddenly he slipped off this tubing, attempted to break his fall by grabbing a brace on the lower part of the truss unit, but was unsuccessful and fell to the ground. A finish coat of paint had been applied to the truss the day before, and there was testimony to the effect that it was thoroughly dry at the time of the accident and that the paint used dries in from three to four hours. In conflict with this there was testimony that there was fresh paint on the clothing of the decedent.

When petitioner's application for adjustment of her claim was filed, it came on for a hearing before a referee of respondent commission with all parties represented. Following such hearing respondent commission, on June 11, 1940, made its findings and award in favor of the applicant, petitioner herein, and against the employer by reason of the serious and willful misconduct of such employer. Within the time allowed by law the employer filed a petition for rehearing and an application to transfer the proceedings to the San Francisco office of respondent commission. Under date of August 9, 1940, the commission made and served its order granting the employer's petition for rehearing and set the matter for further consideration at Los Angeles. On October 11, 1940, the ordered rehearing proceeded before the same referee who presided at the original hearing and the matter was again submitted. At the opening of the proceedings on rehearing the employer moved that the referee disqualify himself on the ground that he was prejudiced. This motion was denied. On October 14, 1940, the employer filed with the commission a written "motion to set aside order of submission and request for further hearing". Respondent commission granted the last-mentioned motion and transferred such "further hearing" to a referee other than the one who had theretofore presided at all proceedings held on petitioner's application for adjustment of her claim; and at this last-named hearing additional testimony was taken. The referee last-named was furnished with a transcript of the testimony taken before his predecessor referee, and following the additional testimony offered at the hearing over which he presided, it was ordered that the matter be submitted. Thereafter the findings and recommendation of the last-named referee were adopted by the commission as its decision after rehearing. In such decision it was found that the employee's injury was not caused by the serious and willful misconduct of the employer, and accordingly it was ordered on March 10, 1941, that the applicant, petitioner herein, take nothing by reason of her claim of serious and willful misconduct.

[1] Petitioner contends that respondent commission exceeded its jurisdiction when it granted a rehearing for the reason that such order was predicated merely upon a change of opinion on the part of the commission as to the correctness of its original position. Petitioner's arguments in support of her claim would be persuasive if the commission had, for instance, granted a rehearing on the sole ground that the employer had discovered new evidence, material to it, which it could not with reasonable diligence have discovered and produced at the original hearing, and then upon rehearing no such new evidence was produced, but nevertheless the commission changed its original award. Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm., 6 Cal.2d 314, 323, 57 P.2d 501. However, such is not the situation existing in the case now before us. Here the petition for rehearing was made upon several other grounds and not upon the ground of newly-discovered evidence. The petition for rehearing was grounded upon the claim that the evidence did not justify the findings of fact; that the findings of fact did not support the order, decision and award. The petition for rehearing having been filed within the statutory time, the commission was vested with jurisdiction and it was its duty to grant a rehearing if in its opinion errors of law occurred in the original hearing, or if in the opinion of the commission the findings of fact were unsupported by the evidence, or if in its opinion the award was unsupported by the findings. The reasoning contained in cases and decisions dealing with the right of the commission to reopen cases after the making of an award which has become final, either through failure to appeal from a rehearing or an adverse ruling thereon, and which right has been exercised under the 245-week continuing jurisdictional period, is not helpful in determining cases wherein the commission exercises its statutory right to pass upon a petition for rehearing regularly made following the award.

[2] Petitioner next contends that respondent commission acted prejudicially to her rights when in the later stages of the proceedings, after rehearing granted, the case was transferred from one referee to another. Section 5310 of the Labor Code, St.1937, p. 293, permits the commission to appoint one or more referees in any proceeding when in its opinion such a course seems necessary or advisable, and the same section further provides that matters arising out of the same proceeding may be referred to different referees. While prejudice would ensue should the commission hand down a decision through the instrumentality of a referee who had neither heard nor read all of the evidence in the case, such was not the situation with the instant case, where all of the evidence taken by the original referee was transcribed, submitted to and read by the referee who acted finally in the matter. Under such circumstances there was compliance with the legal mandate that "the one who decides must hear".

[3] The commission having adopted the findings of and the decision recommended by the referee in the proceedings held after the granting of a rehearing, it was not required that the commission review the record. It is only when the commission disregards the findings and recommendation of its referee and makes different findings and award that a review of the evidence by the commission is required. Taylor v. Industrial Accident Comm., 38 Cal.App.2d 75, 82, 100 P.2d 511; Bethlehem Steel Co. v. Industrial Accident Comm., 42 Cal.App.2d 192, 193, 194, 108 P.2d 698.

[4, 5] Finally, petitioner contends that the finding of respondent commission that the death of the deceased employee was not caused by serious and willful miscon-

duct of the employer finds no substantial support in the evidence. At the outset it should be noted that, where any substantial evidence is introduced in support thereof, the findings of the commission are conclusive. 27 Cal.Jur. 582, and cases there cited. It is the law that the question of whether or not the actions of the employer amounted to willful misconduct, as that term is used in the act and as defined in Great Western Power Company v. Pillsbury, 170 Cal. 180, 186, 149 P. 35, is one of fact for determination by the commission. In the case of Cunningham Construction Co. v. Morgan, 86 Ind.App. 387, 156 N.E. 524, it was stated that "the question [of willful misconduct] was one of fact for the Industrial Board". It therefore follows that if the record contains any substantial evidence upon which respondent commission can predicate a finding that the conduct of the employer was not such that it would indicate that the employer knew or ought to have known that it was likely to jeopardize the safety of the employee, and if there is present in the record substantial evidence that the conduct of the employer was not such as would manifest a reckless disregard of the safety of the employee and a willingness to inflict the fatal injury of which complaint is made, then the finding and award of the respondent commission against petitioner must be upheld.

The following facts were in evidence. One witness stated that the tower and truss structure was anchored to the ground near a building on the moving picture lot; the wall of the building being one or two feet from the nearest side of the towers; that it was not anchored to the building; that no safety lines or belts were used. This witness, after being qualified, testified that in his opinion a man could not have worked with a safety line because the cross braces would get in the way of the line. This witness had been engaged in the work of erecting tower and truss structures similar to the one here in question since 1926, and during that time had never used lifeline, nets or life belts on jobs similar to the one with which we are here concerned. He testified that by reason of his experience as a practical steel and scaffold man he did not believe the job could have been handled in any different way than it was handled; that there was nothing to which lifelines could have been fastened, and furthermore, that the lines would foul while the man was crawling through and tying in the truss. He did admit, however, that a lifeline could have been hung over the adjoining building and anchored on the other side of it. He testified, however, that if a net were strung under the truss and a man fell from the truss into the net before the truss was securely fastened to the tower, the impact would cause the towers to buckle and fall. Section 7106 of the Labor Code provides that nets or intermediate flooring must be provided only if the structure exceeds twenty-five feet. Admittedly, this one did not.

Another witness, who was a safety inspector for the accident commission, testified that in his capacity as such inspector he had never notified respondent Scaffolds Company that it was violating any safety order in the building of this particular scaffold or that the safety orders of the commission were applicable to rolling or moving scaffolds less than 25 feet in height. He further testified that in ten years' experience as a safety inspector for respondent commission he had never seen rope nets used on rolling scaffolds like the one here involved where the height was under 25 feet, nor had he ever seen a man use a safety belt or line while working on the construction or tying together of a truss like the present one. It was testified that the practice and custom in the trade is the same as in building an oil well derrick, viz., the men do not wear belts or lines during the actual construction of the derrick because they are moving around continuously, but after the structure is completed and they go up on it to do work other than construction work they wear safety belts. The commission's safety inspector testified that he did not think it would be practicable to have fastened the truss to the towers with the whole structure on its side on the ground and then lift it to a vertical position; this because unusual stresses and strains would cause the structure to buckle. Another reason given in evidence as to why it would be impracticable to use a safety line in doing work of the nature that decedent was doing, was that he would have had to crawl or climb over the braces—they being too high to step over—and in so crawling or climbing he would have been more apt than ever to slip and fall. As to hand-holds, it was testified that the structure itself provided them, being composed of tubular members small enough to give a good hand-hold. It was stipulated at the hearing that another safety inspector, if called as a witness, would testify substantially to the foregoing.

Another witness, who was director of safety for Lumbermen's Mutual Casualty Company at Los Angeles, and who was a graduate mechanical engineer, testified that his company insures all except three of the major studios; that in the course of his duties he inspects all equipment used by such studios once every two or three weeks and has been so engaged for over ten years. He testified that he was familiar with the type of structure built in this case, and upon which the deceased employee was working; that he had never seen a safety net used while tying the braces of such a structure; that the use of safety lines in such brace-tying operations would be impossible. He did admit that it would have been possible and practicable to swing a net underneath the truss; and as to whether a man falling in the net would cause the towers to buckle and collapse he could not testify without going into a mathematical computation as to stresses and strains. The president of respondent Scaffolds Company testified that he was the person who determines what safety precautions are to be taken in assembling and putting together the scaffolds which the company manufactures. In this matter he testified he is governed by a set of rules promulgated by the parent company in Milwaukee which manufactures the scaffolds; by the industrial accident commission's rules; by inspectors of the company insurance carriers, and by certain union rules. He stated that he had never been informed by the industrial accident commission or any of its inspectors or employees that safety nets or safety lines or belts should be used in the assembling of movable scaffolds which are less than 25 feet in height. He further testified that he had never been informed by the commission or any of its inspectors that any of the safety orders contained in the general construction safety orders were applicable to moving scaffolds less than 25 feet in height. He testified that he was familiar with the general custom and practice in the scaffold business; that it would not have been practical to have used a safety net under the truss in this case before all the braces had been tied; further, that it would have been impractical to use a safety line, since the men would have had to be continually taking it off and putting it on again to keep it from becoming fouled.

There was also testimony given by the grip superintendent at Columbia Studios, in which work he had been engaged for some sixteen years, that as a part of his work he was in charge of rigging and building sets, stages, etc. He testified he was familiar with the type of scaffold used by the employer herein. It was his opinion that nets could not be used before the trusses were put together and in use because it would interfere with the raising of the trusses; that belts and lines would not only slow the men up but would foul, due to the particular type of construction. Another witness, who was in charge of construction for a competitor of respondent employer, but which used the same type of product, testified that based on his years of experience he would say that lifelines, nets or scaffolds were not practicable in such construction work. He was of the same opinion as previous witnesses concerning the impracticability of tying the towers and trusses on the ground and then raising the whole structure, stating that this could not be done without placing a strain on the structure which could have a tendency to cause it to collapse. One of the safety inspectors for respondent commission testified that in his opinion the construction as practiced on this particular type of job was safe. He also testified that with reference to safety nets, the time involved in erecting and placing such nets would exceed the time required to erect the scaffold; that it would take two or three men a half day to put up such a net. In this connection, a safety inspector for the commission testified that when considering the safety elements in a construction job the question of man hours must be considered; that the hours of labor and the number of men necessary for each installation must be considered; that if the man hours of labor are increased there is additional exposure to danger, and this must be measured against the man hours necessary to perform the original job; that if the man hours necessary to complete the labor of installing safety devices exceed a certain amount in comparison with the main job, then the so-called safety devices actually increase rather than decrease the accident exposure and hazard. This testimony was given in connection with the question naturally arising as to whether industrial hazards would be increased or diminished by the erection of the supposed safety devices. For example, if the building of a scaffold or net would take three men a half day, during which time they are of necessity working in high places and exposed to the risk of falling while installing the safety device, and if the job which it is designed to protect is one where the height at which the men work is even less and is one which can be finished by two men in two or three hours, the theory of industrial hazards dictates that three men should not be exposed to greater hazard for a half day than the two men doing the main job are exposed to for a shorter time.

There was testimony given by qualified experts that the tower and truss scaffold herein was a safe place upon which to work, having in mind all of the factors surrounding the construction.

[6-8] From the facts adduced in evidence, as hereinbefore set forth, to us it becomes clear that the respondent commission had before it at least substantial evidence to warrant it in reaching the conclusion that the injury resulting in the death of the employee was not occasioned by reason of the serious and willful misconduct of the employer. It follows, therefore, that the objection of petitioner herein with reference to such finding cannot be sustained. The findings of the industrial accident commission are subject to review only insofar as they have been made without any substantial evidence whatsoever in support thereof. The jurisdiction of an appellate court in cases of this character is limited strictly to determining whether there is evidence sufficient to sustain the award. It is not our function to determine the credibility of the witnesses or the weight to be attached to their testimony. With this subject we have nothing to do because the commission is the final arbiter on questions of fact. Whatever our views may be upon the subject are of no consequence, as we are without power to disturb the findings of the commission when supported by evidence; and its conclusion upon a question of fact founded upon conflicting evidence is final.

For the foregoing reasons the award is affirmed.

YORK, P. J., and DORAN, J., concurred.

PAGE v. WASHINGTON MUT. LIFE ASS'N et al.

Civ. 12538.

District Court of Appeal, Second District, Division 1, California.

Aug. 30, 1941.

Rehearing Denied Sept. 24, 1941.

Hearing Granted Oct. 27, 1941.

1. Appeal and error 🔑110

There is no appeal from order denying new trial in civil action.

2. Appeal and error 🔑907(3)

Where appeal is on judgment roll alone, trial court's findings must be presumed to be supported by evidence, and sole question is whether such findings support court's conclusions of law and judgment based thereon.

3. Insurance 🔑679

Where assumption rider, issued by company reinsuring mutual life association's life policies, changed terms of policy assumed by such company as to premium payments and virtually made completely new insurance contract of different type, association's waiver of prompt payment of premiums under old conditions was not binding on reinsuring company.

4. Insurance 🔑392(1)

To "estop" insurer, accepting late payments of premiums on life insurance policies, from denying liability thereon because of delay in payment of subsequent premium, such conduct must have been relied on by insured in making late payments.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

5. Insurance 🔑392(1)

Where beneficiary of life policy, assumed by company issuing rider revising policy as to premium payments, did not know and had no reason to believe that company had accepted late payment of first premium due under revised policy when she made payment of second premium, and payment of additional sum due on second premium after beneficiary mailed sum first thought to be due thereon to such company was made before she received any communication from company as to premiums, company was not estopped from denying liability on policy because of failure to pay second premium within grace period, as beneficiary did not rely on company's acceptance of first premium in paying second premium after such period.

6. Insurance 🔑392(1)

An insurer's acceptance of late payment of premium on life insurance policy in single instance is insufficient to "estop" it from denying liability on policy because of subsequent delinquencies in payment of premiums.

7. Insurance 🔑146(1)

An insurer's duties and liabilities must be drawn from insurance contract.

8. Insurance 🔑353(1)

A recital in life insurance company's agreement, assuming policies issued by mutual life association, that it was made with beneficiaries, as well as holders, of policies, was insufficient to imply duty of company to notify beneficiary, as well as insured, under one of such policies, of company's assumption thereof, and terms of such assumption as to payment of premiums, in absence of other express or implied provisions of agreement requiring such notice.

9. Insurance 🔑388(3)

Where terms of life insurance policy, as assumed by company reinsuring policies of association which issued it, did not include provision requiring company to send notices of terms and conditions of such assumption or of premiums due under policy as assumed to beneficiary as well as insured, company's failure to notify beneficiary did not constitute "waiver" of right or "estoppel" to deny liability on policy because of failure to pay premium within time fixed thereby.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Waiver".

10. Insurance 🔑392(1)

Insured's illness, rendering him unable to discuss with beneficiary of life insurance policy terms of assumption thereof by certain company, did not form basis for "waiver" by such company of prompt payment of premium because of its previous acceptance of late premium payments, in absence of finding that company knew of insured's condition at time of such acceptance.

11. Insurance 🔑388(3)

In absence of contractual obligation on insurer to give beneficiary of life insurance policy notice of premium payment due, insurer's failure to reply to beneficiary's letters concerning such payment for six days did not operate as "waiver" of right or "estoppel" to deny liability on policy because of failure to pay premium within grace period.

12. Insurance 🔑349(1)

The burden was on insured to keep life insurance policy in force by payment of premiums, rather than on insurer to exert every effort to prevent insured from allowing policy to lapse through failure to make premium payments.

13. Appeal and error 🔑907(3)

In action on life insurance policy, where trial court concluded from facts found that defendant waived strict performance of terms and conditions of policy and assumption rider respecting time for payment of premiums and accordingly awarded judgment to plaintiff, the inequity created by condition of such rider, greatly increasing amount of premiums, is immaterial on appeal on judgment roll alone.

14. Insurance 🔑310(2)

A letter, in which insurer informed beneficiary of life insurance policy that grace period for payment of premium had expired and enclosed form of application for reinstatement of policy, constituted sufficient notification to beneficiary of cancellation thereof.

WHITE, J., dissenting.

* * *

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action on a life insurance policy by Edna Mae Page against the Washington Mutual Life Association, the Physicians Life Insurance Company, and others. From a judgment for plaintiff against defendant Physicians Life Insurance Company, it appeals.

Reversed, with directions.

John L. Flynn, of Los Angeles, for appellant.

I. Gralla and Henry O. Wackerbarth, both of Los Angeles, for respondent.

W. P. Wood and M. W. Young, both of Los Angeles, for A. Caminetti, Jr., Insurance Com'r.

DORAN, Justice.

[1, 2] This appeal is prosecuted by the defendant Physicians Life Insurance Company from a judgment entered against it in the amount of $3,000, in favor of the

plaintiff and respondent, as beneficiary under a life insurance policy issued by the defendant Washington Mutual Life Association and reinsured and assumed by appellant under conditions hereinafter noted. The notice of appeal also states that an appeal is taken from the order denying defendant and appellant's motion for a new trial. As frequently pointed out, there is no appeal from such an order in a civil action of this nature. The appeal herein is upon the judgment roll alone; hence the findings of the court must be presumed to be supported by the evidence, and the sole question here to be decided is whether the findings support the conclusions of law and the judgment based thereon.

The trial court found the following facts to be true: On December 15, 1928, the defendant Washington Mutual Life Association issued a life insurance policy for $3,000 covering the life of one Frank F. Pratt, with his wife, Anna G. Pratt, as beneficiary. The beneficiary was later changed to the plaintiff herein, the change being endorsed on the policy. The policy of insurance was of the mutual type, calling for the payment of membership dues by the insured quarter-annually on the 15th days of March, June, September and December of each year, and in addition payment of death assessments, under certain conditions, upon receipt of notice of the death of any member of the association in good standing. Payment of the quarter-annual dues had continued the policy in full force and effect up to September 15, 1937, and death assessments levied on the policy were fully paid to and including July 31, 1937. On July 1, 1937, the defendant Washington Mutual Life Association and appellant entered into an agreement whereby appellant reinsured the policies of life insurance or membership certificates of the Washington Mutual Life Association in force on August 1, 1937. It is to be noted that the agreement of reinsurance, as found by the court, recites that it is made by appellant "to and with the said Washington Life, and to and with each and every holder of a policy of insurance or membership certificate issued by said Washington Life, in force on the first day of August, 1937, and to and with the beneficiaries thereof, and to and with their legal representatives and assigns". In connection with taking over the assets and assuming the obligations and payments due on the insurance policies issued by the Washington Mutual Life Association, appellant issued a written document denominated "Washington Mutual Life Assumption Rider", a copy of which was mailed to the insured under the policy here in question, on or prior to August 1, 1937. No copy of the said rider or any information with reference thereto or with reference to the merger or consolidation of the two insurance companies was mailed to respondent, who became the beneficiary under the policy on November 17, 1936. The rider recited that it, together with the policy formerly issued by the Washington Mutual, constituted the contract of insurance between the member and appellant. Enclosed with the rider referred to, appellant sent the insured notices of the change effected by the reinsurance agreement, together with a notice of the revised premium due under the policy as modified by the rider. The premium notice thus sent read as follows: "Physicians Life Insurance Company, Home Office, 7th Floor, 333 Kearney Street, San Francisco, Cal. Phone EXbrook 2150. This is to remind you that your premium will be due and payable as specified below. Receipt will not be returned unless requested. Your check is a receipt. Important: Please return this notice with your remittance. Amount due $24.00. Payable Aug. 1, 1937 Policy No. 2615. Continues your Policy in force to September 1, 1937. Send payment now! Do not lay this aside —this is important to you and yours. Send all payments direct to Home Office." The rider above referred to provided that the retention thereof "and/or payment by the member of a premium call during August, 1937, or thereafter, shall constitute the acceptance thereof by the member, and this Rider shall be binding on the Physicians Life only on the payment of said premium calls". The rider also provided for twenty days' grace for the payment of premiums.

The premium notice and letters or notices above referred to were received by the insured before the expiration of the grace period for the August 1, 1937, premium. Thereafter, on August 18, 1937, two days before the expiration of the grace period, the insured wrote a letter to appellant as follows: "In regard to W. Mu. Ins. Co. policy we have not been able to determine just how much insurance we will be able to carry as yet. It will depend on how much money we can spare or we may be able to raise which we will not find out about for a few days."

No further communications were received by appellant from the insured. On September 16, 1937, twenty-seven days after the grace period had terminated, the respondent went to the home of the insured, and while there saw for the first time the printed and typewritten notice or reminder which appellant had mailed to the insured with reference to the payment of the premium. This was the first knowledge respondent had of the fact that the Washington Mutual Life Association had been taken over by or merged or consolidated with appellant and the first knowledge of any request for the payment of the premium of $24. Respondent thereupon inquired of the insured concerning the merger or consolidation, but at the time the insured was ill and unable to give respondent any information. Respondent then took the premium notice and immediately went to the office formerly occupied by the Washington Mutual Life Association at Los Angeles and found the said office vacant, with no information on the door or thereabouts as to where the office of the said association had been moved. Upon further inquiry, respondent was unable to locate the office of the Washington Mutual Life Association. Thereupon respondent went to the post office, procured a money order in the sum of $24, payable to appellant, and mailed the same by air mail, special delivery, together with the premium notice and a letter, to appellant's home office. Appellant was served with a notice to produce all letters written by respondent to appellant, but at the trial did not produce the letter thus sent with the money order and premium notice. According to respondent's recollection at the trial, the said letter was as follows: "Enclosed please find money order for $24.00 to pay on policy of Frank F. Pratt, No. 2615. I am the beneficiary in this policy and have paid on it many times. We do not understand this change and I do not wish to drop this policy as Mr. Pratt has a paralyzed wife. Please let me know how and when to pay at once." Respondent wrote her telephone number and address at the bottom of the said letter. This letter, with accompanying payment and notice, was mailed to appellant September 16, 1937, and was, together with the enclosures, received by appellant on September 17, 1937. Appellant accepted the money so sent in payment of the premium for the month of August, 1937, and deposited the same in its bank account. On September 17, 1937, respondent procured a money order for $12, payable to appellant and mailed it to appellant that day by air mail and special delivery, with a letter reading as follows: "Enclosed please find $12.00 which I hope is the correct amount as payment from Sep. 1-37 to Oct. 1-1937 on the policy of F. F. Pratt. On the 16 I mailed $24.00 to pay up to September 1-37. Please advice me if there is an error in this amount." This letter was received at the San Francisco post office at 7 a. m. on September 18, 1937, and delivered by special delivery messenger to the office of appellant during the forenoon of that day.

On September 23, 1937, respondent learned for the first time that appellant had an office at Los Angeles, and was informed that by calling at that office she could ascertain the correct amount of monthly payments necessary to be paid on the policy in question under the terms of the assumption rider. On the last date mentioned respondent called at appellant's Los Angeles office and was there informed that the monthly premium on the policy was $24, and that such monthly premium payments commenced as of August 1, 1937. Respondent thereupon immediately procured an express money order for $12 and sent the same to appellant at its home office in San Francisco, accompanied by the following letter: "After making an inquiry in regard to Mrs. Pratt's policy No. 2615 Washington Mutual, I find out the payments are $24.00 per month. I enclosed $12.00 to balance on the month of Sep. So far I haven't had a reply from Sep. 16 and 17th, 1937, letters. Would like to know if we are fully paid and covered in case of death." The court found that the first knowledge respondent had that appellant was demanding the sum of $24 per month as the premium on the policy was September 23, 1937. Some few days after that date the insured gave the plaintiff the copy of the assumption rider which he had received from appellant on or prior to August 1, 1937. Respondent's letter of September 23, 1937, to appellant, was received at the post office at San Francisco on September 24, 1937, and was delivered to appellant's office during the forenoon of that day.

The first communication of any character that respondent received from appellant was appellant's letter dated and mailed at San Francisco on September 23, 1937, which was as follows: "We are in receipt of your remittance of $24.00 to pay August 1st premium on policy 2615 F. F. Pratt, also $12.00 to apply on the September premium. Since the premium is $24.00 per month it will be necessary for you to remit an additional $12.00 to complete the payment. The grace period has expired on the above payments, and it will be necessary for Mr. Pratt to sign the enclosed application for reinstatement. Kindly have the enclosed application signed and return with remittance of $12.00." This letter was not received by respondent until after she had mailed to appellant the second $12, enclosed in her letter of September 23, 1937. The court found that no notice of cancellation of the policy in question was ever given to respondent or to the insured, nor did appellant cancel the said policy for the nonpayment of premiums or any other money due thereon.

On October 14, 1937, respondent sent to appellant at its home office a postal money order in the sum of $24 for the October, 1937, premium on the policy, and the money order was received by appellant on or about October 15, 1937.

On September 25, 1937, respondent wrote a letter to appellant in which she stated: "In reply to your letter of the 23rd instant advising that the grace period has expired on the August and September payments on policy No. 2615 issued by the Washington Mutual Life Association to Frank Flint Pratt, I have to advise that it is impracticable for Mr. Pratt to execute the form of application for reinstatement of the insurance which accompanied your letter. Therefore, please refund to me by early mail the $48.00 I have advanced in payments of $24.00 and two $12.00 payments, sending remittance to me at the above address." In response thereto, appellant, on September 29, 1937, wrote a letter to respondent enclosing the money orders and a check covering the $24 payment mailed on September 16, 1937, and stated: "We are in receipt of your letter of September 25th in which you state that it is impracticable for Mr. Pratt to sign the application for reinstatement in connection with Washington Mutual Policy No. 2615, and ask the return of your remittance of $48.00. Enclosed you will find our check for $24.00 Post Office M. O. No. 116398 for $12.00 and Express Order No. AF-1159241." On October 1, 1937, respondent sent a telegram to appellant, reading as follows: "Hold money until further notice regard policy 2615." Also on the same date respondent returned all of the said money orders and check to appellant with a letter stating: "At the suggestion of the California State Insurance Commission, I am returning the following: Letter from you to me dated September 29th, together with the following: (reciting the check and money orders above referred to). You will no doubt hear from the California Insurance Commission direct in connection with case."

The insured died on October 21, 1937, and on October 22, 1937, respondent procured a certified copy of the death certificate and immediately forwarded the same to appellant. On November 5, 1937, appellant wrote to respondent as follows: "* * * as stated in our prior correspondence, the policy of Mr. Frank Flint Pratt, lapsed and became void and of no effect because the premium payment of $24.00 that was due on September 1, 1937, was not tendered within the grace period. Enclosed you will find post office money order * * * drawn in our favor and dated September 17, 1937, in the amount of $12.00; (express) money order * * * in the amount of $12.00, drawn in our favor on September 23, 1937; post office money order * * * being dated October 14, 1937, drawn in our favor in the amount of $24.00; and our check, dated September 29, 1937, drawn in favor of Edna Mae Page in the sum of $24.00. We mailed you this check on September 29, 1937, in accordance with the request made in your letter of September 25, 1937, although we had no legal obligation to do so since this was the premium paid for August, 1937, and had been earned by our company." On March 24, 1938, respondent's attorney returned the said money orders and check to appellant with a letter stating that he had investigated respondent's claim and was of the opinion that it was valid and that respondent had accordingly instructed him to institute proceedings therefor.

With relation to a separate defense set up by appellant to the effect that respondent had no insurable interest in the life of the insured, the court found that respondent "was on November 17, 1936, and for many months prior thereto, a person to whom the said Frank F. Pratt is and was under a legal obligation for the payment of money, of which the death or illness of Frank F. Pratt might delay or prevent payment or performance"; and that "for many months prior and subsequent to November 17, 1936, the plaintiff loaned and advanced many sums of money to the said insured Frank F. Pratt in order to defray the living expenses of the said Frank F. Pratt and his wife, and for more than four years last past the plaintiff had paid the quarter annual dues and death assessments levied against the said Frank F. Pratt under said * * * policy".

It was also found that on two different occasions prior to August 1, 1937, the Washington Mutual Life Association received and accepted the payment of quarter-annual dues after the expiration of the grace period provided for in the policy, such payments having been made on June 21, 1937, for dues due June 15, 1937, and on October 1, 1936, for dues due September 15, 1936.

The court concluded that appellant had waived strict performance of the terms and conditions of the membership certificate (or policy) and assumption rider with respect to the payment of premiums on the due date or within the grace period thereafter; that the policy did not lapse by virtue of the failure to pay the premium falling due on September 1, 1937, within the grace period of twenty days thereafter, and the said policy was in full force and effect up to and including the date of the death of the insured; and judgment was accordingly awarded to respondent for the proceeds of the policy with interest.

[3] The judgment of the trial court is thus seen to be based solely upon the theory of the waiver of payment of premiums within the grace period provided by the policy in question. This theory would appear to be drawn principally from the finding of the court that the first monthly premium on the policy as assumed by appellant was accepted by appellant after the expiration of the grace period therefor, coupled with a finding that on two previous occasions appellant's predecessor had accepted late payment of premiums or dues under the original policy. As to the acceptance of late or delinquent dues or premiums by the Washington Mutual Life Association under the original policy, it is to be noted that the assumption rider issued by appellant changed the terms of the policy as to dates and payments of premiums, thus creating a new set of conditions as to premium payments. These new conditions supplanted those under which payments were formerly made. In fact, the addition of the rider to the policy virtually made a completely new contract of insurance of a type different than the former contract. Under such circumstances, any waiver by the Washington Mutual of prompt payment of premiums under the old conditions could not be held to bind appellant under the new terms and conditions. Appellant assumed liability under the policy subject to the terms provided in the rider and did not merely take the place and assume the role of its predecessor. The finding of acceptance of late payments by Washington Mutual Life Association is therefore immaterial, and the theory of waiver must depend upon the act of appellant itself in accepting the first premium after the expiration of the period of grace.

[4-6] Cases in which waiver of the terms of a policy requiring prompt payment of premiums has been held to exist, appear to be those in which there has been a consistent practice on the part of the insurer of accepting late payments, or in which a relatively long series of late payments have been accepted, thus leading the policyholder to believe that late payments will continue to be accepted. See Turner v. Redwood Mutual Life Ass'n, 13 Cal.App.2d 573, 57 P.2d 222; Vinther v. Sunset Mutual Life Ins. Co., 11 Cal.App.2d 118, 53 P.2d 182. It may be seen that the true theory enunciated by these cases is not strictly one of waiver but rather one of estoppel. See Nelson v. National Guaranty Life Co., 131 Cal.App. 669, 672, 21 P.2d 1022, cited in the Vinther case, supra. The conduct of the insurer must have been relied upon by the insured when making the late payments. But in the instant case the findings of the court reveal that when respondent made her payment of the second premium due under the revised policy of insurance she did not know, nor had she any reason to believe, that the payment of the first premium had been accepted by appellant. The court found that the payment of the first premium was mailed to appellant on September 16th, and that on the following day, without having received any word from appellant as to the first premium, respondent mailed appellant the sum of $12 as payment of the second premium; and then, on September 23d, after respondent learned that the correct amount of the premium was $24, respondent mailed appellant an additional $12. But the trial court found that the payment of this addi-

tional sum was made before respondent had received any communication from appellant as to the premiums. It cannot be said, therefore, that respondent, in paying the second premium after the grace period, relied upon the acceptance by appellant of the late payment of the first premium. Moreover, it is doubtful if respondent properly could have relied upon the single instance of waiver of the first premium as justification for late payment of the second premium. "It may be conceded that the receipt of the premium by the company * * * after the time had expired * * * would operate as a waiver, for the purpose of that renewal, of the condition that payment must be made in advance. It is difficult to perceive any sound reason for holding that this would abrogate the condition as to future renewals." Upton v. Travelers' Ins. Co., 179 Cal. 727, 730, 178 P. 851, 852, 2 A.L.R. 1597. It would seem that something more than a single previous instance would be required to estop an insurer in the event of subsequent delinquencies.

[7-9] The trial court, however, appears also to have based its conclusion that appellant had waived prompt payment of premiums upon other facts found to exist, namely, that respondent, as beneficiary, had received no notice of the assumption of the policy by appellant nor of the terms of such assumption, and that appellant sent its first communication to respondent after the period of grace for payment of the September premium had already expired. But it must be pointed out that there was no contractual duty imposed upon appellant to notify the beneficiary of the terms and conditions under which appellant would assume the policy, or to give notice of the premiums due; and the duties and liabilities placed upon an insurer are to be drawn from the contract of insurance. The duty of appellant in this respect had been discharged when notices were sent to the insured. It is true that the assumption agreement recited that it was made with the beneficiaries as well as with the policyholders, but this recital alone would be insufficient to imply a duty on appellant's part to notify the beneficiary as well as the insured under a policy, in the absence of other express or implied provisions of the agreement requiring such notice. This is particularly so where, as here, the beneficiary had no vested interest, the insured having the right to change the beneficiary. It is clear that the reason the assumption agreement recited that it was made with beneficiaries was to leave no doubt that the beneficiaries would have a direct cause of action against appellant to recover any benefits due in accordance with the terms of the policy as modified by the assumption rider. The terms of the policy as assumed by appellant did not include any provision requiring notices sent to the insured to be also sent to the beneficiary. Therefore, the fact that appellant did not notify, respondent of the terms and conditions of its assumption of the policy, or of the premiums due under the policy as assumed, furnishes no basis for a theory either of waiver or estoppel.

[10] It should be noted that the findings of the court reveal that the insured under the policy indicated by his communication to appellant on August 18, 1937, not only that he had received his copy of the assumption rider, but that he also had some understanding of the effect of such conditions on the continuance of his insurance, for he stated that he had not yet been able to determine how much insurance he would be able to carry and that it would depend upon how much money he could spare, implying thereby that he knew the terms of appellant's assumption of the policy had greatly increased the cost of the insurance, necessitating a possible reduction in the amount the insured could carry. It is also apparent from the findings of the court that respondent's confusion and difficulties over ascertaining the terms of appellant's assumption of the policy largely grew out of the fact that the insured became so ill he was unable to discuss the matter with her.

The situation thus created by the illness of the insured could not form the basis for a waiver by appellant of prompt payment of premiums in the absence of a finding that at the time of acceptance of a late premium appellant had knowledge of the condition of the insured. It does not appear here that appellant knew of the illness of the insured. Obviously, the state of the insured's health at the time of his default in payment would be the determining factor in any election by appellant to waive the terms of the policy and continue the insurance in force notwithstanding the default.

[11, 12] It is difficult to perceive how or in what manner the failure of appellant to reply to respondent's letters for six days

could operate either as a waiver or estoppel. It has already been pointed out that there was no contractual obligation on the part of appellant to notify the beneficiary of premium payments due; and it follows, therefore, that there was no duty imposed on appellant to communicate with respondent regarding the payment of premiums before the grace period expired. Moreover, the burden was upon the insured under the contract of insurance to keep the policy in force by payment of premiums, rather than upon the insurer to exert every effort to prevent the insured from allowing his policy to lapse through failure to make the payments. Under the circumstances, respondent was not entitled to rely either upon any communication of appellant or upon appellant's failure to communicate with her with respect to the premiums.

Respondent urges that the acts and conduct of appellant are sufficient to "waive" the payment of the second premium within the grace period. Presumably, respondent has in mind the creation of an estoppel, rather than a theory of waiver. The acts and conduct of appellant above specifically considered have been shown to be insufficient as a basis for either an estoppel or waiver; and no other acts found by the court could properly form the basis for a waiver or estoppel.

[13] The quarterly rate of dues on the original $3,000 policy appears to have been $3, which amounts to but one dollar per month for the insurance in question. The conditions upon which appellant assumed liability under the policy imposed a monthly premium of $24 for the same amount of insurance. In other words, under the policy as revised an amount which was originally sufficient as dues for two years became only enough to keep the policy in force for one month. Of course, under the assumption rider death assessments were apparently eliminated, and the monthly premium became the only payment to be made by the insured. However, the equity or inequity created by such conditions is of no concern here. The only question here involved is whether appellant waived the terms of the policy as to prompt payment of premiums or was estopped to declare the policy no longer in effect. The amount of increase in the premiums over the former dues is immaterial. In fact, it would be untenable to urge that appellant is estopped to deny liability because of the harshness of the terms imposed in assuming it; and respondent does not take such a position. Respondent sought to pay the increased premiums and to obtain the benefits under the policy as revised by appellant. Whether the insured might have taken steps to protect himself against the imposition of such terms is of no consequence in the instant case.

Nor does the traditional abhorrence by the courts of a forfeiture here play a part, since the findings of the trial court furnish no basis in fact for any relief to respondent.

[14] It should be noted that the court's finding that no notice of cancellation of the policy was ever given to respondent or to the insured is at variance with the finding as to appellant's letter to respondent of September 23d, with which it enclosed a form of application for reinstatement of the policy and in which it stated that the grace period had expired. Such a letter should constitute a sufficient notification. See California-Western States, etc., Co. v. Feinstein, 15 Cal.2d 413, 101 P.2d 696. Moreover, the policy in question does not appear to have provided for notice of cancellation.

It should also be pointed out that cases, some of which have been recited by respondent, wherein the insurer was held to have waived a default in premiums by entering into negotiations or transactions with the insured which recognized the continued validity of the policy or treated it as still in force, have no application to the instant case. It is not shown here that any such negotiations or transactions were entered into by appellant.

The court did not find, nor does respondent urge, that in her attempts to pay the premiums and keep the policy in force respondent was acting as the agent of the insured; though it is doubtful that the result would be any different in such a case. It would appear that, under the facts as found, the insured would be in no better position than respondent to claim a waiver or estoppel.

Appellant did not originally file a reply brief. However, at the hearing of this cause it was stated by counsel that appellant's affairs were in the hands of the insurance commissioner, and subsequently a brief has been filed on behalf of the insurance commissioner which raises no new points but is in effect a reply to respondent's brief.

For the foregoing reasons, the judgment is reversed with directions to enter judgment for defendant.

YORK, P. J., concurred.

WHITE, Justice (dissenting).

I dissent. Courts are disposed to seize upon slight circumstances to prevent a forfeiture. In the absence of fraud, where a party has made a sincere and honest effort toward payment of his premium in time, it seems to me that substantial reasons should be required to defeat it as a payment, especially when, as here, appellant insurance company, after being advised of respondent's ignorance of the exact status or amount of the newly established premiums and of her anxiety to maintain the policy in force, failed to notify her until the expiration of the grace period. To my mind, every element of good faith required appellant insurance company, when it received respondent's letters of September 16th and 17th, immediately to advise her of the correct amount due, before September 20th, that being the last day of the grace period.

As was stated by our Supreme Court in Bittinger v. New York Life Ins. Co., 17 Cal.2d 834, 112 P.2d 621, 625, "Conditions which create forfeitures will be construed most strongly against the insurer. Only a stern legal necessity will induce such a construction as will nullify the policy." Upon the authority of Bryson v. Nat. Travelers Casualty Co., 206 Cal. 475, 274 P. 957, it seems to me that when respondent commenced negotiations with appellant insurance company concerning the confusion that had arisen upon her part concerning the premium a bounden duty devolved upon such insurance company to immediately advise her; and in any event such insurance company was estopped from declaring a forfeiture without extending to respondent a reasonable opportunity for payment of the amount due following its letter to her under date of September 23d. See, also, Spiegelman v. Metropolitan Life Insurance Co., 21 Cal.App.2d 299, 68 P.2d 1006.

In my opinion the judgment should be affirmed.

18 Cal.2d 603

SEE v. JOUGHIN et al.

L. A. 17105.

Supreme Court of California.
Sept. 4, 1941.

1. Judgment ⊂⊃572(2)

A judgment on facts presented in complaint and confessed by demurrer is as effectual bar to subsequent action between same parties respecting same subject-matter as would be a verdict and judgment finding same facts.

2. Judgment ⊂⊃572(2)

A judgment for defendant on demurrer to declaration for omission of essential allegation fully supplied by declaration in plaintiff's subsequent suit against same defendant respecting same subject-matter is no bar to such second suit, though both suits were instituted to enforce same right.

3. Judgment ⊂⊃572(2)

A judgment given after sustaining general demurrer to complaint on ground of substance, such as disclosure of absolute defense by allegations of complaint or failure of facts alleged therein to establish cause of action, may be deemed a judgment on merits and conclusive in subsequent suit wherein same facts are pleaded.

4. Judgment ⊂⊃572(2)

Even a judgment on general demurrer to complaint may not be on merits, for defects set up may be technical or formal, in which case plaintiff may eliminate them or correct omissions and allege facts constituting good cause of action in proper form by a different pleading, and where such a new and sufficient complaint is filed, such prior judgment will not bar second suit.

5. Judgment ⊂⊃572(2)

A judgment dismissing action, brought to set aside judgment foreclosing mortgage on grounds of extrinsic fraud in procuring it in order to engraft trust on foreclosure funds, after sustaining general demurrer to amended complaint, adjudicated plaintiff's case on merits and barred second suit by her against same defendants to have foreclosure decree and sale thereunder declared to be for plaintiff's benefit in order to engraft trust on same property, as plaintiff stated substantially same case in both instances and same evidence was essential to establish allegations of complaint in each action.

6. Appeal and error ⊂⊃653(1)

An appellate court, at any time pending determination of appeal, may have record amended so as to speak truth, thus insuring disposition of cause on its substantial merits rather than on technical objections. Code Civ.Proc. § 953.

7. Appeal and error ⊂⊃659(3)

Where engrossed bill of exceptions in transcript on appeal from judgment dismissing action on ground of res judicata, together with trial judge's affidavit, revealed that defendants' counsel offered in evidence judgment roll in previous proceeding between parties and that inspection thereof caused court to dismiss action, defendants were entitled to correction of record on appeal so as to include such judgment roll, and Supreme Court's accomplishment of same result by ordering diminution of record so as to incorporate such judgment roll and trial court's nunc pro tunc order to include it in bill of exceptions was unimportant, if error. Code Civ.Proc. § 953.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action in equity by Zilla Grace See against Lizzie Joughin and others for declaration of a trust on certain realty for plaintiff's benefit. From a judgment of dismissal, plaintiff appeals.

Affirmed.

See, also, 15 Cal.2d 178, 99 P.2d 264.

David G. Kling and Daniel A. Knapp, both of Los Angeles, for appellant.

Eckman & Lindstrom, Ralph G. Lindstrom, Arthur W. Eckman, and Robert L. Moore, all of Los Angeles, for respondents.

G. P. Adams and W. W. Orme, both of Los Angeles, and Bonpane & Prince, of Hollywood, for respondents Lizzie Joughin, and others.

George P. Adams and Charles Beardsley, both of Los Angeles, for respondent Carl Bilger.

CURTIS, Justice.

By this action in equity plaintiff sought to have a trust declared upon certain real property for her benefit. Claim to relief was based upon allegations of extrinsic fraud on the part of defendants in procuring a decree of foreclosure upon this land

The question to be determined is whether the plaintiff is barred from maintaining this action by virtue of a former adjudication in litigation between the same parties over the same subject matter.

On February 19, 1934, the plaintiff filed her original action in the superior court of Los Angeles county. Hearing was had on the second amended complaint, which averred three causes of action. The first count attempted to allege facts constituting extrinsic fraud as grounds for setting aside a judgment which was rendered in a former action foreclosing a mortgage, the second count was for labor performed and expenses incurred in making certain improvements on the mortgaged property in anticipation of a renewal of the second mortgage held by the plaintiff, and the third count asked the court to declare the judgment of foreclosure to be a mere mortgage to secure the plaintiff's lien. General and special demurrers to the second amended complaint were sustained without leave to amend and a judgment of dismissal was entered against the plaintiff and in favor of the defendants. An appeal was taken by the plaintiff, and the judgment was affirmed by the District Court of Appeal upon the ground that the pleading failed "to state a cause of action either to set aside the judgment of foreclosure for extrinsic fraud, to declare a trust in the foreclosure fund or for services performed and expenditures incurred in behalf of the estate". See v. Joughin, 18 Cal.App.2d 414, 418, 64 P.2d 149, 150.

Thereafter plaintiff on February 6, 1937 commenced against the same parties the present suit, the sole purpose of which was to have the decree of foreclosure and the sale thereunder declared to be for the benefit of the plaintiff, and to have a trust declared upon the same property which was involved in the first action. To the amended complaint the defendants interposed their separate answers and special pleas of res judicata. No evidence was taken at the trial in September, 1938, because the court sustained at the outset the defendants' motion to dismiss on the ground that plaintiff was undertaking to assert the same cause of action as to which issue had been made in the previous proceeding. From the judgment of dismissal entered in favor of all defendants on the sole ground of res judicata, the plaintiff brings this appeal.

[1-4] It is well settled that a judgment upon the facts presented in a complaint and confessed by demurrer is as effectual as a bar as would be a verdict and judgment finding the same facts. 2 Freeman on Judgments, 5th Ed., § 746, p. 1571; 34 C.J. 797, § 1219. It is, however, "equally well settled, that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action." Gould v. Evansville & C. R. Co., 91 U.S. 526, 534, 23 L.Ed. 416. These principles have had frequent application in our decisions; and any difficulty in the subject arises, not over the meaning or soundness of the rules, but rather as to their application in particular instances. A clear and accurate statement of the distinctions to be drawn is found in the recent case of Goddard v. Security Title Insurance & Guarantee Company, 14 Cal.2d 47, 52, 92 P.2d 804, 806: "* * * A judgment given after the sustaining of a general demurrer on a ground of substance, for example, that an absolute defense is disclosed by the allegations of the complaint, may be deemed a judgment on the merits, and conclusive in a subsequent suit; and the same is true where the demurrer sets up the failure of the facts alleged to establish a cause of action, and the same facts are pleaded in the second action. 2 Freeman on Judgments, 5th Ed., § 746, p. 1571; Erganian v. Brightman, 13 Cal.App.2d 696, 57 P.2d 971; von Moschzisker, Res Judicata, 38 Yale L.J. 299, 318, and cases cited. But even a judgment on general demurrer may not be on the merits, for the defects set up may be technical or formal, and the plaintiff may in such case by a different pleading eliminate them or correct the omissions and allege facts constituting a good cause of action, in proper form. Where such a new and sufficient complaint is filed, the prior judgment on demurrer will not be a bar. Newhall v. Hatch, 134 Cal. 269, 66 P. 266, 55 L.R.A. 673; Terry v. Hammonds, 47 Cal. 32; Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 268 P. 1073; 2 Freeman on Judgments, 5th Ed., §§ 747, 748; von Moschzisker, Res Judicata, 38 Yale L.J. 299, 318. * * *"

[5] In the light of these principles there remains to be considered whether the judg-

ment rendered upon the demurrer in the former action is a bar to the present one. Comparing the plaintiff's respective pleadings, under the test as to whether the general demurrer to the second amended complaint in the first suit involved a ruling upon the merits of the plaintiff's cause of action as stated in the amended complaint in the last one, we can reach but one conclusion—that the plaintiff stated substantially the same case in both instances. The gist, the gravamen of her case, as framed in her successive actions was extrinsic fraud on the part of the defendants which, she alleged, resulted in the judgment of foreclosure of a mortgage adverse to her interests. The relief sought in both cases was fundamentally the same—a declaration of trust, in the former suit by the setting aside of a decree of foreclosure in order to engraft a trust on the foreclosure funds, and in the present one by having the decree of the same foreclosure declared to be for the benefit of plaintiff in order to engraft a trust upon the same property. The reasons relied upon in each instance were substantially the same. Different forms of expression, it may be conceded, were used in several instances in the amended complaint in the last suit, from those employed in the second amended complaint in the former proceeding but these changes amounted to no more than a rephrasing and rearrangement of language in presenting the identical case previously adjudicated, and such additional averments did not add anything of vitality to plaintiff's pleading of her case as predicated upon allegations of extrinsic fraud.

A well-considered case similar in principle to the instant one is Erganian v. Brightman, 13 Cal.App.2d 696, 57 P.2d 971, wherein plaintiff successively brought two actions against the defendant for wrongful use of process. In her answer to the complaint in the second suit, defendant alleged the final judgment of dismissal entered in the first action upon the sustaining of the general demurrer to the plaintiff's complaint, and that the only difference between the successive complaints was the pleading of certain additional evidentiary facts or conclusions relative to the same cause of action stated in the former suit. In concluding that the judgment of dismissal was a bar to the second action, the court, at page 701 of its opinion in 13 Cal.App.2d, at page 973 of 57 P.2d, made the following observation equally pertinent to the instant discussion:

"* * * In the case of Hardy v. Hardy, 97 Cal. 125, at page 131, 31 P. 906, 908, the court says:

" 'The same evidence which the plaintiff would have introduced to establish the allegations of her complaint in the former action was essential to establish those of the present complaint.'

"The identic nature of the evidence which must be used is frequently employed as a test to determine the identicity of causes of action. It is apparent to us, from a scrutiny of the allegations of the first action and those of the present action, that the evidence used to establish either must be the same. * * *"

Parallel circumstances are present here where the plaintiff by her amendments introduced in the trust-declaration cause of action in her second suit did not strengthen her case, but only succeeded in amplifying the purported grounds of relief without varying the substantial character of the evidence necessary to sustain her claim.

Calculated to fortify her argument that the additional averments in the amended complaint in the present suit are curative of the imperfections and deficiencies contained in her pleading in the first action, so that the former judgment would not operate as a bar here, plaintiff brings to our attention these authorities: Newhall v. Hatch, 134 Cal. 269, 66 P. 266, 55 L.R.A. 673, and Terry v. Hammonds, 47 Cal. 32. But the instant situation is easily differentiated from those cases, in each of which the complaint in the second suit supplied a material averment lacking in the corresponding pleading in the first suit, wherein the judgment of dismissal was rendered upon sustaining a general demurrer. This controlling feature is illustrated by the following language from Terry v. Hammonds, supra, 47 Cal. at page 36: "In the former action brought by the plaintiffs there was no averment in the complaint to the effect that the services were rendered in the preservation of the separate estate of the wife, and on the faith of that estate; nor even that the wife had a separate estate. But these material averments are supplied in the present case, and the two causes of action are therefore different." Equally significant is the reasoning of the court in Newhall v. Hatch, supra, 134 Cal. at page 272, 66 P. at page 267, 55 L.R.A. 673, with respect to the effect of the prior adjudication that the cause of action was barred by the statute of limitations: "* * * In that [former] action the plaintiff sought to recover upon an obligation alleged to have been made in November, 1892, whereas in the present action his right of recovery is also based upon the additional promise of Hatch, made in September, 1895,—an issue which was not presented in the former action, and which could not have been determined therein." However, the salutary principle of these decisions in the distinctive circumstances outlined is of no avail to the plaintiff here, for our careful examination of her pleadings in the two actions convinces us that their substance and legal effect are the same in all material respects. Accordingly, it is our opinion that the plaintiff's case as presented here was adjudicated upon its merits in the former litigation, and the second suit is barred.

[6, 7] The only other point which requires notice concerns the trial court's entry of an order nunc pro tunc as of the day of the settlement of the bill of exceptions, to include in that bill the judgment roll in the former action. Thereafter, in response to the defendants' motion, supported by affidavit of the trial judge, this court ordered diminution of the record so that the nunc pro tunc order and judgment roll could be incorporated therein "all without prejudice, however, to the consideration on this appeal of the validity and effect of said nunc pro tunc order". See v. Joughin, 15 Cal.2d 178, 180, 99 P. 2d 264, 265. An appellate court may, at any time pending determination of the appeal, have a record amended so as to speak the truth (§ 953, Code Civ.Proc.), thus insuring disposition of causes, upon their substantial merits rather than upon technical objections. An examination of the engrossed bill of exceptions as contained in the transcript on appeal in the present suit, together with the afore-mentioned sworn statement of the judge on the subject, reveals that the defendants' counsel offered in evidence the judgment roll in the former proceeding and that its inspection caused the trial court to dismiss the instant action. Under these circumstances it would have been proper for this court to have ordered the record on this appeal corrected so as to include the judgment roll in the former action, and thus "enable this court to review the decision of the lower court, in view of all the facts which that court had before it when it made such decision". McMahon v. Hamilton, 202 Cal. 319, 325, 260 P. 793, 795; In re Lamb's Estate, 95 Cal. 397, 408, 30 P. 568. In any event defendants were entitled to this relief; therefore, the particular method followed to obtain the desired result here loses importance.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

18 Cal.2d 573

STEELE v. BARTLETT.

S. F. 16658.

Supreme Court of California.

Sept. 2, 1941.

1. Time 🔑10(1)

The time within which or upon which an act may be done is extended by statutes one day when the last day falls on a Sunday or holiday, but the time for an act that must be performed "not less" than or "not later" than a given number of days before a designated time is not extended by such statutes when the designated time falls on a Sunday or holiday. Code Civ.Proc. §§ 12, 12a, 13; Pol.Code, §§ 12, 13.

2. Time 🔑10(1)

Under statute providing that nominating papers must be filed not later than 12 o'clock noon on 31st day before election, nominating papers of candidates at special election to fill two vacancies on city council, filed on 30th day before election, were filed one day late, and the fact that the 31st day before election was Sunday did not serve to extend time for filing to the following day. Code Civ.Proc. §§ 12, 12a, 13; Pol.Code, §§ 12, 13; St.1939, p. 282, § 9760.

In Bank.

Mandamus proceeding by Carl D. Steele against Albert H. Bartlett, city clerk, to compel the city clerk to omit certain names from ballots on ground that nominating papers were not filed in time.

Peremptory writ of mandamus ordered to issue.

R. S. Riddle, of San Pedro, for petitioner.

No appearance for respondent.

PER CURIAM.

Mandamus to compel the respondent city clerk to omit certain names from ballot.

The city of Torrance, a city of the sixth class, has noticed a special election for September 10, to fill two vacancies on the city council resulting from the recall of incumbents. Several persons seeking the office have filed nominating papers, which papers, under section 9760 of the Elections Code, St.1939, p. 282, must be filed "not later than twelve o'clock noon on the *thirty-first* day before the election." Computation reveals that the thirty-first day before September 10 (election day) was Sunday, August 10, the last day on which such nominating papers might be filed. However, six of the eleven candidates (Day, Hyde, Newton, Paour, Calder and Tolson) filed their nominating papers on Monday, August 11, which is only thirty days before the election. Accordingly, petitioner as a taxpayer and elector, instituted this proceeding in mandamus to compel the respondent city clerk to omit the names of said six persons from the ballot on the ground that their nominating papers were not filed within time.

[1] Griffin v. Dingley, 114 Cal. 481, 483, 46 P. 457, and Hutchins v. County Clerk, 140 Cal.App. 348, 35 P.2d 563, are authority for the proposition that while sections 12, 12a, and 13 of the Code of Civil Procedure and Political Code serve to extend one day the time within which or upon which an act may be done when the last day therefor falls on a Sunday or holiday, said sections are without application and do not extend the time for an act that must be performed "not less" than or "not later" than a given number of days before a designated time. In the latter situations it is held that to permit such an extension would be to nullify the legislative intent that the act must be performed more than a designated number of days before the event specified.

As stated in Griffin v. Dingley, supra, 114 Cal. at page 483, 46 P. at page 457, "the statute does not fix the day upon which or the time within which the certificate is to be filed, but declares that it shall be filed 'not less' than 30 days before the day of election. To hold that it could be filed 28 days [two consecutive holidays were there involved] before the day of election would be in manifest disregard of the provisions of the statute."

[2] It necessarily follows that the nominating papers of the six candidates whose names are here sought to be kept off the ballot were filed one day late and the fact that the thirty-first day before the election fell on a Sunday did not serve to extend the time for such filing to the following day.

Let a peremptory writ of mandate issue as prayed.

46 Cal.App.2d 718

PEOPLE v. MESSERLY.

Cr. 463.

District Court of Appeal, Fourth District, California.

Sept. 11, 1941.

1. Criminal law 🔑1166(1)

Where accused admitted that jury was justified in finding him guilty of assault with a deadly weapon and that evidence was sufficient to sustain that verdict, no substantial right of accused was prejudiced by action of trial court in trying accused's insanity plea alone before a new jury after the first jury disagreed on such issue, as permitted by Penal Code. Pen.Code, § 1026.

2. Criminal law 🔑867

Where there has been a failure of trial by disagreement of the jury, the status of the case is the same as if there had been no trial.

3. Criminal law 🔑624

Where jury found accused guilty of assault with a deadly weapon, and disagreed on issue presented by plea of not guilty by reason of insanity, the trial court properly directed a trial before another jury on the issue presented by the insanity plea alone without a retrial of the question of the accused's guilt of the offense charged. Pen. Code, § 1026.

4. Assault and battery 🔑92
Criminal law 🔑570(1)

Evidence sustained conviction for assault with a deadly weapon, as against pleas of not guilty and not guilty by reason of insanity.

5. Criminal law 🔑624

The Penal Code provision giving trial court discretion to try issue of sanity of an accused before the same or before a different jury from that trying accused for the offense charged is constitutional. Pen.Code, § 1026.

6. Criminal law 🔑1036(6)

Objections to qualifications of alienists appointed by the court to examine accused who entered plea of not guilty of assault with a deadly weapon by reason of insanity, could not be raised for the first time on appeal. Pen.Code, § 1027.

7. Criminal law 🔑624

Where two alienists were appointed by the trial court to examine accused who entered plea of not guilty of assault with a deadly weapon by reason of insanity, and the alienists thoroughly examined accused and were fully cross-examined by counsel for accused, action of trial court in denying request made by counsel for accused that the court appoint a third alienist to examine accused and testify at the trial, as permitted by Penal Code, was not abuse of discretion. Pen.Code, § 1027.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Charles W. Messerly was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Vincent Whelann, of San Diego, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant was accused by information of the crime of assault with a deadly weapon. He pleaded not guilty and not guilty by reason of insanity, and expressly waived the appointment of an alienist from the state hospital. Two other alienists were appointed by the court. The jury found appellant guilty of assault with a deadly weapon as charged. Thereafter the trial court ordered the trial to proceed before the same jury on the plea of not guilty by reason of insanity. After deliberating for more than a day the jury declared it was unable to agree upon a verdict. It was thereupon ordered discharged. Appellant moved to set aside the verdict of guilty of assault with a deadly weapon, which motion was by the court denied. The case was thereafter reset for trial on the second plea for February 3, 1941. Appellant waived the statutory time for trial and moved for continuances which were granted. On March 3, 1941, a new jury was sworn to try the issue of not guilty by reason of insanity. That jury returned its verdict finding appellant sane at the time of the commission of the offense as charged in the information. This appeal is from the judgment of conviction.

A brief resume of the facts may be thus stated: On the night of October 22, 1940, appellant went to the home of his estranged wife. He had been separated from her for several months and had been negotiating for a reconciliation. He had been drinking for some time prior to his call at his wife's residence on the night in question. A married couple were visiting at her home on that night. Appellant appeared at the rear door of the home. Later appellant and appellant's wife were seen in the kitchen. Appellant was striking his wife up and down the back and over the shoulders with what afterwards proved to be an ice pick. Several of the stab wounds pierced her lungs, causing severe hemorrhages. The ice pick was still in the appellant's hand at the time of the arrival of the investigating officers.

Appellant argues: (1) That it was error to try the insanity plea alone before a new jury, after the first jury had disagreed on this issue, and contends that he was also entitled to a retrial by the new jury of the question of his guilt or innocence of the offense charged. (2) That he did not have the benefit of two alienists as contemplated by section 1027 of the Penal Code. (3) The sufficiency of the evidence of appellant's sanity is also questioned.

[1] Section 1026 of the Penal Code gives the trial court discretion to try the second issue before the same or a different jury. Appellant admits that the first jury was justified in finding him guilty of as-

sault with a deadly weapon and that the evidence was sufficient to sustain that verdict. No substantial right of the appellant can therefore be prejudiced by this action of the trial court. This section provides for such procedure and unless some fundamental right of the accused was taken away or the appellant has been in some manner prejudiced in the trial before the new jury on the second issue, the appellant's contention is without merit.

Appellant argues that the question of the constitutionality of section 1026 of the Penal Code in allowing two different juries to pass upon these issues separately has never been determined by the higher courts of this state. It appears that counsel for appellant has cited and adopted the argument and authorities cited in the dissenting opinion, in People v. Marshall, 209 Cal. 540, 551, 289 P. 629. The majority opinion, however, rejected that argument and upheld the action of the appellate court in People v. Marshall, 99 Cal.App. 224, 278 P. 258, remanding the remaining issue presented by the special plea for trial before another jury. In the latter case the defendant entered a plea of not guilty and not guilty by reason of insanity and was convicted by a jury on the charge of grand theft. The jury was discharged. The trial court proceeded to pronounce judgment without submitting to that jury or another jury the remaining issue in reference to defendant's sanity.

People v. Pokrajac, 206 Cal. 259, 274 P. 63, on which case appellant also relies, may be authority supporting the right of a reviewing court to order a new trial on both issues where that court concluded that under the circumstances there appearing, a retrial as to both issues should be had. People v. Marshall, 209 Cal. 540, 543, 289 P. 629. Neither case cited by appellant supports the argument that a retrial as to both issues must be had in all cases.

[2, 3] When there has been a failure of trial by disagreement of the jury, the status is the same as if there had been no trial. People v. Disperati, 11 Cal.App. 469, 476, 105 P. 617. The jury having disagreed in the instant case on the issue presented by the second plea, it was as if there had been no trial on that issue. The situation then presented is exactly the same as that presented in People v. Marshall, supra, where it was decided that it was proper to direct a trial upon the issue presented by the second plea alone without a retrial of the question of appellant's guilt or innocence of the offense charged. The same question as here presented was presented in People v. Dawa, 15 Cal.2d 393, 101 P.2d 498. The appellant there was charged and found guilty of the crime of murder. He had entered two pleas, not guilty, and not guilty by reason of insanity. The jury returned a verdict of murder in the first degree without recommendation. In the report of that case the following appears on page 394 of 15 Cal.2d, on page 498 of 101 P.2d.

"The trial upon the defendant's insanity plea then proceeded, as authorized by statute, before the same jury. In view of the ultimate inability of the jury to reach a verdict upon the issue raised by said plea, it was discharged and a new jury sworn to try the sanity issue. * * * The jury returned a verdict finding the defendant sane at the time of the commission of the homicide. Under the verdicts and the law, the trial court had no alternative but to enter judgment imposing the extreme penalty."

The appeal in that case was an automatic appeal under Penal Code, section 1239, from a death penalty. It is not improper to assume, and of persuasive force to consider, that if any constitutional irregularity appeared in that case, the Supreme Court would not have affirmed the judgment in the language quoted above.

The question of the constitutionality of section 1026 of the Penal Code was fully discussed in People v. Hickman, 204 Cal. 470, 268 P. 909, 270 P. 1117.

[4, 5] The evidence was legally sufficient to support the verdict finding appellant guilty of the charge and finding him to be sane at the time of the commission of the crime. No reason appears for another trial upon the same issue, nor does any constitutional prohibition or inherent right of appellant appear to have been violated by having submitted to a new jury the issue of appellant's plea of insanity. The question here presented has been determined adversely to appellant's contention by the Supreme Court of this state.

[6, 7] The only remaining question involves a request made by counsel for appellant that the court, due to the poverty of appellant, appoint a medical expert to "examine him and testify at the trial".

Two alienists were appointed by the court and thoroughly examined the appellant. These alienists were fully cross-examined by counsel for appellant. No objections were made at the trial as to their qualifications. Such objections cannot now be raised for the first time on appeal. People v. Smith, 96 Cal.App. 373, 274 P. 451. In effect appellant was merely requesting the trial court to exercise its discretion and appoint a third alienist, which is permitted under the provisions of Penal Code, section 1027. We see no abuse of discretion in disallowing this request.

Judgment affirmed.

MARKS, Acting P. J., concurred.

46 Cal.App.2d 704

PEOPLE v. CORSALINI.

Cr. 2190.

District Court of Appeal, First District, Division 2, California.

Sept. 3, 1941.

Hearing Denied Oct. 2, 1941.

1. Larceny 🔑65

Conflicting evidence sustained conviction for grand theft.

2. Criminal law 🔑997

Where accused on hearing of his petition for a writ of error coram nobis testified that his attorney asked that a jury be waived and that prosecuting attorney said "Let the defendant answer that", it appeared that accused's attorney joined in the waiver as against accused's contention that he was entitled to a jury trial because his counsel did not join with him in waiving trial by jury.

3. Criminal law 🔑997

Where accused's testimony, in support of his petition for a writ of error coram nobis on the ground that he had been deprived of jury trial through false representation of his attorney that waiver of jury would be necessary in order to secure a continuance, was flatly contradicted by such attorney, court was entitled to resolve conflict against accused and deny petition.

4. Witnesses 🔑219(3)

Where accused testified in support of his petition for writ of error coram nobis on the ground that he had been deprived of a jury trial through false representation of his attorney that waiver of jury would be necessary in order to secure a continuance, the failure to object to contradictory testimony by accused's attorney "waived" accused's privilege as a client, if any existed after accused had testified to his version of conversation with attorney.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

5. Criminal law 🔑1169(1)

Where probation officer's report in no way dealt with question at issue on hearing of accused's petition for writ of error coram nobis on the ground that accused had been deprived of a jury trial through false representation of his attorney, error, if any, in admitting such report over objection that it was hearsay was not prejudicial.

◆

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Ralph Corsalini was convicted of grand theft and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener and Dennis Hession, Deputy Attys. Gen., for respondent.

DOOLING, Justice pro tem.

The defendant was convicted of grand theft. The witness Tollner, was a German sailor from the S. S. Columbus at that time interned at Angel Island. He testified that on the morning of October 13, 1940, at about 4 a. m., he was on a street in San Francisco and inquired of a man standing by an automobile how to get to the Three Musketeers. The man directed him and then started to talk to him about wrestling and began to wrestle with him with one hand between his legs. The man then ran to the car, in which another man was seated, and the car drove away. Tollner found that a black wallet, which he had placed in his left hand hip pocket fifteen to thirty minutes before after paying for a cup of coffee, was missing. The wallet had contained $10. Tollner went into a hotel in front of which these events had occurred and a man in the hotel called the police. Tollner could not identify the defendant as the man who had wrestled with him.

The witness Meldow testified that in the early morning of October 13, 1940, he was standing in the lobby of the Willard Hotel at 161 Ellis street in San Francisco looking into the street through a plate glass window. He saw the defendant and Tollner in front of the hotel about twenty feet from him. The defendant was patting Tollner on the hips. Then he heard a remark: "I bet I can guess your weight" and the defendant "picked up the German fellow and grabbed him under the legs, and lifted him up, and as his hand slid down, I saw what was apparently a pocket book come out in his hand". The defendant then walked to the car and drove away. This witness took the license number of the car, a New York license, and the hotel clerk notified the police.

A police officer testified that he located the car about 10 a. m. the same day by the number given the department and through that found and arrested the defendant.

The defendant admitted talking to Tollner in the early morning of October 13th in front of the Willard Hotel, admitted putting an arm around him, admitted leaving in the car, but denied that he wrestled with him or took his wallet.

[1] Appellant claims that these facts are not sufficient to prove his guilt beyond a reasonable doubt. It is true that Tollner could not identify the defendant but the identification by Meldow was positive and we are satisfied that the facts recited amply support the judgment of conviction.

Appellant makes some contention that he is entitled to a jury trial because his counsel did not join with him in waiving trial by jury. The minutes recite: "Thereupon the Defendant waived trial by Jury." Defendant himself testified on the hearing of his petition for a writ of error coram nobis, hereinafter considered: "Mr. Lipman (appellant's attorney) asked that we waive a jury and Mr. Garry (the prosecuting attorney) said, 'Well let the defendant answer that'.

"The Court: But you did then answer, did you? A. I did."

[2] From this it seems clear that appellant's attorney joined in the waiver.

After an application for probation had been denied and defendant had been sentenced, defendant through his present attorney moved to set aside the judgment and sentence and filed a petition for a writ of error coram nobis on the ground that he had been deprived of a jury trial through the false representation of his attorney to him that it would be necessary to waive trial by jury to secure a continuance.

Defendant took the stand and testified in support of his motion and petition. His testimony was flatly contradicted by Mr. Lipman, his former attorney, who testified that at no time did he tell defendant that if he wanted a continuance he would have to waive a jury. The court denied the motion and petition and from these orders defendant has also appealed.

[3, 4] The court was entitled to resolve the conflict between appellant and his former attorney against appellant. People v. Deutsch, 16 Cal.App.2d 121, 60 P.2d 155. No objection was made to the testimony of Mr. Lipman and the privilege, if any existed after appellant had testified to his version of his conversations with his attorney, was waived. 27 Cal.Jur., p. 55.

[5] The court admitted into evidence on the hearing of the petition the report of the probation officer over objection that it was hearsay. We may assume that this objection was sound, but the report did not in any way deal with the sole question then in issue, i. e., did appellant's attorney induce him to waive a jury trial by a false representation? The error, if any, could not have been prejudicial.

The judgment and orders appealed from are affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

46 Cal.App.2d 684

ALPHONZO E. BELL CORPORATION v. BELL VIEW OIL SYNDICATE et al. (ALEXANDER et al., Interveners).

RILEY et al. v. ALPHONZO E. BELL CORPORATION et al.

Civ. 11691.

District Court of Appeal, First District, Division 2, California.

Sept. 3, 1941.

Hearing Denied Oct. 30, 1941.

1. Trusts 🔑235

The rule of nonliability of a trust estate for tortious acts of the trustee is not absolute.

2. Trusts 🔑235

A fiduciary trust estate may be required to respond in damages for trustee's tortious act to extent that the estate has been enriched by such act. Civ.Code, § 3521.

3. Joint stock companies and business trusts 🔑17

Where oil corporation sued oil syndicate and its unit holders for subsurface trespass and taking of more than two million barrels of oil through slant wells, which unit members did not deny, and trustees of syndicate settled all claims for $450,000, in intervention by unit holders challenging right of trustees to settle claims from trust estate, it was presumed that trust estate and unit holders had secured substantial benefit from settlement.

4. Joint stock companies and business trusts 🔑19

Where oil corporation sued oil syndicate and its unit holders for subsurface trespass and taking of more than two million barrels of oil through slant wells, which unit holders did not deny, and trustees of syndicate settled all claims for $450,000 paid from trust estate, there being no charge of fraud in settlement, unit holders cannot sue to recover amount paid by trustees in settlement without restoring benefits which they received from settlement and dismissal of corporation's action. Civ.Code, § 3521.

5. Pleading 🔑35, 310

Where oil syndicate was conceded by all parties to be common law trust, and conclusions pleaded by unit holder of syndicate in proceeding challenging settlement of claims against syndicate by trustees, that trustees were without right to drill wells, that trust estate was not party capable of being sued, and that trustees were without power to defend estate in court and to compromise and settle litigation, were contrary to express terms of instrument creating trust which was made part of complaint, superior court in hearing on demurrer to complaint, examined instrument creating trust and treated pleader's conclusions as surplusage.

6. Joint stock companies and business trusts 🔑17

Trust indenture creating oil syndicate *held* to expressly empower trustees to develop and operate oil properties and wells in name of syndicate, to exercise exclusive management and control of trust estate, and to employ counsel to prosecute, defend or settle any law suits and to compromise or refer to arbitration any claims in favor of or against trust.

7. Joint stock companies and business trusts 🔑19

An oil syndicate which was actually a common law trust was properly sued under its name, as it was an association of two or more persons transacting business under common name. Code Civ.Proc. § 388.

8. Joint stock companies and business trusts 🔑19

Oil syndicate organized to develop and operate oil properties, and admitted by all parties to be common law trust *held* to be a "business" within meaning of statute providing that certain businesses could be sued in their common name. Code Civ.Proc. § 388.

See Words and Phrases, Permanent Edition, for all other definitions of "Business".

9. Judgment 🔑572(3)

In order for judgment overruling demurrer to cause of action in complaint by oil corporation against oil syndicate for subsurface trespass and taking of oil to have been final upon issue of capacity of syndicate to be sued, capacity need not have been raised by demurrer, but it was sufficient if original complaint pleaded all facts relative to acts of syndicate which would have been necessary to raise that issue, and there was opportunity to raise issue at that time.

10. Judgment 🔑725(1)

Whatever issue was actually and necessarily included in a former judgment is deemed to have been adjudged there. Code Civ.Proc. § 1911.

11. Action 🔑53(1)

A party cannot try his case piecemeal.

12. Judgment 🔑668(1)

Where unit holders of oil syndicate organized as common law trust had been parties to suit by oil corporation against syndicate for subsurface trespass and taking of oil and were present in court and demurrer to corporation's cause of action had been overruled, such judgment was final upon all issues relating to liability of all defendants, when unit holders complained in later proceeding of liability of syndicate.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Alphonzo E. Bell Corporation against Bell View Oil Syndicate and others for value of oil extracted from plaintiff's property by subsurface trespass and for injunction to restrain further extraction of oil, wherein Emma J. Alexander and others and Union Oil Company of California filed complaints in intervention. After proceedings were had in Superior Court to clarify proceedings, Guy S. Riley and another filed complaints in intervention. From an order sustaining demurrers to complaint in intervention without leave to amend, Guy S. Riley and another appeal.

Affirmed.

Hearing denied; EDMONDS, J., did not participate.

Mott & Grant, J. Edw. Haley, and Howard A. Grant, all of Los Angeles, for interveners and appellants.

Haight, Trippet & Syvertson, Raymond Haight, and Arthur L. Syvertson, all of Los Angeles, for respondents Bell View Oil Syndicate et al.

Paul M. Gregg, Andrews & Kline, and Mortimer Kline, all of Los Angeles, for respondent Union Oil Co.

G. P. Adams, of Los Angeles, Philip S. Dickinson, of Whittier, and Hill, Morgan & Bledsoe and Kenneth Wright, all of Los Angeles, for respondents Emma J. Alexander et al.

Overton, Lyman & Plumb, Eugene Overton, and Donald H. Ford, all of Los Angeles, for respondent A. E. Bell Corporation.

NOURSE, Presiding Justice.

The litigation involved in this appeal relates to the controversies among the owners and lease holders of certain oil bearing properties, and the trustees and unit holders of interests in a business or commercial trust created for the purpose of operating part of the property involved. It was begun by the Bell corporation to restrain the alleged unlawful trespass of these trustees by which they were alleged to have abstracted large quantities of valuable oil from the plaintiff's property by means of "slant" wells. A recapitulation of a part of the history of the litigation is given in an appendix to respondents' brief from which we quote:

"The original complaint in this action was filed on June 22, 1935. Plaintiff, Alphonzo E. Bell Corporation, is a land owner in the Santa Fe Springs oil field. Defendant, Bell View Oil Syndicate, a common-law trust, through its three trustees, defendants Hooper C. Dunbar, Craig C. Horton and Gordon B. Morris, owns a small parcel of land lying to the southwest of the property of plaintiff. In the original complaint, in addition to the Syndicate and the trustees, the unit holders thereof were made parties defendant and Union Oil Company of California, the lessee of Alphonzo E. Bell Corporation, was made a nominal party defendant, after having failed, upon request, to join as a party plaintiff.

"Demurrers to this complaint were interposed by defendants and the demurrer of certain defendant unit holders was sustained without leave to amend. An appeal from the judgment of dismissal in behalf of the unit holder, following that order was taken in L. A. No. 15658 (3rd Civil 5926) and the District Court of Appeal reversed said judgment and ruling on demurrer, which decision is reported in 24 Cal.App. 2d at page 746, 76 P.2d 166.

"While the above appeal was pending plaintiffs amended their complaint and at approximately this time interveners Emma J. Alexander, et al., plaintiffs in intervention, and Union Oil Company of California, defendant in intervention, intervened in the action. (Interveners are respectively lessors and lessee of a parcel of real property that lies between the property of Alphonzo E. Bell corporation and of the Bell View Oil Syndicate.) New demurrers were filed and sustained without leave to amend. Thereafter Union Oil Company of California appeared in the action and, with Alphonzo E. Bell Corporation, joined in a motion for leave to file an amended complaint, despite the prior ruling on demurrer. The interveners Emma J. Alexander, et al., also asked leave to amend their complaint. The motions were heard by a new and different judge, the judge hearing the prior demurrers having resigned from the bench. After hearing, the motion of Alphonzo E. Bell Corporation and Union Oil Company was granted but that of interveners was denied on the grounds that their interest was not such as to warrant intervention. Interveners appealed from the following judgment of dismissal, L. A. No. 15948 (3rd Civil No. 5927) and the judgment of the District Court of Appeal reversing said ruling is reported in 24 Cal.App.2d 587, 76 P.2d 167. Plaintiffs Alphonzo E. Bell Corporation and Union Oil Company filed their amended complaint and a demurrer thereto was sustained as to plaintiff Union Oil Company, without leave to amend. Union appealed from the dismissal following this ruling, L. A. No. 16061 (3rd Civil No. 5928) and the judgment of the District Court of Appeal reversing that judgment is reported in 24 Cal.App.2d at page 747, 76 P.2d 166.

"Alphonzo E. Bell Corporation thereupon filed a new complaint which was again demurred to, which demurrer was sustained without leave to amend. An appeal was taken from the judgment of dismissal following this ruling, L. A. No. 16263 (3rd Civil No. 5929) and the decision of the District Court of Appeal reversing said ruling is reported in 24 Cal.App.2d at page 748, 76 P.2d 166.

"The four appeals above referred to, although reported separately, were as a matter of fact, consolidated and were heard by the same court and at the same time. The four decisions above recited were made on January 27, 1938. Thereafter, the Supreme Court on March 28, 1938, [76 P.2d 166, 167] denied a petition to have the cause heard by it.

"After the remittiturs of the above referred to appeals had been returned, proceedings were had in the Superior Court of the State of California, in and for the County of Los Angeles designed to clarify the proceedings, and prior to the time fixed for defendants to answer, interveners Riley and Brenneman asked leave and were granted on June 3, 1938, the right to intervene in the present proceedings."

After this complaint in intervention was filed the appellants herein were granted leave to file a supplemental complaint alleging that, since the dates of filing of their original complaint the trustees of the Bell View Oil Syndicate had entered into a compromise and settlement of the litigation with the original plaintiff and the other interveners under which they had paid to those claimants the sum of $450,000, and taken a dismissal of all the causes pending. They asked judgment against all parties for restoration of this sum to the trust estate. Demurrers to the amended and supplemental complaints, based upon both general and special grounds, were sustained without leave to amend. No request to amend was made, but these interveners have appealed from the judgment of dismissal based upon the ruling on the demurrers.

The appellants rest their appeal upon the two enquiries—whether a trust estate can be held liable for damage caused by tort of its trustees, and whether the trustees may use trust funds in settlement of claims made by third parties based upon such damage. The respondents, who are the original plaintiff, the interveners other than these appellants, the Bell View Oil Syndicate and its three trustees, disagree with this statement of the issues and state a multiple of questions which they contend present the issues involved but which need not be repeated as we will confine our discussion to such points as we deem determinative of the appeal.

The appellants argue that, since the trust estate is not liable for the tortious acts of its trustees, and cannot be sued upon such liability, the use of trust funds to settle the litigation was beyond the powers of the trustees. The argument is based upon two false premises—a trust estate *may* be liable for such acts under certain circumstances; the liability of this estate to be sued therefor has been determined on the former appeal and this is the law of the case. The power of the trustees to make the compromise is expressly conferred by the trust indenture.

[1, 2] The question whether this trust estate may be sued for damages arising in this manner cannot be determined upon the authorities relating to fiduciary trusts alone, and as to such trusts, the rule of nonliability is not absolute. Thus a fiduciary trust estate may be required to respond in damages for the trustee's tortious act to the extent that the estate has been enriched by such act. This principle is stated in Brownfield v. McFadden, 21 Cal.App.2d 208, 216, 68 P.2d 993, 998, in this language: "As the trust estate has been thus enriched by the loan, it would seem there should be a moral obligation on its part to repay the loan. * * * If this is true the general assets of the trust estate should be held liable for the payment of the note and judgment upon it. * * * The executor had actual notice of this order and the estate should not be permitted to accept its benefits and escape its burdens." The principle is based upon the maxim of jurisprudence stated in section 3521 of our Civil Code: "He who takes the benefit must bear the burden."

[3, 4] The appellants argue that this principle is not applicable here because their complaint in intervention does not specifically allege that the trust estate was enriched by the acts of its trustees. The third amended complaint of the Bell Corporation, suing the trust estate as well as the trustees and the beneficiaries, alleged that these "defendants well knew that it was probable that said well would depart from within the confines of said Bell View property and enter into and trespass upon the property of others; That in drilling and deepening said well said defendants were required to use such care as was necessary to prevent said well from departing from within the confines of said Bell View property; * * * that nevertheless, the said defendants and each thereof failed and neglected to exercise such care and in utter disregard of the rights of plaintiff permitted said well to enter into and beneath the property of plaintiff and to penetrate and to produce from the oil and gas deposits and measures contained in the Bell property." It is further alleged that, through these and other similar operations these defendants removed from beneath the plaintiff's property more than two million barrels of oil to the damage of the plaintiff of more than three million dollars. These allegations have not been denied by any of the parties to the proceeding. The appellants' complaint in intervention does not controvert them. In this respect the appellants have followed the none too commendable practice of avoiding allegations of the true facts in order to escape demurrer. It is inconceivable that, if this sum of more than three million dollars was received by the trustees and no part of it passed over to the trust estate, these appellants would not have instituted proceedings to call the trustees to account and would not have been forced to pursue the highly doubtful remedy which they here assert. And of course if it were true that any portion of the converted oil went to enrich the trust estate the principle above noted would foreclose the proceeding. In any event, since the action instituted by the Bell Corporation was dismissed and ended as to all defendants—the trust estate, the trustees, and the unit holders—before appellants' amended and supplemental complaint was filed it must be presumed that the trust estate and the unit holders secured a substantial benefit from the settlement which must be restored before the present action can be maintained. That is to say, there being no fraud, deceit or bad faith charged in the settlement, the appellants cannot sue to recover it for themselves without restoring the benefits which they received from the settlement and dismissal of the action.

[5] But, assuming that the question of failure of restoration is not presented on the demurrers, appellants are faced with the obstacle that the trust estate is nevertheless responsible for the alleged acts of conversion. The third amended complaint of the original plaintiff alleged that the Bell View Oil Syndicate "was and now is an association of two or more persons transacting business under the name of Bell View Oil Syndicate; that the Bell View Oil Syndicate is what is commonly referred to as a Massachusetts or common law trust; that defendants Hooper C. Dunbar, Gordon B. Morris and Craig C. Horton are, and at all times herein mentioned were trustees of said Bell View Oil Syndicate. * * *" The appellants concede that such was the character of the trust. But they argue that the trustees were without right to drill the wells, that the trust estate was not a party capable of being sued in court, and that the trustees were without power to defend the estate in court, and hence, without power to compromise and settle the litigation. All these conclusions of the pleader are contrary to the express terms of the instrument creating the trust which is pleaded in full and made a part of the complaint. Under these circumstances the court will, in hearing on the demurrer, examine the exhibits and treat the pleader's conclusions as surplusage. National Pavements Corp. v. Hutchinson Co., 132 Cal. App. 235, 238, 22 P.2d 534, citing Peak v. Republic Truck Sales Corp., 194 Cal. 782,

790, 230 P. 948, and Bashford v. Levy & Zentner Co., 123 Cal.App. 204, 210, 11 P. 2d 51.

[6] Turning to the trust indenture we find that the trustees are given express power to develop and operate oil properties and wells "in the name of the Bell View Oil Syndicate"; to "exercise the exclusive management and control of the trust estate"; and to "employ counsel to begin, prosecute, defend or settle law suits, at law, in equity or otherwise, and to compromise or refer to arbitration, *any claims in favor of or against the trust*". (Emphasis ours.)

[7, 8] As a business or commercial trust the unit holders made up "an association of two or more persons transacting business under the name of Bell View Oil Syndicate". This is the manner in which the trust, the trustees, and the unit holders were sued in the original proceeding. Section 388 of the Code of Civil Procedure provides that when "two or more persons, associated in any business, transact such business under a common name, * * * the associates may be sued by such common name * * *." The practice was approved in Jardine v. Superior Court, 213 Cal. 301, 317, 320, 2 P.2d 756, 764, 79 A.L.R. 291, where the supreme court used the following language which is pertinent here: "The question is not whether the members secure for themselves any profits, present or prospective, *but whether there is a business.* Here we have a business, and one which earns large profits. If they are not the profits of the members individually, they must be the profits of the association itself, and such is, indeed, the fact. No amount of theoretical argument can escape the fact that money is being received for services rendered, and that the money so received and the property purchased with it is held by trustees for the association." (Emphasis ours.) All the pleadings, as well as the trust indenture, disclose that the oil syndicate was a "business". If there is any sanctity around a Massachusetts, or common law trust, which permits it to engage in business and earn large profits free from judicial control we do not know upon what legal or moral foundation the principle is based.

[9-12] But aside from the question of the right to sue the syndicate for the alleged tort (and here it should be borne in mind that the original plaintiff had prayed for injunctive relief, both restrictive and mandatory, and for an accounting as well as damages for the tort), appellants are faced with an obstacle which no amount of argument can overcome. That is the admitted fact that the syndicate and its unit holders were sued along with the trustees, that the latter defended in the name of the syndicate, and the appellate court ruled that a good cause of action was stated against all the defendants. It is of no avail to appellants that the capacity of the syndicate to be sued for the alleged tort *may* not have been raised by the previous demurrers. It is sufficient that the original complaint pleaded all the facts relative to the acts of the syndicate through its trustees which would have been necessary to raise the same issue which appellants now assert and that these appellants had the opportunity at that time to raise it. It is the settled rule that whatever issue was actually and necessarily included in a former judgment will be deemed to have been adjudged thereby. Code of Civil Procedure, section 1911. It is equally well settled that a party cannot try his case by piecemeal. These appellants as unit holders were parties to the original proceeding in the district court of appeal wherein the order sustaining their demurrer was overruled. It does not appear from the decision on that appeal whether this particular question was raised, but it might have been, and if it has any foundation it should have been. Sufficient to say that the reversal was on the ground that the plaintiff pleaded a cause of action showing that all defendants, including the syndicate trust, were liable. As such it is a final judgment upon all issues relating to the legal liability of all defendants under the facts pleaded. Neale v. Morrow, 163 Cal. 445, 448, 125 P. 1052. That judgment must in this proceeding be treated as the law of the case. 2 Cal.Jur., pp. 944, 945; Goland v. Peter Nolan & Co., 15 Cal.App.2d 696, 700, 60 P.2d 183; United Dredging Co. v. Industrial Acc. Comm., 208 Cal. 705, 712, 284 P. 922.

For these reasons it follows, without citation of authority, that since the syndicate and all its unit holders were in court to answer a complaint which had been held good against them, the trustees were authorized, under the express provisions of the trust indenture, to compromise and settle that litigation. In legal effect the appellants' complaint in intervention pleads that the trustees did that, and nothing more. There is no charge of fraud, misrepresentation, or bad faith. There is no charge that the trustees, in making the settlement, abused their discretion—other than the implied charge that they should have again endeavored to litigate the question whether the complaint pleaded a cause of action against the syndicate. The demurrers to their complaint and supplemental complaint were properly sustained.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

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46 Cal.App.2d 872

MacCONNELL et al. v. WILBUR et al.

Civ. 2942.

District Court of Appeal, Fourth District, California.

Sept. 11, 1941.

Appeal and error ⇨554(2), 607(1), 611

Where notice of entry of judgment was served and filed on May 27, 1941, and notice of appeal therefrom on June 18, 1941, no order to prepare transcript was filed, no proceedings for preparation of transcript or bill of exceptions were pending, trial court terminated proceedings for preparation of transcript on August 11, 1941, and nothing had been filed in District Court of Appeal except papers on motion to dismiss appeal, such motion was granted and appeal dismissed, as appellants' time for preparation of record on appeal had expired.

◆

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Proceeding between Allan R. MacConnell and others and Fred Wilbur and others. From a judgment for Fred Wilbur and others, Allan R. MacConnell and others appeal. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

Robert Loundagin, of Lone Pine, for appellants.

Jess G. Sutliff, of Independence, for respondents.

MARKS, Acting Presiding Justice.

This is a motion to dismiss this appeal.

The certificate of the county clerk shows the following: Notice of entry of judgment was served and filed on May 27, 1941. Notice of appeal was served and filed on June 18, 1941. No order to prepare any transcript has been filed and no proceedings for the preparation of a transcript or bill of exceptions are pending. On August 11, 1941, the trial court terminated all proceedings for the preparation of a transcript on appeal.

Nothing has been filed here except the moving papers.

As appellants' time for the preparation of a record on appeal has expired the motion is granted and the appeal is dismissed.

GRIFFIN, J., concurred.

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46 Cal.App.2d 708

TRANSCONTINENTAL & WESTERN AIR, Inc., v. BANK OF AMERICA N. T. & S. A.

Civ. 13074.

District Court of Appeal, Second District, Division 2, California.

Sept. 8, 1941.

1. Principal and agent ⇨3(1)

Where plaintiff promised to make sales of travelers' cheques issued by bank for a profit and directed its employees to sell and issue the cheques, the plaintiff became the bank's "agent" and the parties were not engaged in a "joint adventure".

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Joint Adventure".

2. Corporations ⇨397

The acts of officers and employees of corporation in performance of the business of the corporation were the acts of the corporation itself.

3. Principal and agent 🔑48

Where plaintiff agreed to act as agent of defendant bank for a consideration, in the sale of travelers' cheques, the plaintiff became liable for fulfillment of the covenants undertaken.

4. Master and servant 🔑305, 307

If the duty of a master is violated by his employee, the master is liable the same as though he personally were guilty of the breach, and such liability is not obviated by the fact that the employee acted contrary to instructions and criminally.

5. Master and servant 🔑307

The fact that unfaithfulness of employee in committing a wrong may amount to a felony does not alter obligation of employer to employer's principal so long as the employee is acting within the scope of his employment.

6. Principal and agent 🔑160½

Where plaintiff agreed to sell travelers' cheques issued by defendant bank, and plaintiff's employee, who was in charge of one of plaintiff's offices, issued the cheques, the employee in issuing the cheques was acting within the "scope of his employment" for the plaintiff, which was liable for the cheques even though the employee exceeded his authority by withholding the proceeds received by him from sale of the cheques.

See Words and Phrases, Permanent Edition, for all other definitions of "Scope of His Employment".

7. Principal and agent 🔑63(1)

Where travelers' cheques which were sent by defendant bank to plaintiff for sale were accompanied by receipt which contained provisions which were the substance of prior correspondence between the parties and notified plaintiff that it was to observe same care and protection in custody of cheques as would be given to like amount of currency, the plaintiff, by accepting the cheques accompanied by the receipt, undertook responsibility of due issuance of the cheques even though receipt was not signed by the plaintiff.

8. Bills and notes 🔑363

Where employee in charge of plaintiff's office, who had authority to negotiate travelers' cheques issued by defendant bank for sale at plaintiff's office, appropriated proceeds from sale of cheques to his personal use, but the bank had no information that any payee had knowledge of the employee's misconduct, the indorser of each of the illicitly issued cheques was a "bona fide holder" thereof, and the bank properly paid the negotiated cheques. Civ.Code, § 3097.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Holder".

9. Bills and notes 🔑363

Under Negotiable Instruments Law where a check is in the hands of a holder in due course, a valid "delivery" of the cheque is conclusively presumed to have been made by all parties prior to him. Civ.Code, §§ 3095, 3097.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

10. Bills and notes 🔑382

Fact that cheque has been stolen from its maker prior to delivery is not a defense against a bona fide holder for value. Civ. Code, § 3097.

11. Bills and notes 🔑380

Innocent holders of travelers' cheques which were negotiated by employee in charge of plaintiff's office, who had authority to negotiate cheques which had been issued by defendant bank for sale at plaintiff's office, would not be allowed to suffer the loss occasioned by the dishonesty of the employee who appropriated the cheques by stealthily issuing them for funds for his own use.

12. Bills and notes 🔑363

If a traveler's cheque after the blanks are filled is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands. Civ.Code, §§ 3095, 3097.

13. Bills and notes 🔑363

In the absence of proof of notice of any covert vice in the issuance or indorsement of negotiable paper, it is binding upon its maker.

14. Principal and agent 🔑160½

Where plaintiff had authority to negotiate travelers' cheques issued by the defendant bank for sale at plaintiff's offices and plaintiff held the cheques as bailee under an agreement to be fully responsible for their due issuance and for prompt remittance to bank, and plaintiff's employee in charge of plaintiff's office, who had authority to negotiate cheques, appropriated proceeds from cheques to his personal use, the bank was liable to all holders of the cheques who were innocent of the employee's wrongdoing, and the plaintiff was liable to the bank for the value of the cheques.

15. Principal and agent 🔑160½

Where travelers' cheques issued by defendant bank for sale at plaintiff's offices were forwarded to plaintiff's employee pursuant to plaintiff's express instructions, and the employee had authority to sell the cheques and to instruct purchasers how to fill in blanks, and the employee negotiated the cheques for his personal use, the resulting loss was occasioned by the negligence of the plaintiff and plaintiff was required to suffer the loss. Civ.Code, §§ 3095, 3097, 3543.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Transcontinental & Western Air, Incorporated, against the Bank of America N.T. & S.A., to recover amount of travelers' cheques which had been delivered by the defendant to the plaintiff for sale and were negotiated by plaintiff's employee who converted the proceeds. From an adverse judgment, the plaintiff appeals.

Affirmed.

Tripp, Penney & Callaway, of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and John E. Walter, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment entered in favor of defendant upon an agreed statement of facts.

Plaintiff operates certain airline transportation routes in the United States. In connection with its airlines, it maintains offices for general business traffic and ticket sales in a number of cities. Defendant is a national banking association with its principal office in the City of San Francisco. It maintains many other offices in California. Incidental to its general banking business, it issues and sells travelers cheques.

Pursuant to an agreement between the parties accomplished by correspondence, on or about September 22, 1938, plaintiff forwarded to defendant a list of travel offices and names of persons in charge. Shortly thereafter it forwarded travelers cheques in the amount of $4,000 to each of such offices. The cheques were to be sold by plaintiff to the traveling public at a sale price of ¾ per cent above their face value. Of this profit on the sales ½ per cent was to be retained by plaintiff as its commission, the remaining ¼ per cent was to be remitted by plaintiff to the bank.

When the first shipment of travelers cheques was forwarded to plaintiff's St. Louis office, one Ole May was stationed at plaintiff's San Francisco office. For several days prior to November 11, 1938, May was a "District Traffic Agent" of the St. Louis office and as manager thereof had access to the travelers cheques received by that office. On November 11th May disappeared. Five days later plaintiff discovered that the shipment of cheques in the amount of $4,000 was missing. Subsequent to the disappearance of May and prior to February 28, 1939, he sold the cheques which he took from the St. Louis office in the amount of $2,810 for his personal use. The cheques so negotiated by May came duly to the office of the bank and were honored on divers days from the 15th of November, 1938, until March 2, 1939. Thereafter, on the 27th day of May, 1939, May called at an office of the bank in the City of Los Angeles and delivered the balance of the unsold cheques in the sum of $1,190 to an officer of defendant.

After demands by the bank for the payment of the cheques negotiated by May, defendant charged and deducted from the account of plaintiff the sum of $2,810 without the consent of plaintiff. This action followed. This discussion disposes of all of appellant's contentions.

All of the correspondence which constituted the contract between the parties was between plaintiff and defendant. Attached to the letter directed to plaintiff at its St. Louis office by defendant, under date of September 27, 1938, was a receipt which contained the same terms and conditions as set forth in identical receipts forwarded at the same time to all other offices of plaintiff. The language of that receipt is that the plaintiff "agrees to observe the same care and protection in the custody of the Travelers Cheques as would be given a like amount of currency; to hold the said Travelers Cheques in trust for the Bank of America National Trust and Savings Association; that said Travelers Cheques and proceeds of the sale thereof shall be held separate and apart from the assets of the undersigned, to be fully responsible for their due issue and for the prompt remittance to the Bank of America of the proceeds of the sale thereof, and to notify the Bank of America National Trust and Savings Association promptly in case of loss or theft of said Travelers Cheques.

[1] Plaintiff received the cheques at its St. Louis office October 3, 1938. That it undertook the sales thereof is emphasized by the language of plaintiff in a letter to the bank wherein it mentioned the "possibility of our handling your travelers checks * * * you notify this office of all shipments of travelers checks made to our various agents * * * confine sales to our city traffic offices where our personnel can devote the proper time to selling * * * will advise our personnel to accept your stock and begin sales * * * a list of our traffic offices and the names of persons in charge is also attached * * *. Bank of America travelers checks will be available for sale at all T.W.A. traffic offices." This establishes a contract of agency between plaintiff and defendant. It betakes of nothing of the nature of a joint adventure. Plaintiff, having promised to make the sales for a profit, directed its employees to sell and issue the cheques. The bank had nothing to do with the transfer of May to the St. Louis office and had had no contact with him prior to or during the time he was manager of that office. At the time the cheques were forwarded that office was under the management of one Craden. May appeared immediately thereafter. He was there as an employee of plaintiff. As an instrumentality of plaintiff, he took possession of the cheques. Having received the cheques in order to make sales of them, plaintiff thereby became defendant's agent. Carter v. Rowley, 59 Cal.App. 486, 211 P. 267.

In no sense was May an agent of the bank. The bank exercised no direction or control over the employees of plaintiff with respect to the handling of the cheques. Plaintiff's agents in charge of its various offices negotiated the sales of the cheques solely because plaintiff had authorized defendant to forward them to the several managers of its farflung offices. Moreover, while there was nothing in the correspondence requiring plaintiff to employ agents to sell the cheques, yet it appears repeatedly that the cheques were to be sold by appellant's employees. So far as the bank was concerned, plaintiff might have replaced any employee handling the cheques at any of its offices with another employee without consulting defendant. All of the services to be performed in the sales of the cheques was to be done by plaintiff and its own organization.

[2, 3] In making the sales plaintiff could act only through its own officers and employees. The acts of such parties in the performance of the business of the plaintiff were acts of the corporation itself. Having agreed to act as the agent of defendant for a consideration, plaintiff became liable for the fulfillment of the covenants undertaken. American Soda Fountain Co. v. Stolzenbach, 75 N.J.L. 721, 68 A. 1078, 16 L.R.A.,N.S., 703, 127 Am.St.Rep. 822; Killingsworth v. Portland Trust Co., 18 Or. 351, 23 P. 66, 7 L.R.A. 638, 17 Am.St.Rep. 737; Wells-Dickey Co. v. Embody, 82 Mont. 150, 266 P. 869; Restatement of the Law of Agency, § 406.

[4-6] It is fundamental that if a duty of the master be violated by his employee the master is liable the same as though he personally were guilty of the breach. Such liability of the master is not obviated by the fact that his servant acted contrary to instructions and criminally. Muehlebach v. Paso Robles Hotel Co., 65 Cal.App. 634, 225 P. 19. The fact that the faithlessness of the employee in committing the wrong may amount to a felony does not alter the obligation of the agent to his principal so long as the servant is acting within the scope of his employment. Ibid; Hiroshima v. Pacific Gas & Electric Co., 18 Cal. App.2d 24, 63 P.2d 340; Grigsby v. Hagler, 25 Cal.App.2d 714, 78 P.2d 444. Because May exceeded his authority in withholding proceeds received by him from the sales of the cheques does not relieve plaintiff; in issuing the cheques he was acting within the scope of his employment. Grenada Bank v. Moore, 131 Miss. 339, 95 So. 449. Whether plaintiff was a gratuitous bailee or served for hire it was liable for the cheques.

We have observed the distinction of those cases involving the recovery of damages (1) where property is delivered to another and it is stolen by or destroyed by reason of the negligence of an employee, from (2) those cases where property is delivered to another and is stolen by some one not in the relationship of employee. The cases cited by appellant come within the second classification with the exception of two. Miller v. Citizens' National Trust & Savings Bank, 1 Cal.App.2d 470, 36 P.2d 1088, and Copelin v. Berlin Dye Works & Laundry Co., 168 Cal. 715, 144 P. 961, L.R.A.1915C, 712. The latter cases do not apply here. The facts in each of them show that the wrongful act in question was entirely unrelated to the purposes of the agency or was committed independent of the transaction of the principal's business. Grigsby v. Hagler, supra. As to the Miller case, it was emphatically disapproved in Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383. The case of Copelin v. Berlin Dye Works & Laundry Co., supra, was distinguished by the court in Muehlebach v. Paso Robles Hotel Co., supra, where the court pointed out that the cleaning company assumed no duty of safekeeping the jewelry and delegated no such duty to its servants. In each of the cases of Perera v. Panama-Pacific International Exposition Co., 179 Cal. 63, 175 P. 454, and Travelers Fire Insur. Co. v. Brock & Co., 30 Cal.App.2d 112, 85 P.2d 905, the jewelry was taken by a thief who was not an employee.

[7] Plaintiff was liable for the safety of the cheques by the terms of the receipt which accompanied their shipment. While it was indeed never signed by plaintiff yet the facts that it accompanied the cheques and that its provisions were the substance of the prior correspondence make it binding upon plaintiff. This receipt notified plaintiff that it was to "observe the same care and protection in the custody of these Travelers Cheques as would be given to a like amount of currency * * * to hold said travelers cheques in trust for the bank"; to hold the cheques and proceeds of sale "separate and apart from T.W.A. assets * * * to be fully responsible for their due issue and for prompt remittance (to bank) of the proceeds of sale thereof". By the acceptance of the cheques accompanied by this declaration of plaintiff's obligations, the latter undertook the responsibility of the due issuance of the cheques. All of the duties imposed by the terms of the receipt were breached by plaintiff.

[8] Appellant contends that by paying all of the cheques negotiated by May at the time of their presentation, the bank's voluntary acts defeat its right to charge the account of plaintiff. This claim in effect is that the several bona fide holders of the cheques issued and appropriated by May to his own use must stand the loss of the sums paid for the cheques. To grant such contention would serve to destroy public confidence in negotiable paper. Cheques in the sum of $2,810 were issued by May for his personal use. The bank had no information that any payee had knowledge that May had negotiated the cheques without the consent of the bank. This made the indorsee of each of the illicitly issued checks a bona fide holder thereof.

[9-12] May had authority to sell the cheques and to cause the signature of the purchaser to be filled in at the proper places. Under the negotiable instruments law, where a check is in the hands of a holder in due course a valid delivery of the instrument is conclusively presumed to have been made by all parties prior to him. Civ.Code, sec. 3097. Even though the cheque might have been stolen from its maker prior to its delivery, yet such theft is not a defense against a bona fide holder for value. Northern Pacific R. R. Co. v. Spokane Valley Growers' Union, 132 Wash. 607, 232 P. 691, 43 A.L.R. 194; American Express Co. v. Anadarko Bank & Trust Co., 179 Okl. 606, 67 P.2d 55, 110 A.L.R. 972. Inasmuch as the cheques were complete at the time they came into the hands of innocent holders, the latter will not be allowed to suffer the loss occasioned by the dishonesty of an employee who appropriated the cheques by stealthily issuing them for funds for his own use. American Express Co. v. Anadarko Bank & Trust Co., supra; Cooke v. United States, 91 U. S. 389, 23 L.Ed. 237. In the latter case it was held that treasury notes printed and ready to issue and which were stolen and placed in circulation passed title to bona fide purchasers for value. The holders of the cheques wrongfully issued by Ole May to himself having come into the possession of bona fide holders, the title gained by such holders was superior to that of the bank. Each cheque on its face was free from suspicion of the illegal act of May; no holder had any notice. It follows that the purchaser of any of such cheques in good faith was not required under any principle embodied in the universal negotiable instruments law to inform himself of the history of the cheque before he could with safety acquire legal ownership thereof. So universal is the use of commercial paper, such as the travelers cheques in question, that it should have the same

freedom of circulation as a government bond. This is possible only by giving to it the sanctity of the promise of a saint by encircling it with the arm of the law. Any other method of treating such paper in the channels of trade and commerce would interfere with the normal flow of business transactions. Chemical National Bank v. Kellogg, 183 N.Y. 92, 75 N.E. 1103, 2 L.R.A.,N.S. 299, 11 Am.St.Rep. 717, 5 Ann.Cas. 158. If a travelers cheque, after the blanks are filled, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands. Secs. 3095, 3097, Civ. Code; secs. 14 and 16 N.I.L.

The case of a stolen blank travelers cheque which had been later filled out is not parallel to the case at bar. But to the extent that it may be likened to the act of May, it has been disposed of by the courts of this state. People v. Cohen, 71 Cal.App. 367, 235 P. 658. It was there held that a cheque, although blank at the time of the taking, was of substantial value; and that the thief was liable for the actual value to the lawful owner. In the case of Northern Pacific R. R. Co. v. Spokane Valley Growers' Union, supra, the defendant had signed an entire book of checks in blank and placed them in its safe. A bookkeeper having access to the checks filled in his name as payee in a number of them and cashed them at divers institutions. When the checks were received by the purchasers from the faithless bookkeeper, they were complete and did not upon their faces indicate that they were other than genuine. The purchasers thereof having paid the full face value at the time of acquiring them, a valid delivery of the cheques was conclusively presumed by all of the predecessors of him who in due course presented them for payment.

[13, 14] The law merchant, the history of the customs of bankers and tradesmen, the oft-enacted and revised statutes in occidental states guaranteeing the regularity and integrity of negotiable instruments regularly obtained in due course—the confluence of these and other economic forces has so fortified negotiable paper that in the absence of proof of notice of any covert vice in its issuance or endorsement, it is binding upon its maker. The fortunes and conveniences of commerce render it imperative that such paper should circulate with such character as to reassure all holders of its security. 4 Cal.Jur. 15. The cheques issued by May to himself were of that character. Consequently defendant became liable to all holders thereof who were innocent of May's wrongdoing and the cheques not having been returned to the bank before being acquired by innocent holders plaintiff is liable for their conversion. Appellant held them as bailee under agreement "to be fully responsible" for their due issue and for the prompt remittance to the bank. That created an absolute liability for the safe return of them or of their value. 4 Cal.Jur. 16, 20.

[15] Finally, the judgment must be affirmed upon another theory, towit, the negligence of plaintiff. When promissory notes or cheques are endorsed in blank and they pass into the hands of innocent purchasers through the negligence of those who have their custody, the payors cannot escape their obligation because the instruments were stolen. Phelps v. American Mortgage Co., 40 Cal.App.2d 361, 104 P.2d 880; Allen Grocery Co. v. Bank of Buchanan, 192 Mo.App. 476, 182 S.W. 777. The cheques were forwarded to May pursuant to plaintiff's express instructions. He had authority to sell the cheques and to instruct the purchasers how to fill in the blanks. Since the theft of the cheques resulted solely from plaintiff's negligence it must suffer the loss occasioned by its own neglect. "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civ.Code, sec. 3543.

Judgment is affirmed.

WOOD, J., concurred.

McCOMB, J., deeming himself disqualified, takes no part in this decision.

PEOPLE v. PEIRCE et al.

Cr. 2166.

District Court of Appeal, First District, Division 2, California.

Sept. 15, 1941.

Rehearing Denied Sept. 30, 1941.

Hearing Denied Oct. 14, 1941.

1. Criminal law 🔑742(1)

The character and credibility of all witnesses is for jury to decide.

2. Homicide 🔑250

Evidence of prisoners that accused jailers had severely beaten decedent with clubs, corroborated by nature and severity of wounds and injuries received by decedent, as testified to by unimpeached medical witnesses, supported conviction of manslaughter.

3. Criminal law 🔑1159(2)

Court of Appeal cannot reweigh evidence on appeal.

4. Criminal law 🔑857(1)
Homicide 🔑236(1)

Evidence was ample to support finding that thinness of decedent's skull did not contribute to his death when he was beaten by jailers and not to justify setting aside conviction of manslaughter on ground that jury disregarded instruction that if defendants used reasonable means to subdue decedent which resulted in decedent's death because of thinness of his skull, jury must find defendants not guilty.

5. Criminal law 🔑857(1)
Homicide 🔑242

Evidence that decedent was unarmed, that one of defendants received only slight scratch and other defendant received no injury, that defendants continued to club decedent after he was handcuffed and lying helpless, was ample to support finding that there was no apparent necessity for defendants to beat decedent fatally and not to justify setting aside conviction of manslaughter on ground that jury disregarded instruction to effect that officers in subduing one breaking jail or fleeing from justice may use such force as is necessary even to extent of killing.

6. Homicide 🔑105

Officers may not beat a prisoner to death because they fear his unruly conduct may perhaps incite other prisoners to attempt to escape from jail.

7. Assault and battery 🔑92
Homicide 🔑250

Evidence *held* to support conviction of both defendant jailers of manslaughter and assault by means of force likely to produce great bodily harm on an inmate.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

August D. Peirce and Glenn Hancock were convicted of manslaughter and assault by means of force likely to produce great bodily harm, and they appeal.

Affirmed.

Leo A. Sullivan, of Oakland, for appellants.

Earl Warren, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., and L. E. Dayton, Deputy Dist. Atty., both of Oakland, for respondent.

DOOLING, Justice pro tem.

Defendants appeal from judgments upon verdicts convicting them of manslaughter and assault by means of force likely to produce great bodily harm, and from orders denying their motions for new trial.

Defendant Hancock was jailer and defendant Peirce assistant jailer of the Oakland city jail. The convictions followed the death of one Fred Fernelius who died as a result of head injuries received while confined in such jail.

Fernelius, who had been worried because of lack of work and inability to sleep, and who had apparently suffered from some intermittent delusions that he was being persecuted and threatened with harm, after drinking a portion of a quart of muscatel wine was arrested on the night of May 3, 1940, on an Oakland street and booked as a drunk in the Oakland city jail. At that time he was without hat, coat or outside shirt. To the arresting officer he seemed like a man on the verge of delirium tremens.

Fernelius spent a quiet night in the jail and on the morning of May 4 he was called out of his cell and taken with other prisoners into an exercise yard in preparation for their appearance in court. Fernelius suddenly rose from a bench on which he had been sitting, ran into the jail, collided with a trusty named "Hurley" knocking him to the ground by the force of the collision, and continuing into a corridor which led to the rear cells started up a flight of stairs. Defendant Peirce started to pursue Fernelius and defendant Hancock followed.

What occurred thereafter is the subject of much conflicting testimony. Peirce overtook Fernelius and a struggle ensued. Both Peirce and Hancock admit striking Fernelius on the head with their clubs to subdue him. Hancock testified that he only struck one light blow. Peirce's testimony was to the effect that Fernelius was grappling with him and in an attempt to free himself he struck a few blows backwards over his own head. The testimony of the other eye-witnesses will be referred to hereafter.

Fernelius was carried out of the jail in an unconscious condition, bleeding profusely from wounds about the head, and on May 5, 1940, at 11:30 p. m. he died. Medical testimony given by physicians who performed a post-mortem examination was to the effect that death was caused by a contused wound of the brain with extensive cerebral hemorrhage and fracture of the skull; the fracture consisting of a major linear fracture 7⁴⁄₁₀ inches long from the right occipital to the left parietal, and smaller fractures branching off. The decedent had two cuts across the top of his head, apparently made by some blunt instrument, which had laid the scalp open to the bone, and a contused wound on the back of his head apparently also inflicted by a blunt instrument. Fernelius' skull was unusually thin for a man's, about the thickness of a normal woman's skull with some abnormally thin areas. However the apparent point of origin of the major fracture was at almost the thickest part of the skull and in the opinion of at least one medical witness it would require a severe blow or blows to cause the brain injuries found regardless of the thickness of the skull.

The people presented three eye-witnesses of the encounter. The witness Hellman testified that because of the position of his cell he did not see Peirce and Hancock overtake Fernelius but heard scuffling and then Fernelius backed into his view and both Peirce and Hancock followed striking Fernelius with their clubs about his head and face. Fernelius' arms were at his side and he appeared dazed and was making no resistance. Fernelius fell to the floor on his back and both defendants continued to strike Fernelius with their clubs. This witness did not see handcuffs put on Fernelius but then observed that he had been handcuffed. After the handcuffs were on the defendants continued to strike Fernelius with their night sticks while he was lying on the floor on his back. There was a pool of blood on the floor where Fernelius was lying about a foot in diameter and as he was carried out by four trusties in an unconscious condition blood was dripping from his head all the way out.

The witness Peterson testified that he was in his bunk when the sound of the scuffle attracted his attention. He got up and the first thing that he saw was Peirce's club dropping away from Fernelius' head and Fernelius reeled against the wall with blood running from his head. Peirce said: "God damn you, now run", and hit him again. Fernelius put up his hands to protect himself and Peirce "grabbed him by the arm and then hit him again and then he hit him again". * * * "The first hit he stayed up; the second hit he went down" and then "he hit him again". Fernelius first "reeled down on his knees" and "then he went down in a sitting position". In that position the handcuffs "were clamped on one hand. I didn't see them put them on both hands." After the handcuff was put on and with Fernelius in a sitting position on the floor "Hancock hit him and then Peirce hit him". There was a pool of blood on the floor and blood was running from Fernelius' face and head. "He was still * * * I don't believe he was conscious at all after the second hit. * * * He was not breathing but very little and when he did breathe he was gushing blood out of his mouth and blood was all down in front."

The witness Santos testified that he saw Fernelius collide with Hurley. Both men fell down. Hurley tried to hold him but Fernelius broke away and ran toward the rear cells pursued by Peirce and Hancock. Fernelius started up the rear stairs and was stopped by some one coming down. Fernelius tried to ward off Peirce and Hancock by pushing and kicking at them but Peirce seized him by one wrist and pulled him from the stairs. Fernelius fell down and Peirce fell over him. The first blow was struck with Fernlius lying on the floor, his head a little bit raised. Peirce started hitting him over the head with his club and Hancock who was standing was hitting him over the head from the side. After half a dozen blows or better they got the handcuffs on one wrist and Fernelius started to pull himself up to a half sitting position and "Peirce started hitting him again with the club and then Fernelius just settled back and started shaking * * * he was quivering and he fell back and he quieted down. * * * During the first series of those blows, the first few blows sounded hard and they started softening up like a soft football, like a squash and that is when he fell back."

A number of other witnesses who were in cells beyond sight of the encounter testified to hearing blows both before and after a click as of handcuffs being locked.

All of these witnesses for the people who testified to seeing or hearing the affray were prisoners in the jail at the time and many of them had been convicted of felonies.

Appellants make no complaint of any ruling of the trial court. Their sole grounds of appeal are that the evidence is not sufficient to support the verdicts, and that the jury in arriving at the verdicts must have disregarded certain instructions of the court.

Appellants' points, while not separately stated, may be fairly segregated as follows:

1. The eye-witnesses for the people were all men of degraded character actuated by a feeling of malice against police officers and the hope of mitigation of their own punishments.

[1] The attorneys for appellants were allowed the fullest latitude on cross-examination to develop the histories, convictions of felony, and charges pending as to all the people's witnesses. No complaint is made of any ruling of the court in this connection, and the jury was fully acquainted with the character of witnesses upon whose testimony the people were compelled to rely. The character and credibility of all witnesses is for the jury to decide. People v. Bond, 13 Cal.App. 175, 109 P. 150.

Besides the very nature and severity of the wounds and injuries received by the decedent, as testified to by medical witnesses whose characters were unimpeached, tended to contradict the stories told by the defendants on the stand and to corroborate the testimony of the people's witnesses as to the savageness and brutality of the beating administered to Fernelius.

[2, 3] There is substantial evidence to support the verdicts which seems in no way inherently improbable. It satisfied the minds of the jurors in arriving at their verdicts and the court in denying the motions for new trial. This court cannot again reweigh the evidence on appeal. People v. Perkins, 8 Cal.2d 502, 66 P.2d 631.

2. Fernelius' skull was abnormally thin and the jury must have disregarded that fact in reaching their verdicts.

Dr. Moore, one of the people's medical witnesses, testified that "it would take a severe blow to produce the brain damage that was present * * * the fracture is not of moment".

There is no evidence that Fernelius' scalp was abnormal and he suffered at least two blows from a blunt instrument severe enought to lay his scalp open to the bone. The fracture ran through almost the thickest part of the skull at the point of its apparent origin. In addition the injury to the brain was of the contre-coup type, that is the brain was damaged by striking the inside of the skull on the opposite side of the head from the point where the head was struck, and not by the direct application of the blow through the skull to the brain at the point of impact.

The jury was instructed that if defendants used reasonable means to subdue Fernelius and the use of such means resulted in his death because of the abnormal thinness of his skull they must find the defendants not guilty.

[4] There is nothing in the record to suggest that they disregarded this instruction. The evidence above recited was ample to support a finding that the thinness of Fernelius' skull did not contribute in any way to his death.

3. It is further claimed that the jury must have disregarded certain instructions of which the following are typical:

a. "You are further instructed that a policeman, as a peace officer, in making the arrest of a person for a felony, may use such force as is necessary to arrest such felon, even to the extent of killing him when he is in flight."

b. "You are further instructed that if you find that the deceased, Fred Fernelius, was in the act of attempting to escape from the Oakland City Jail, * * * it then became the immediate duty of the defendants, August D. Peirce and Glenn Hancock as peace officers, to subdue Fred Fernelius, and in accomplishing this result both August D. Peirce and Glenn Hancock had the right to use any amount of force that appeared to be reasonably necessary to either of them."

c. "You are hereby instructed that homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance either when necessarily committed in the discharge of any legal duty or when necessarily committed in arresting persons charged with felony and who are fleeing from justice or resisting such arrest. Homicide is also justifiable when committed by any person in either of the following cases, first, when resisting any attempt to murder any person or to commit a felony, or to do some great bodily injury upon any person, or, second, when committed in defense of person against one who manifestly intends or endeavors by violence or surprise to commit a felony, or three when committed in the lawful defense of such person when there is reasonable grounds to apprehend a design to commit a felony or to do some great bodily injury and imminent danger of such design being accomplished, or, four when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed or in lawfully suppressing any riot or in lawfully keeping and preserving the peace."

These, and similar instructions, may be considered together in the light of the evidence before the jury. Fernelius was unarmed. The only injuries received by Peirce were a slightly lacerated ear and minor scratches and bruises for the treatment of which he did not even consult a doctor. Hancock suffered no injury. There was also evidence from which the jury could find that defendants continued to club Fernelius after he was handcuffed and lying helpless on the floor when there could no longer be any possibility of his escape or of his seriously injuring either officer.

[5] The jury may well have found under the evidence that there was no real or apparent necessity to beat Fernelius at all, or none to beat him fatally, or that the fatal blows were struck after the necessity real or apparent, if any, had ceased to exist.

[6] 4. It is suggested that appellants feared a general jail break and so were justified in what they did. No authority is cited to the proposition that officers may beat a prisoner to death because they fear that his unruly conduct may perhaps incite other prisoners to attempt to escape from jail and apparently no instruction was tendered on that subject. But the jury may well have found that neither officer actually feared a jail break. There was no evidence of any act of any other prisoner which could possibly suggest any idea of attempting to escape, and neither of the defendants nor any other officer in the jail made any move to guard any doors, or to take any other step to thwart a jail break if one was attempted. And again we have the evidence that both officers continued to club Fernelius about the head after he had been reduced to helplessness.

5. That in any event there is no evidence to support the verdicts against Hancock.

Hancock testified that he struck only one light blow on Fernelius' head. The witness Hellman testified that after Fernelius fell on his back on the floor both defendants were still striking him. "I was watching them hit him on the head. * * * He was laying on the floor on his back." After the handcuffs were put on him "they continued to strike * * * Fernelius upon the head with their night sticks. * * * It seemed that Peirce put in more blows than Hancock."

The witness Peterson testified: "Q. Now after they got the handcuff on Fernelius then what happened? A. His leg slipped or something and I guess—I could see just as he slipped, why Hancock hit him and then Peirce hit him."

"* * * Q. After the handcuff was on, the handcuff was put on as I understand when he was down in a sitting position on the ground? A. Yes sir.

"Q. After that handcuff was on you saw more blows struck by Peirce and Hancock did you? A. Yes sir. I only saw Hancock hit him one time."

The witness Santos testified that no blows were struck until Peirce had pulled Fernelius to the floor and gotten on top of him. Fernelius was lying with his back on the floor. The defendants then began to strike him. "After the first series of blows were struck he passed out." They got the handcuff on one wrist and Fernelius pulled himself partly to a sitting position. "He was trying to break away and they clubbed him again."

The jury could well find that Hancock as well as Peirce struck one or more severe blows on Fernelius' head after he was in a helpless position on the floor.

[7] An examination of the transcript convinces us that the evidence supports the judgments of conviction of both appellants.

The judgments and the orders denying appellants' motion for new trial are affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

46 Cal.App.2d 739

BOLTON v. LOGAN.

Civ. 2787.

District Court of Appeal, Fourth District, California.

Sept. 15, 1941.

Hearing Denied Nov. 13, 1941.

1. Mines and minerals 🔑38(15)

In action to quiet title to mining claims where plaintiff claimed title under execution sale and defendant under mortgage foreclosure sale and judgment roll in the foreclosure proceedings and the sheriff's deed given pursuant to sale thereunder were received in evidence, and complaint and decree of foreclosure set forth facts when lien accrued, defendant was not required to prove by other evidence the execution of the mortgage or its assignment to mortgagee's assignee.

2. Judgment 🔑510
Trial 🔑62(2)

In action to quiet title to mining claims claimed by defendant under mortgage foreclosure sale, where judgment roll in the foreclosure proceedings and the sheriff's deed given pursuant to sale thereunder were received in evidence, evidence attacking the validity of the mortgage and alleged collusion involved in its foreclosure was properly admitted.

3. Trial 🔑397(1)

In action to quiet title to mining claims claimed by defendant under mortgage foreclosure sale where judgment roll in the foreclosure proceedings and the sheriff's deed given pursuant to sale thereunder were received in evidence to prove defendant's title and in rebuttal evidence attacking validity of the mortgage, and alleged collusion involved in its foreclosure was admitted, court erred in not making a finding on the material issue raised.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Paul Bolton against R. S. Logan to quiet title to mining claims, claimed by plaintiff under execution sale and by defendant under mortgage foreclosure sale. From a judgment for the defendant, plaintiff appeals.

Reversed and remanded, with instructions.

W. W. Kaye, of Los Angeles, for appellant.

Mayock & Lester and Welburn Mayock, all of Los Angeles, for respondent.

MUNDO, Justice pro tem.

The opinion delivered upon a former appeal herein (30 Cal.App.2d 30, 85 P.2d 546, 86 P.2d 365) contains a sufficient statement of the nature of the controversy. In that opinion we held that the trial court should have admitted the decree of foreclosure and the sheriff's deed as evidence tending to prove defendant's title. They were muniments in an asserted title. See Barr v. Gratz' Heirs, 4 Wheat. 213, 4 L.Ed. 553.

[1] Upon the second trial the judgment roll in the foreclosure proceedings and the sheriff's deed given pursuant to sale thereunder, were received in evidence. According to Purser v. Cady, 120 Cal. 214, 52 P. 489, it is necessary, if not established by the complaint or the judgment of foreclosure, to establish by proper evidence the time at which the lien accrued. Here the complaint and the decree of foreclosure set forth these facts and it therefore was unnecessary for defendant to prove by other evidence the execution of the mortgage or its assignment.

[2, 3] Plaintiff in rebuttal sought to attack the foreclosure decree by introducing evidence over the objection of the defendant attacking the validity of the mortgage and the alleged collusion involved in its foreclosure. The court admitted this evidence but did not make a finding thereon.

Judgment upon the second trial went for defendant and plaintiff appeals. The court properly admitted the evidence attacking the validity of the mortgage and the collusion involved in its foreclosure, but erred in not making a finding on this material issue. Bird v. Murphy, 72 Cal.App. 39, 236 P. 154; Krug v. John E. Yoakum Co., 27 Cal.App.2d 91, 80 P.2d 492, citing Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 152 P. 542.

For this reason the judgment is reversed and the cause remanded with instructions to the trial court to make findings as to the validity of the mortgage and the foreclosure and enter judgment accordingly.

BARNARD, P. J., and GRIFFIN, J., concurred.

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46 Cal.App.2d 722

PEOPLE v. HOWARD.

Cr. 3454.

District Court of Appeal, Second District, Division 1, California.

Sept. 12, 1941.

1. Forgery 🔑44

Evidence sustained conviction for forgery of a check signed in blank by the president of a corporation, as against contention that the state failed to prove that defendant did not come into possession of check innocently and did not so hand it to person who cashed check.

2. Forgery 🔑47

In prosecution for forgery of a check signed in blank by president of a corporation, defendant's intent to defraud and knowledge of fictitious character of check were questions for trial judge where a jury trial was waived.

3. Forgery 🔑44(1)

In prosecution for forgery of a check signed in blank by president of a corporation, evidence warranted inference that defendant had an intent to defraud and knew of fictitious character of check.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Frank Howard was convicted of forgery under an information alleging prior convictions, and he appeals.

Affirmed.

Frank Howard, in pro. per., for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

A jury trial having been waived, the court found appellant guilty of the crime of forgery, as charged in an amended information, which also alleged five prior convictions: the first for forgery; the second, fourth and fifth for issuing checks without sufficient funds, and the third for attempted robbery. Appellant admitted the first, second, third, and fifth prior convictions, and the fourth was dismissed upon motion of the district attorney.

This appeal is prosecuted from the judgment of conviction and from the order denying appellant's motion for a new trial upon the following grounds: (1) the evidence is not sufficient to support the verdict; (2) the verdict is contrary to the evidence; (3) the court erred in denying appellant leave to substitute counsel of his own choosing and in the admission of evidence; (4) misconduct of the prosecuting attorney.

It is indicated by the evidence adduced at the trial that appellant had been paroled from Folsom Prison; that J. M. Higman, president of the Reliable Lumber, Inc., located at Rosemead, California, had signed appellant's parole papers and during the months of April and May, 1940, provided him with sleeping quarters which were adjacent to the office of the said lumber company. The check-book of the company was kept in a desk in the office and it contained checks signed in blank by Mr. Higman upon which were printed the names "Bank of America, El Monte Branch", and "Reliable Lumber, Inc." On September 10, 1940, the company's auditor discovered that three of these signed checks were missing from the said check-book. It appears also that during the convention of the Veterans of Foreign Wars held during the latter part of August, 1940, appellant, who was a member of the military police detail of that organization, became acquainted with Mr. Morey C. Serf, district manager of Seagram's Distilleries Corporation. Mr. Serf testified that in September of 1940, appellant inquired of him if he could obtain through a wholesaler some liquor for use at a committee meeting. Appellant presented to Mr. Serf a check made in favor of the Seagram corporation, but Mr. Serf declined to accept it, stating that the sale was not a Seagram transaction and therefore the check should be made payable either to him (Serf) or the distributor. Appellant left Serf's office and returned in about two hours and presented to him the check involved in this case, to-wit: Reliable Lumber, Inc., No. 2967, for $100, signed by J. M. Higman, drawn on the El Monte branch of the Bank of America, with the name of the payee blank. Mr. Serf took the check and wrote in his own name as payee and sent appellant to a wholesale distributor to procure the liquor. Mr. Serf cashed the check while in San Diego a few days later and it was thereafter charged to the account of the lumber company by the bank upon which it was drawn. Mr. Higman testified he had not authorized appellant to fill in the check or to remove it or any other checks from the check-book.

When appellant was arrested on October 20, 1940, in the office of the state parole officer, he admitted that he gave the check to Mr. Serf for some whiskey and some cash, but denied that he had written or passed the check. In a conversation he had with the arresting officers, appellant said, "I believe that the party that made out this check used a typewriter in the offices of the V. F. W., in Mr. Brinkmeyer's office in the Lane Mortgage Building * * * I believe you will find that the party who made out the check might have used a check protector at the Gene Palmer Cosmetic Company", and gave the officers the address of said company.

It was further developed by the evidence that in September, 1940, appellant was assisting with some reorganization work for the Gene Palmer Cosmetic Company, and was in and out of the office of that company for three or four weeks; that a check protector and an Underwood noiseless typewriter were kept on a desk in said office; that this check protector was turned over to Deputy Sheriff Gompert, who for twelve years had had charge of the sheriff's research laboratory maintained for the purpose of "examination, classification and identification of physical evidence".

Mr. Gompert testified it was his opinion that the words "Exactly $100 Exactly" appearing on the check, which was introduced in evidence and marked Exhibit 1, were written by the check writer (Exhibit 2) which was delivered to him by Deputy Sheriff Law on October 22, 1940. He also testified that on October 23, he compared and analyzed the typewriting on the check and was of the opinion that it was written by the typewriter (Exhibit 3) which was identified as the Underwood noiseless typewriter which was in the office of the Gene Palmer Cosmetic Company from August 1, 1939, to October 21, 1940, under a rental contract with the Office Appliance Company of 6266 Hollywood boulevard.

Appellant took the stand in his own defense and identified Exhibit 1 as the check which he gave to Mr. Serf for $10 cash and $104 worth of liquor, but he claimed that he received the check on September 23, 1940, from one Earl F. Wallace, a man he said he had met during the V. F. W. encampment held August 25 to 30, 1940, and for whom he negotiated the purchase of liquor through Mr. Serf. He also testified that said Wallace accompanied him to the Gene Palmer Company's office and to the office of the Veterans of Foreign Wars where three typewriters were maintained, and that Wallace had opportunity to use both the typewriters and the check protector. Mr. Wallace was not produced as a witness, and by stipulation of counsel the report of T. E. Eckert, an investigator, to the effect he was unable to locate said Wallace, was read into the record.

In connection with his first point, appellant contends that "the State has utterly failed to prove that he did not come into possession of the check in question innocently, and did not so hand it to Morey Serf".

[1] The testimony presented by the record herein is a complete demonstration of appellant's guilt of the offense charged against him, and leaves no doubt in our minds that the verdict is amply supported. People v. Collins, 60 Cal.App. 263, 267, 212 P. 701.

[2, 3] With respect to appellant's second point, the intent to defraud and appellant's knowledge of the fictitious character of the check were questions for the

court, and such intent and knowledge were facts which might reasonably have been inferred from the circumstances shown by the evidence. People v. Roche, 74 Cal. App. 556, 559, 241 P. 279, and cases there cited.

A careful examination of the record in this case satisfies us that it is free from error, and that appellant's third and fourth points are entirely without merit.

For the reasons stated, the judgment and order are, and each of them is, affirmed.

DORAN and WHITE, JJ., concurred.

PORTNOY et al. v. SUPERIOR COURT OF RIVERSIDE COUNTY et al.

Civ. 2816.

District Court of Appeal, Fourth District, California.

Sept. 11, 1941.

Hearing Granted Nov. 6, 1941.

1. **Counties 🔑21½**
Municipal corporations 🔑589
A county or city has the power under constitution to enact police regulations and ordinances promoting considerations of public welfare, morals, health, and safety, provided such regulations are not in conflict with the general laws. Const. art. 11, § 11.

2. **Municipal corporations 🔑592(1)**
State legislature can inhibit local legislative bodies from enacting rules and police regulations only by itself occupying the same legislative field so completely that legislation on the subject by local legislative bodies will necessarily be inconsistent with state law. Const. art. 11, § 11.

3. **Counties 🔑21½, 55**
Municipal corporations 🔑594(1)
Police regulations and ordinances of county or city, which are not in conflict with general laws, are valid so long as the requirements of such ordinances are not in themselves pernicious, as being unreasonable or discriminatory. Const. art. 11, § 11.

4. **Counties 🔑21½**
Municipal corporations 🔑592(2)
Where state legislature has assumed to regulate a given course of conduct by prohibitory enactments, a county or municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purposes of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable. Const. art. 11, § 11.

5. **Counties 🔑21½**
Municipal corporations 🔑592(1)
Whether state legislature has undertaken to occupy exclusively a given field of legislation so as to preclude enactment of county or city police regulations in the field must be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate. Const. art. 11, § 11.

6. **Counties 🔑21½, 55**
The fact that county ordinance, dealing with gaming, included, by way of general description, games prohibited by statute as well as those not so prohibited, did not affect validity of the entire ordinance, but all games prohibited by statute must be excluded from the operation of the ordinance. Pen. Code, §§ 319 et seq., 330 et seq., 330a, 331; Const. art. 11, § 11.

7. **Counties 🔑55**
Municipal corporations 🔑111(4)
Where any part of a city or county ordinance is invalid for any reason, in order to render the whole ordinance void for the same reason, all of the parts thereof must be so interdependent as that no one part may be eliminated without destroying the force of the whole ordinance.

8. **Counties 🔑55**
Municipal corporations 🔑111(4)
Where a city or county ordinance is valid in one part and invalid in another, if valid part is not dependent in any measure upon invalid part, but can without invalid part accomplish one or all of the material purposes of the ordinance, the valid part of the ordinance will be sustained and that which is void will be eliminated and disregarded. Const. art. 11, § 11.

9. **Counties 🔑55**
Municipal corporations 🔑111(4)
Court will not declare entire ordinance of city or county invalid where objectionable

part of ordinance may be eliminated without destroying the efficacy of the remainder, the objectionable part being treated as a nullity, leaving rest of the ordinance, if it comprehends within itself an entire and complete scheme, to stand as valid. Const. art. 11, § 11.

10. Counties ⚷55

Portions of county ordinance, dealing with gaming, which declared unlawful acts not prohibited by state law, could be held valid, notwithstanding other acts declared unlawful by ordinance were also prohibited by statute. Pen.Code, §§ 319 et seq., 320, 330 et seq., 330a, 331; Const. art. 11, § 11.

11. Counties ⚷21½

A maximum fine of $600 or imprisonment in county jail for a maximum period of seven months, or both, did not constitute such an unreasonable penalty for violation of county ordinance prohibiting gambling as to render such ordinance invalid. Const. art. 11, § 11.

12. Counties ⚷21½

Conviction, under complaint, charging defendant with maintaining a building in which gambling was permitted and carried on in violation of county ordinance, was not unauthorized on ground that ordinance was invalid because in conflict with state law, where ordinance in addition to making owner or lessee who maintains a house in which gambling is permitted or carried on liable to punishment, as provided by statute, also included an agent, employee, servant, clerk, etc., who maintains any building, room or other place where gambling is permitted or carried on, and imposed a greater penalty than state law. Pen.Code, §§ 319 et seq., 320, 330 et seq., 330a, 331, 337a; Const. art. 11, § 11.

13. Counties ⚷21½

County ordinance, making it unlawful to have in one's possession any slot machine as the result of the operation of which any money is or may be won or lost, covered acts not prohibited by statute making it unlawful to have in one's possession any slot machine upon the result of the operation of which money is won or lost, and hence conviction under complaint charging possession of slot machines upon the operation of which money may be lost in violation of county ordinance was not unauthorized. Pen.Code, §§ 319 et seq., 320, 330 et seq., 330a, 331, 337a; Const. art. 11, § 11.

14. Criminal law ⚷1011

Whether dismissal of one of three counts of complaint charging violation of county ordinance, prohibiting gaming and the possession of slot machines, constituted "former jeopardy", precluding conviction on two remaining counts, charging violations of same ordinance, was not reviewable on certiorari. Code Civ.Proc. § 1074.

See Words and Phrases, Permanent Edition, for all other definitions of "Former Jeopardy".

15. Criminal law ⚷1014

Where superior court affirms a judgment of the justice's court, the judgment of superior court operates to "estop" the defendant from proceeding in the District Court of Appeal against the justice's court to review on certiorari judgment of the justice's court.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

Certiorari proceeding by Frank Portnoy and others, petitioners, against the Superior Court of Riverside County and others, to review the validity of a judgment of the justice's court of Riverside Township, which was affirmed on appeal by the named defendant, wherein petitioners were found guilty of a violation of a county ordinance.

Writ discharged.

Clifford Thoms and Leonard Wilson, both of Los Angeles, for petitioners.

Earl Redwine, Dist. Atty., of Riverside, for respondents.

GRIFFIN, Justice.

Petitioners, by this writ, seek to review the question of the validity of a judgment of the Justice's Court of Riverside Township, which judgment was later affirmed on appeal by the Superior Court of that county, wherein petitioners were found guilty of a violation of certain sections of a county ordinance.

Ordinance No. 248 of the County of Riverside provides in part:

"Section 1. It shall be unlawful for any person to deal, play, open, carry on or conduct or to cause or to permit or to allow to be dealt, played, opened, carried on or conducted, either as owner, agent or employee, whether for hire or not, any banking or percentage game, device or scheme, mechanical or otherwise, or any pool selling or bookmaking device or scheme not mentioned or included in Part 1, Title 9, Chapter 9, § 319 et seq., or in Part 1, Title 9, Chapter 10 of the Penal Code of the State of California, § 330 et seq., which said games, devices or schemes are played, carried on or operated with cards, dice or by any contrivance for money, checks, credit or other representative of value where the result of the playing, carrying on or operation of such game, device or scheme is dependent, in whole or in part, upon hazard or chance.

"Section 2. It shall be unlawful for any person, either as owner, lessee, principal, agent, employee, servant, clerk, waiter, cashier or dealer to establish, lease, open, maintain, keep, carry on or work in any building, house or room or any other place where any game, device, scheme, gaming or gambling is permitted, allowed or carried on in violation of any of the provisions of this Ordinance or in violation of the law of the State of California.

* * *

"Section 4. * * * it shall be unlawful for any person to own or have in his possession or under his custody or control any slot machine, upon the result of the action of which money or other valuable thing is staked or hazarded and which is or may be operated or played by placing or depositing therein any coins, checks or slugs, or as a result of the operation of which any money or other representative of value is or may be won or lost, when the result of the action or operation of said slot machine is dependent in whole or in part upon hazard or chance."

Section 7 provides that a violation of any of the above sections shall be a misdemeanor and provides punishment by a maximum fine of $600 or imprisonment in the county jail for a maximum period of seven months or both.

Petitioners were jointly charged in count one of the complaint with the violation of ordinance No. 248 in that they did on January 15, 1941, wilfully and unlawfully maintain a building where gambling was permitted and carried on. In the second count it was charged that they, on the same date, did wilfully and unlawfully cause and permit a game to be played, carried on, and operated with dice, for money or other representative of value, such game being dependent upon hazard or chance. Count three charged that they, on the same date, did wilfully and unlawfully have in their possession and under their custody and control, four slot machines, upon the result of the action of which, money may be staked, and as a result of the operation of which, money or other representative of value may be won or lost, the result of the operation of said slot machines being dependent upon hazard or chance. Count two was subsequently dismissed. Petitioners entered a plea of not guilty and a plea of once in jeopardy. They went to trial upon the remaining counts which resulted in a verdict of guilty as to each count and the jury found for the people on the plea of former jeopardy. A motion for new trial was made, argued and denied. Joint appeals were perfected and the judgments were affirmed by the Superior Court sitting as a court of appeal.

Petitioners now contend, as contended on appeal to the Superior Court: (1) That ordinance No. 248 is unconstitutional and void as being in conflict with sections 320, 330, 330a, 331, and 337a of the Penal Code; that the ordinance covers precisely the same acts as are covered in the Penal Code; that the ordinance attempts to increase the maximum penalty, in the way of a fine, from $500 to $600, and the term of imprisonment from six months to seven months, thereby creating another conflict with the general laws. (2) That petitioners have been once in jeopardy for the offenses charged in counts one and three of the complaint. The basis for this contention is that the dismissal of count two of the complaint was a bar to any subsequent action or prosecution of the offenses contained in counts one and three of the complaint, for the reason that count two was an integral part of the alleged crime which could not be successfully separated from the other counts.

Respondents also raise the question of the jurisdiction of this court to entertain the proceeding or issue a writ of certiorari for the claimed reason that certiorari will not lie to review the judgment of a justice's court after an appeal taken and determined in the Superior Court, even though the inferior tribunal was without jurisdiction to render the judgment.

[1-5] The rule is well settled that a county or city has the power, under section 11 of article XI of the Constitution, to enact police regulations and ordinances promoting considerations of public welfare, public morals, public health, and public

safety, provided that such regulations are not in conflict with the general laws. The only way the legislature can inhibit local legislative bodies from enacting rules and police regulations is by the state itself occupying the same legislative field so completely that legislation on the subject by local legislative bodies will necessarily be inconsistent with the state act. So long as the requirements of the ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both may stand. There may be different regulations without a conflict. In re Iverson, 199 Cal. 582, 250 P. 681. It must be conceded that the legislature, in this respect, has not so completely occupied the field in respect to gambling laws that there is no act remaining that could not be declared unlawful by a county or a municipality. Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a county or municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purposes of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable. Mann v. Scott, 180 Cal. 550, 556, 182 P. 281. Whether the legislature has undertaken to occupy exclusively a given field of legislation is to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate. Section 331 of the Penal Code provides that "Every person who knowingly permits any of the games mentioned in section three hundred thirty and section three hundred thirty *a* of this code to be played, conducted, or dealt in any *house owned or rented* by such person, in whole or in part, is punishable as provided in the preceding sections." (Italics ours.)

[6] In count one of the complaint it is not alleged that gambling was played, conducted or dealt in any *house*. It is not alleged that defendants were the *owners* or *lessees* of *any house,* and not alleged that the gambling permitted and allowed constituted games prohibited by section 330 or section 330a of the Penal Code. Section 2 of the ordinance under which count one is pleaded is heretofore set out in full. It will be noted that the county ordinance, in addition to making the *owner or lessee* liable also includes the agent, employee, servant, clerk, etc., who maintains not only a house, but any building, room, or other place where any gambling is permitted or carried on in violation of any of the provisions of the ordinance or state law, and provides a greater penalty than is provided by section 331 of the Penal Code. A comparison of the provisions of the ordinance with the provisions of the Penal Code discloses that while both deal with the same general subject, a subject which lies within the police power of both the county and the state, the section of the ordinance hereunder attacked is but another, different, more stringent regulation relating to one phase of the question dealt with in the state law. While the ordinance may include, among the acts denounced, some of the acts punishable by state law, the fact that it includes, by way of general description, games prohibited by statute, as well as those not so prohibited, does not affect the validity of the entire ordinance. But all games so prohibited by statute must be excluded from the operation of the ordinance. In re Murphy, 128 Cal. 29, 60 P. 465.

[7-12] Where only part of an ordinance is invalid for any reason, in order to render the whole ordinance void for the same reason, all of the parts thereof must be so interdependent as that no one part may be eliminated without destroying the force of the whole ordinance; but where an ordinance is valid in one part, and invalid in another, the former part, if not dependent in any measure upon the latter, and can without the latter accomplish one or all of the material purposes of the ordinance, will be sustained, and that which is void will be eliminated and disregarded. It follows that the court will not declare an entire ordinance invalid where the objectionable part may be eliminated without destroying the efficacy of the remainder. The effect of such partial invalidity will then be, that the independent provision, not in its nature and connections essential to the law, may be treated as a nullity, leaving the rest of the enactment, if it comprehend within itself an entire and complete scheme, to stand as valid. We may, therefore, hold legal portions of the ordinance which declare unlawful acts not prohibited by state law. People v. Mintz, 106 Cal.App. 725, 290 P. 93. It cannot be said that the possible maximum fine and imprisonment under the ordinance here considered is an unreasonable penalty to be fixed for the commission of the acts prohibited. The ordinance is not inconsistent with kindred enactments of

the state. People v. Fages, 32 Cal.App. 37, 162 P. 137; In re Iverson, supra; In re Simmons, 199 Cal. 590, 594, 250 P. 684.

As to the third count charging a violation of section 4 of the ordinance, it will be noted that section 330 of the Penal Code provides generally that it is unlawful to have in one's possession any slot machine, upon the result of the operation of which money *is* won or lost. The ordinance contains the same general provision except that it provides that "as a result of the operation of which any money or other representative of value *is* or *may be won or lost*". It will therefore be noticed that under the ordinance the possession of such machine is unlawful, without the necessity of staking money or the actual operation of the machine, or without winning or losing money as a result of having staked that money. The possession of the machine becomes unlawful under section 4 of the ordinance if the machine is of such nature or character that money *may be* staked thereon, which machine *may be* operated with the result that money *may be* won or lost on it. Under the state law the machine must be operated and the money *won* or *lost.*

[13] An examination of count three will disclose that it is not alleged that the machines in the possession of the two defendants were actually operated nor that money was staked thereon, nor whether or not that money was actually won or lost. There is a difference in having in one's possession a machine used and operated and a machine not used and operated. Section 330a of the Penal Code reaches the former. Section 4 of the ordinance reaches the former but also reaches the latter. The defendants were charged with the latter and not the former. The same argument and authorities therefore apply to this count as apply to count one.

[14] The other questions presented are not meritorious or are not reviewable on this writ. Code Civ.Proc., sec. 1074; Sherer v. Superior Court, 94 Cal. 354, 29 P. 716; Times-Mirror Co. v. Superior Court, 15 Cal.App. 515, 115 P. 248; Roberts v. Police Court, 185 Cal. 65, 195 P. 1053; Spanach v. Superior Court, 4 Cal.2d 447, 50 P.2d 444; Culver v. Superior Court, 185 Cal. 144, 195 P. 1055; Albers v. Superior Court, 30 Cal.App. 772, 159 P. 453; Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Los Angeles Bond, etc. Co. v. Superior Court, 1 Cal.App.2d 634, 37 P.2d 159.

[15] Where a superior court affirms a judgment of the justice's court the judgment of the superior court operates to estop the defendant from proceeding in this court against the justice's court to review, on certiorari, the judgment of the justice's court. It therefore becomes immediately apparent that the respondent Justice's Court of the Township of Riverside is not a proper party to this proceeding. Sherer v. Superior Court, supra; Moyer v. Superior Court, 29 Cal.App.2d 330, 84 P.2d 240; Albers v. Superior Court, supra.

As this writ must be discharged for the reasons expressed, it becomes unnecessary to make a determination of the disputed question whether the judgment and proceedings of the justice's court in the instant case, by a writ of certiorari directed against the Superior Court, may be annulled after an affirmance of the judgment on appeal by the Superior Court. Culver v. Superior Court, supra; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715.

For the reasons expressed the writ is discharged.

MARKS, Acting P. J., concurred.

18 Cal.2d 616

WARDEN v. WELCH et al.

L. A. 17100.

Supreme Court of California.

Sept. 13, 1941.

1. Records ⟹9(13¼)

The statutory provision that a purchaser of registered land sold for any tax or assessment shall within five days after such purchase file in the office of the registrar a written notice of such purchase is applicable, and is "mandatory" where summary sales have been held by tax collectors for delinquent taxes. Gen.Laws 1937, Act 8589, § 77.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. Records ⟹9(13¼)

Under statute requiring purchaser of registered land sold for any tax or assessment to file in office of registrar a written notice of such purchase, a sale of land made by a commissioner appointed by the court after judgment rendered in a foreclosure action on a delinquent street assessment bond pursuant to statute was not a sale for a "tax or assessment" requiring notice to be given registrar, but was a sale for purpose of carrying judgment into effect. Gen.Laws 1937, Act 8589, § 77; St.1893, p. 36, § 5, subd. *l*, as amended by St.1921, p. 560.

See Words and Phrases, Permanent Edition, for all other definitions of "Tax or Assessment".

3. Records ⟹9(13¼)

Under statute providing that a purchaser of registered land sold for any tax or assessment shall within five days after such purchase file in office of registrar a written notice of such purchase, a sale on foreclosure of a street assessment bond by a commissioner appointed by the court was not a sale for a tax or assessment, notwithstanding that bond represented an "assessment", since the indebtedness evidenced by bond became merged in the judgment in satisfaction of which land was sold. Gen.Laws 1937, Act 8589, §§ 77, 88; St.1893, p. 36, § 5, subd. *l*, as amended by St.1921, p. 560.

See Words and Phrases, Permanent Edition, for all other definitions of "Assessment".

In Bank.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Robert P. Warden against Ross Welch and others under sections 33 and 98 of the Land Title Act for a decree compelling the registrar of titles to file a deed conveying realty to plaintiff, to cancel a certificate of title theretofore issued, and to issue a certificate of title to plaintiff. A general demurrer to the complaint was sustained without leave to amend, and from a judgment for the defendants, plaintiff appeals.

Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Arch H. Vernon, Earl E. Johnson and Lawrence L. Otis, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

This action was brought pursuant to the provisions of sections 33 and 98 of the Land Title Act (2 Deering's Gen. Laws, Act 8589) for a decree compelling the registrar of titles to file a deed conveying certain real property to plaintiff, to cancel a certificate of title theretofore issued to the defendants Svensrud, and to issue a certificate of title to plaintiff showing him to be the owner of such property in fee simple. A general demurrer filed by defendants Svensrud was sustained without leave to amend and judgment was entered thereon. Plaintiff has appealed.

The complaint sets forth in substance the following essential facts. The land here involved was registered under the Land Title Act in 1924 and by mesne conveyances title became vested in Charles P. Warden, to whom a certificate of title was issued. In February, 1927, the holder of a bond representing a street assessment against the property commenced an action in the superior court of Los Angeles county to foreclose the bond. Notice of lis pendens in the action was filed with the registrar of titles, judgment of foreclosure of the bond was ordered and, pursuant thereto, the commissioner appointed by the court sold the property on June 7, 1933, to Ross Welch. The commissioner's certificate of sale was filed with the registrar of titles and, at the expiration of the time for redemption, the commissioner's deed was issued and filed, and, in February, 1935, a certificate of title was issued to Welch. Thereafter Welch conveyed the property to the defendants Svensrud and the registrar issued a certificate of title showing an estate in fee simple vested in them. On November 2, 1936, a deed executed in July, 1936, by Charles P. Warden and his wife purporting to convey the property to the plaintiff, and the certificate of title which had been issued to Charles P. Warden prior to the foreclosure proceedings were presented to the registrar of titles and demand made that he file the deed and issue a certificate showing title to the property to be vested in the plaintiff. The registrar refused to comply with such demand and the present action resulted.

Plaintiff contends that the certificate of title issued to defendants Svensrud as a result of a conveyance to them by the purchaser at the foreclosure sale is void and of no effect because such sale was of registered land "for a tax or assessment" and notice of the purchase as required by section 77 of the Land Title Act was not given to the registrar. That section provides in part:

> "A purchaser of registered land sold for any tax or assessment, shall, within five days after such purchase, file in the office of the registrar a written notice of such purchase. And thereupon the registrar shall enter a memorial thereof upon the certificate of title, and shall mail to each person named in the certificate, and in the memorials thereon, a copy of said notice. * * * Unless such notice is filed as herein provided, the land shall be forever released from the effect of such sale, and no deed shall be issued in pursuance thereof."

Defendants answer that section 77 was intended to apply only where summary sales by public officers are held for delinquency in taxes or assessments; that the street assessment and the bond evidencing it were merged in the judgment of foreclosure; and that the sale was therefore one to satisfy a judgment, regulated not by section 77 but by section 88. That section provides:

> "Whenever registered land shall be sold to satisfy any judgment, decree, or order of court, the purchaser shall file with the registrar a duly certified copy of the order of sale, or of the order confirming such sale, when the same needs to be confirmed by the court, and also the certificate, if any, of the officer, that the terms of sale have been complied with, and thereupon the registrar shall transfer the land to him, and issue a new certificate of title therefor to said purchaser."

[1-3] Section 77 has been held applicable and its provisions mandatory where summary sales have been held by tax collectors for delinquent taxes. Newcomb v. City of Newport Beach, 7 Cal.2d 393, 406, 60 P.2d 825; Newcomb v. City of Newport Beach, 12 Cal.2d 235, 237, 83 P.2d 21; In re Seick, 46 Cal.App. 363, 189 P. 314; 8 Calif. L. Rev. 450. No such sale is involved here. The street assessment bond was foreclosed as authorized by the Street Improvement Bond Act of 1893. Section 5, subdivision L of that act (Stats. 1893, p. 33, as amended by Stats. 1921, pp. 556, 560) provides that the holder of a delinquent bond may file a suit to foreclose the bond in which suit the court "shall have the power to adjudge and decree a lien against the lot or parcel of land covered by said bond and to order said premises to be sold on execution as in other cases of the sale of real estate by the process of said court * * *." Clearly, the sale made in this case by a commissioner appointed by the court after judgment rendered in a foreclosure action brought pursuant to that section, was not a sale for a "tax or assessment" under section 77 but was a judicial sale made under the order of a court having jurisdiction of the subject matter, directing the property to be sold for the purpose of carrying its judgment into effect. Cf. In re Pearsons' Estate, 98 Cal. 603, 612, 33 P. 451; In re Estate of Backesto, 63 Cal.App. 265, 268, 218 P. 597; 15 Cal.Jur., p. 299. While it is true that the bond represented an "assessment", the indebtedness evidenced by the bond became merged in the judgment (see Adams v. White Bus Line, 184 Cal. 710, 712, 195 P. 389; Timm v. McCartney, 30 Cal.App.2d 241, 248, 85 P.2d 920; 2 Freeman on Judgments, 5th Ed., p. 1169; 34 Cor.Jur., p. 754) and the land was sold not for the assessment but to satisfy a judgment within the meaning of section 88.

As the complaint fails to show a violation of any of the provisions of section 88, no cause of action was stated against the defendants.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ. concurred.

BETTY v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 17892.

Supreme Court of California.

Sept. 22, 1941.

Rehearing Denied Oct. 20, 1941.

1. Judgment 🔑869

The statute providing that, under stated circumstances, the Superior Court must, upon motion, revive a judgment, and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more, is "remedial" in character and should be liberally construed. Code Civ.Proc. § 708.

See Words and Phrases, Permanent Edition, for all other definitions of "Remedial".

2. Judgment 🔑866(2)

The statute providing that, under stated circumstances, the Superior Court must, upon motion, revive a judgment, and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more, provides a remedy as broad as an action in equity which may be invoked by a judgment creditor more than five years after the date of the judgment. Code Civ.Proc. § 708.

3. Judgment 🔑869

The purpose of statute providing that, under stated circumstances, the Superior Court must, upon motion, revive a judgment, and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more, is to restore a creditor, whose judgment has been satisfied of record because of an error of law which has deprived him of the property applied to its payment, to the position he occupied before the void execution sale. Code Civ.Proc. § 708.

4. Execution 🔑75

The purpose of statute providing that, in event issuance of execution is stayed or enjoined by operation of law or order of court, the time during which the judgment could not be enforced must be excluded from computation of the five years within which execution may issue, is to restore a creditor to the position he occupied before the issuance of execution was stayed or enjoined. Code Civ.Proc. § 681.

5. Judgment 🔑872

Under statute providing that, under stated circumstances, the Superior Court must, upon motion, revive a judgment, and the judgment so revived has same force and effect as would an original judgment of the date of the revival, and no more, a creditor upon revival of a judgment was entitled to a writ of execution within five years thereafter as a matter of right. Code Civ.Proc. § 708.

6. Mandamus 🔑7

The granting or refusal of a writ of mandate rests to a considerable extent in discretion of court to which application therefor is made, and a conclusion should be reached which will promote justice.

7. Mandamus 🔑24

A writ of mandamus will issue to compel Superior Court to perform a clear legal duty not involving the exercise of any discretion.

8. Mandamus 🔑55

Where it appeared that judgment creditor was entitled as matter of right to issuance of an execution upon a judgment which had been revived and that Superior Court refused to issue the execution, the Supreme Court would issue writ of mandate requiring Superior Court to issue the execution. Code Civ.Proc. § 708.

9. Mandamus 🔑3(8)

The fact that judgment creditor might have obtained an order directing a writ of execution to issue on a judgment upon an affidavit showing facts sufficient to authorize the Superior Court to act under statute providing for enforcement of a judgment after five years on supplemental proceedings was not a bar to proceeding for writ of mandate to compel court to issue an execution upon the judgment which had been revived. Code Civ.Proc. §§ 685, 708.

◆

Original proceeding by Marion P. Betty against the Superior Court of Los Angeles County and others for a writ of mandate directing issuance of a writ of execution.

Peremptory writ of mandate issued.

Marion P. Betty, in propria persona, and Porter C. Blackburn, both of Los Angeles, for petitioner.

Benjamin Chipkin, of Los Angeles, for respondents.

EDMONDS, Justice.

In this proceeding an alternative writ of mandate was granted upon a showing that the superior court had refused to direct its clerk to issue an execution upon a judgment. The question for decision concerns the time within which a judgment, which has been revived under the provisions of section 708 of the Civil Code of Procedure, "has the same force and effect" as the original one.

The judgment in controversy was rendered September 20, 1932, in an action brought by Lorn H. Betty. It provided that the plaintiff should have a lien upon certain property and directed that execution issue accordingly. Thereafter, the property was sold by the sheriff, and, upon his return, it was fully satisfied of record. On August 24, 1937, the superior court granted plaintiff's motion to revive the judgment upon the ground that the sheriff's sale was void. The plaintiff then assigned it to M. Potter who, upon the refusal of the county clerk to issue execution, on January 6, 1941, moved the superior court for an order directing him to do so. This motion was denied. Later Potter assigned the judgment to petitioner.

It is the petitioner's contention that the order of August 24, 1937, revived the judgment for a period of five years from that date. The respondents assert that he is not entitled to a writ of mandate because he has a remedy by appeal; that he has not exhausted his remedies because he did not apply to the superior court for an order directing a writ of execution to issue after his assignor's motion was denied; and that, more than five years having elapsed since the judgment was entered, he may obtain execution only upon motion made in accordance with the requirements of section 685 of the Code of Civil Procedure.

[1, 2] Section 708 of the Code of Civil Procedure provides that, under stated circumstances, the superior court must, upon motion, revive a judgment, "and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more". The rights of litigants under this section have been considered and passed upon a number of times (see Heine Piano Co. v. Bloomer, 183 Cal. 398, 191 P. 900, and cases cited), but the question which is determinative of the present controversy has not been decided. However, it has been held that the section is remedial in character and should be liberally construed (Hitchcock v. Caruthers, 100 Cal. 100, 102, 34 P. 627; Cross v. Zane, 47 Cal. 602); also, that it provides a remedy as broad as an action in equity which may be invoked by a judgment creditor more than five years after the date of the judgment. Merguire v. O'Donnell, 139 Cal. 6, 72 P. 337, 96 Am.St.Rep. 91. The petitioner's contention is supported by these holdings, for if the order of revival makes the judgment effective only from the date it was originally entered, then the creditor has not received that equitable consideration which the statute contemplates but has been penalized for a lapse of time occasioned without his fault.

[3, 4] Unquestionably, the purpose of the code section is to restore a creditor, whose judgment has been satisfied of record because of an error of law which has deprived him of the property applied to its payment, to the position he occupied before the void execution sale. This purpose is effected by making up to him the time taken in the fruitless endeavor to secure payment of the judgment; the revived judgment is given the same force and effect as the original judgment "of the date of the revival", that is, the same force and effect as the judgment would have had if entered upon the date the order of revival was made in so far as execution thereon is concerned. A statute with the same purpose is section 681 of the Code of Civil Procedure, which protects the rights of the judgment creditor in the event that the issuance of execution is stayed or enjoined by operation of law or order of court. Under such circumstances, the time during which the judgment could not be enforced "must be excluded from the computation of the five years within which execution may issue".

[5] The respondents lay great stress upon the words "and no more" which conclude the section, arguing that they limit the time within which the revived judgment has the same force and effect as the original one to five years from the date the judgment was originally entered. That construction ignores the much more spe-

cific words "of the date of the revival". Moreover, section 708 is a codification of the Practice Act, § 237, St.1850, p. 428, which provided that "when so revived the said judgment shall have the effect of an original judgment of the said court of that date". The legislature could have been more explicit, but both the purpose and grammatical construction of the code provision compel the conclusion that, upon the revival of his judgment, the creditor is entitled to a writ of execution within five years thereafter as a matter of right.

[6-8] The granting or refusal of a writ of mandate is not altogether a matter of right, and a determination rests to a considerable extent, in the discretion of the court to which application therefor is made (Silver Burdett Co. v. State Board of Education, 36 Cal.App.2d 714, 98 P.2d 533) and a conclusion should be reached which will promote justice. In the present case, the petitioner has shown that the respondents have refused to perform a clear legal duty not involving the exercise of any discretion. Under such circumstances, the writ should issue. Lindsay Strathmore Irrigation District v. Superior Court, 121 Cal. App. 606, 9 P.2d 579.

[9] The fact that the petitioner might have obtained an order directing a writ of execution to issue upon an affidavit showing facts sufficient to authorize the court to act under the provisions of section 685 of the Code of Civil Procedure is not a bar to this proceeding. If five years have not elapsed since the judgment was entered, considering the effect of the order reviving it, then the petitioner may not be required to follow the procedure authorized to carry a judgment into effect after that time has passed. Also, the order denying the motion of the petitioner's assignor was made for reasons which are not affected by the assignment, and a renewal of this motion by the petitioner would again present the same question to the court which had once decided it.

A peremptory writ of mandate will issue accordingly.

GIBSON, C. J., SHENK, CURTIS, CARTER, and TRAYNOR, JJ., and PULLEN, Justice pro tem., concurred.

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46 Cal.App.2d 726

LASCH v. EDGAR et al.

Civ. 2913.

District Court of Appeal, Fourth District, California.

Sept. 13, 1941.

1. Negligence 🔑83

A necessary element of "last clear chance" doctrine is that defendant must know of predicament of plaintiff and his inability to extricate himself from it by use of ordinary care, and must have had last clear chance to have avoided the accident by use of ordinary care, and a defendant cannot be held liable upon theory that he would have discovered the peril of the plaintiff but for remissness on his part.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

2. Automobiles 🔑246(38)

In action arising out of motor vehicle collision, an instruction on last clear chance was erroneous.

3. Appeal and error 🔑978(1)

The trial judge is in a much better position than is an appellate court to judge of the effect which an erroneous instruction had on verdict of jury, and his conclusion on such question, as evidenced by his ruling on motion for new trial, should not be disturbed on appeal except in a case showing clearly that his ruling was wrong.

4. New trial 🔑27

In passing on a motion for a new trial, the trial judge is as firmly bound by constitutional provision relating to formal errors as is an appellate court when the cause is on appeal. Const. art. 6, § 4½.

5. New trial 🔑157

In passing on a motion for a new trial, it is duty of trial judge to sit as a thirteenth juror and weigh the evidence, pass upon its sufficiency, and consider the credibility of witnesses, and this is true even though he does not specify the insufficiency of the evidence as one of the grounds for granting a new trial, because the Constitution contains the direction that he shall not grant a new trial because of errors in instructions to the jury until he has re-examined the entire cause and shall have formed the opinion that the errors complained of resulted in a miscarriage of justice. Const. art. 6, § 4½.

6. Appeal and error ⚷933(4)

On appeal from an order granting a new trial but not specifying that the motion was granted because of the insufficiency of the evidence to sustain the verdict, appellate court must indulge in the presumption that trial court obeyed mandate of Constitution and considered the whole record in the case and decided that the giving of an instruction was prejudicial and did result in a miscarriage of justice. Const. art. 6, § 4½.

7. Appeal and error ⚷1170(11)

Where trial judge granted defendants' motion for new trial in a motor vehicle collision case without specifying that motion was granted because of insufficiency of evidence to sustain verdict evidently considering that an improper instruction on last clear chance doctrine constituted prejudicial error, and it appeared that instruction as given was erroneous, appellate court would affirm trial court's order granting motion for new trial. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Bruno Lasch against Carl Edgar and another arising out of a motor vehicle collision. From an order granting defendants a new trial after verdict of jury for plaintiff, the plaintiff appeals.

Affirmed.

Sam L. Collins and Harold A. McCabe, both of Fullerton, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

MARKS, Acting Presiding Justice.

This is an appeal from an order granting a motion for new trial in a motor vehicle collision case after the jury had returned a verdict in favor of plaintiff in the sum of $3,300. The order did not specify the insufficiency of the evidence as a ground for granting the new trial.

Plaintiff presents but one ground for reversal of the order. He states the giving of an instruction proposed by him on the doctrine of the last clear chance furnished the sole reason for granting the motion in the trial court. He argues that there was no prejudicial error growing out of the giving of this instruction.

The challenged instruction reads as follows: "You are instructed that if you find from the evidence that the plaintiff has been negligent, and, as a result thereof, is in a position of danger which he cannot by the exercise of ordinary care escape, including instances where it is physically impossible for him to escape as well as instances where he is totally *aware* of his danger and for that reason unable to escape, *and the defendant either has knowledge of said situation, or in the exercise of ordinary care should have knowledge that the plaintiff cannot escape from said situation,* and the defendant has the last clear chance to avoid the accident by exercising ordinary care and fails to do so, and the accident results and the plaintiff is injured as the proximate result of such failure to use ordinary care, contributory negligence on the part of the plaintiff or person injured will not defeat his recovery." (Emphasis ours.)

The use of the word "aware" in the instruction may have been the result of a typographical error as there seems to have been an attempt to state the oblivious from danger rule which was rejected in Rasmussen v. Fresno Traction Co., 15 Cal. App.2d 356, 59 P.2d 617 as inapplicable to the facts of that case.

[1] There has been some seeming confusion in the decisions on the precise definition of the last clear chance doctrine. This confusion was partially removed by the majority opinion in the case of Rasmussen v. Fresno Traction Co., supra, in which a hearing was denied by the Supreme Court. One necessary element of the doctrine of the last clear chance, supported by a majority of the California cases in which this element has been directly involved, is this: The defendant must know of the predicament of the plaintiff and his inability to extricate himself from it by the use of ordinary care, and must have had the last clear chance to have avoided the accident by the use of ordinary care before the doctrine can be applied. There must have been presented to him not only the last chance but a clear chance of avoiding the accident. If the plaintiff had an equal chance of avoiding the accident by the use of ordinary care and did not avail himself of it he cannot recover.

This important element of the doctrine was set forth in New York Lubricating Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72, 74, as follows: "It is a well-settled rule in this state that this doctrine is only applicable to a defendant who actually perceived the predicament and danger of a plaintiff in time to have avoided the accident by the exercise of due diligence. A defendant cannot be held liable upon the theory that he would have discovered the peril of the other but for remissness on his part. Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 P. 15, 63 L.R.A. 238, 98 Am.St.Rep. 85; Thompson v. Los Angeles etc., Ry. Co., 165 Cal. 748, 134 P. 709; Tucker v. United Railroads [171 Cal. 702, 154 P. 835]."

This rule was further explained in Rasmussen v. Fresno Traction Co., supra [15 Cal.App.2d 356, 59 P.2d 619], as follows:

"As has frequently been said, the doctrine of the last clear chance means exactly what the words imply and the essence of the rule is that it is applicable only where the defendant, notwithstanding the plaintiff's negligence, has a clear chance, after realizing that the plaintiff cannot escape, to avoid the accident by the exercise of ordinary care, and where the plaintiff cannot avoid it by the use of such care.

"In applying the rule in certain cases, the courts have used language which has led to some confusion and perhaps to some modification. While it has always been held that the rule did not apply unless the defendant actually knew that the plaintiff was in a position of danger, it has more recently been held that the jury is not required to take the defendant's word that he did not see but that, under proper circumstances, the jury may find that he did see, and that the jury, having found on proper evidence that he actually saw, may infer that he should then have known that the plaintiff could not escape."

[2] The quoted instruction given by the trial judge fails to set forth some of the necessary elements of the doctrine of the last clear chance. Its most apparent defect is its failure to require proof of facts from which the reasonable inference might have been drawn that the driver of defendant's car had knowledge of the predicament of plaintiff before the doctrine could come into effect. This serious defect rendered the instruction erroneous.

[3] It has been held that the trial judge is in a much better position than is an appellate court to judge of the effect which an erroneous instruction had on the verdict of the jury and that his conclusion on that question, as evidenced by his ruling on a motion for new trial, should not be disturbed on appeal except in a case showing clearly that his ruling was wrong.

In Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 113 P.2d 244, 247, it was said:

[4, 5] "It is well established that, in passing on a motion for a new trial, a trial judge is as firmly bound by this constitutional provision [sec. 4½, art. VI, Const.] as is an appellate court when the cause is on appeal. It is his duty to sit as a thirteenth juror and weigh the evidence, pass upon its sufficiency and consider the credibility of witnesses. This is true even though he does not specify the insufficiency of the evidence as one of the grounds for granting a new trial because the Constitution contains the direction that he shall not grant a new trial because of errors in instructions to the jury until he has reexamined the entire cause and shall have formed the opinion that the errors complained of have resulted in a miscarriage of justice. Sec. 4½, art. VI, Const.; Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774; Clippinger v. Reiss, 17 Cal.App.2d 604, 62 P.2d 418; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P. 2d 213.

[6] "In considering a similar question in Bieser v. Davies, 119 Cal.App. 659, 7 P.2d 388, 389, this court said: 'On this appeal we think we must indulge in the presumption that the trial court obeyed this mandate of the Constitution and considered the whole record in the case and decided that the giving of the instruction was prejudicial and did result in a miscarriage of justice.'

"In view of these well-recognized principles of law we cannot say that the evident conclusion of the trial judge that the erroneous instructions resulted in a miscarriage of justice finds no support in the record even though a study of the record here leaves the conclusion that the evidence preponderates in favor of the defendants."

[7] With the foregoing authorities before us we must conclude that the order granting the motion for new trial must be affirmed. This makes it unnecessary for us to consider the other purported errors argued by defendants.

The order is affirmed.

GRIFFIN, J., and MORTON, Justice pro tem., concurred.

46 Cal.App.2d 751

PETERSON v. LAMPTON.

Civ. 13176.

District Court of Appeal, Second District, Division 1, California.

Sept. 17, 1941.

1. Appeal and error ⚷460(2)

An order authorizing the issuance of execution after five years is not in effect a "judgment directing the payment of money", within contemplation of statute requiring that bond be posted in order to stay execution pending appeal from judgment or order directing the payment of money. Code Civ. Proc. §§ 685, 942.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment Directing the Payment of Money".

2. Appeal and error ⚷115

An order directing issuance of execution after five years is an "appealable order". Code Civ.Proc. § 963, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

3. Appeal and error ⚷460(2)

Where judgment debtor duly perfected an appeal from superior court's order authorizing issuance of execution after five years, all proceedings in trial court upon the matters embraced in such order were stayed in accordance with statute. Code Civ.Proc. §§ 685, 940, 946; § 963, subd. 2.

4. Appeal and error ⚷460(2)

An appeal from order directing issuance of execution after five years cannot be regarded as an indirect appeal from judgment for the enforcement of which execution was sought, so as to require that bond be posted in order to stay proceedings in trial court pending such appeal, since only proceedings had upon the order to issue execution after five years are reviewable on appeal therefrom and reversal of such order would not vacate the original judgment. Code Civ. Proc. §§ 685, 940, 946; § 963, subd. 2.

5. Appeal and error ⚷460(2)

The clerk of superior court had no power to issue an execution after five years on order of court after an appeal had been taken from such order, even though no stay bond was posted, since perfecting of such appeal stayed all proceedings in trial court upon the matters embraced in order appealed from. Code Civ.Proc. §§ 685, 940, 946; § 963, subd. 2.

6. Courts ⚷207(4)

The District Court of Appeal would not grant writ of mandate to compel clerk of superior court to issue execution after five years, where judgment debtor had perfected appeal from superior court's order directing issuance of execution, even though no stay bond had been posted. Code Civ. Proc. §§ 685, 940, 946; § 963, subd. 2.

Proceeding upon the petition of M. F. Peterson, etc., for a writ of mandate to be directed to L. E. Lampton, Clerk of the Superior Court of Los Angeles County, to compel the issuance of a writ of execution, wherein respondent filed a general demurrer challenging the sufficiency of the grounds stated in petition to authorize the issuance of the writ.

Demurrer to petition sustained, alternative writ discharged, and petition for peremptory writ denied.

John C. Miles and Philip M. Girard, both of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, for respondent.

WHITE, Justice.

Petitioner seeks by writ of mandate to compel the issuance by respondent clerk of the superior court of the state of California, in and for the county of Los Angeles, of a writ of execution in an action now pending in the aforesaid court. By way of return to the alternative writ, respondent has filed a general demurrer challenging the sufficiency of the grounds stated in the petition to authorize or sustain the issuance of the writ prayed for.

Epitomized, the facts are that on or about January 5, 1926, one Joseph Farnsworth recovered judgment in the sum of $3,983.56 against J. W. Breedlove upon a cause of action based upon a foreign judgment theretofore recovered for the payment of a note executed by said Breedlove for the price of certain personal property purchased by him.

From the petition it appears that for a period of more than five years after the rendition of such judgment, plaintiff in that action, Joseph Farnsworth, endeavored to collect the judgment, but his efforts in that direction were futile, owing to his inability to locate property or assets of the judgment debtor. On or about December 11, 1940, plaintiff Farnsworth assigned said judgment to the petitioner herein, M. F. Peterson, for the purposes of collection, and on January 27, 1941, by order of the superior court, petitioner herein was substituted plaintiff for and in the place of Farnsworth, and ever since that time has been such plaintiff and entitled to all of the rights and remedies accrued and accruing in said action.

On or about January 30, 1941, petitioner herein filed his motion for issuance of execution after five years under section 685 of the Code of Civil Procedure, and thereafter, on April 14, 1941, said superior court made its order granting such motion and directing its clerk, respondent herein, to issue execution on the judgment entered in such action, and ordered that issuance of such execution be stayed for a period of ten days from and after the 14th day of April, 1941. On the 23d day of April, 1941, J. W. Breedlove, defendant in said action, filed with the clerk of said superior court a notice of appeal from the order directing the issuance of execution, and also filed a request to the clerk to prepare a transcript on appeal.

From the petition it further appears that up to and including the fifth day of June, 1941, said transcript on appeal was not prepared by the clerk because of the failure of the defendant Breedlove to tender payment for such preparation. On the last-named date petitioner herein filed in the superior court his motion for an order terminating the appeal, but we are not advised in this proceeding as to the disposition made of such motion.

On June 12th petitioner applied to this court and was granted an alternative writ of mandate.

The single issue presented by this proceeding is whether a clerk of the superior court has power to issue an execution after five years (Code Civ.Proc., sec. 685) on order of the court, after an appeal has been taken from such order without filing a stay bond.

[1] Petitioner's contention that an order authorizing the issuance of the execution after five years is in effect a judgment for the direct payment of money and that notwithstanding the taking of an appeal from such order, execution is not stayed pending such appeal unless a bond is posted, has been considered and decided adversely to petitioner's contention in the case of Weldon v. Rogers, 154 Cal. 632, at pages 635 and 636, 98 P. 1070, at page 1071, where it was said: "* * * The superior court, when applied to * * * for leave to have execution issued, as provided in section 685 of the Code Civ.Proc., had no power to direct the payment of money, but only to give leave that the former judgment be 'carried into execution.' * * * For these reasons the former appeal [from an order for execution after five years] cannot be considered as an appeal from an order directing the payment of money, and section 942 gave no authority for an undertaking thereon to stay the proceedings * * * on the execution. * * * In this case there is no appeal from a judgment [for the direct payment of money]. The appeal is from an order made after the final judgment * * * for which no stay is requisite." See, also, Macario v. Macario, 208 Cal. 601, 603, 283 P. 291, and Crowley v. Superior Court, 17 Cal.App.2d 52, 55, 61 P.2d 372.

[2, 3] It cannot be questioned that the order directing issuance of the execution after five years is an appealable order (Code Civ.Proc., sec. 963, subd. 2); and it follows that when an appeal therefrom is duly perfected, as in the instant case (Code Civ.Proc., sec. 940), all proceedings in the trial court upon the matters embraced in said order were stayed. (Code Civ.Proc., sec. 946.)

Petitioner urges that the appeal here in question is analogous to an appeal from an order denying a new trial when such procedure was permitted in civil cases, and, therefore, should be held to be in legal effect an indirect appeal from the judgment; and that unless a bond be given as would have been required to stay execution upon an appeal directly from the judgment, the order directing issuance of execution after five years is not stayed. In support of his proposition in this regard petitioner cites the case of Credits Commutation Co. v. Superior Court, 140 Cal. 82, at page 84, 73 P. 1009, at page 1010, wherein it was stated: "A reversal of an order denying a new trial has the same effect as an order granting a new trial, which is to vacate the judgment. A reversal of a judgment upon a direct appeal has precisely the same effect, and no more; it merely vacates the judgment. The relief being, in form and substance, the same in both cases, an appeal from an order denying a new trial should be held to be, in legal effect, an indirect appeal from the judgment; and, thus considered, the rule with respect to a stay of proceedings on such indirect appeal should be the same as upon a direct appeal from the judgment, and all the requirements of the Code in regard to undertakings for stay of proceedings on appeal from different forms of judgments should be held applicable also to appeals from orders denying a new trial after such judgments. * * *"

Petitioner contends that a reversal of the order herein appealed from would have the effect of vacating the judgment. Such, however, is not the case. Under the rule prevailing at the time an appeal was permitted from an order denying a new trial, it was held that a reversal of such order had the same effect as an order granting a new trial, that is, to vacate the judgment, which would of course in effect amount to a reversal of such judgment the same as if such effect resulted from a direct appeal from the judgment. The form of relief being the same in both cases, an appeal from an order denying a new trial was held to be in legal effect an indirect appeal from the judgment and that the rule with respect to a stay of proceedings on such indirect appeal should be held to be the same as upon a direct appeal from a judgment, so far as the necessity of filing a bond to stay proceedings was concerned.

[4-6] In the case at bar, however, a reversal of the order directing the issuance of execution after five years *would not vacate the judgment.* Such judgment would remain of record and subject to execution if the court should properly order such execution to issue on renewal of an application therefor. Only the proceedings had upon the order to issue execution after five years are reviewable on appeal therefrom, and the final decision thereon would in no way vacate the judgment. When an appeal from an order denying a new trial was permitted in civil cases, it was the uniform practice of the appellate tribunal when such order was reversed also to vacate the judgment, grant a new trial and remand the cause for such retrial. In the event of a reversal of the order from which the appeal herein was taken, the appellate court would be without power to vacate or in any way impair the existing judgment. Therefore an appeal from an order directing issuance of execution after five years cannot be regarded as an indirect appeal from the judgment, and consequently, with respect to a stay of proceedings on such appeal, the rule applicable to direct or indirect appeals from the judgment cannot be applied.

For the foregoing reasons, respondent's demurrer to the petition is sustained, the alternative writ heretofore issued is discharged, and the petition for a peremptory writ is denied.

YORK, P. J., and DORAN, J., concurred.

46 Cal.App.2d 756

PETRY v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 13196.

District Court of Appeal, Second District, Division 1, California.

Sept. 17, 1941.

Hearing Denied Nov. 13, 1941.

1. Divorce 🔑269(2)

The mere approval of a property settlement in a judgment of divorce is not an "order for payment of money" under terms of settlement, as regards enforcement of payment by contempt proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Order for Payment of Money".

2. Divorce 🔑269(2)

If a property settlement agreement between parties to a divorce suit is complete in itself, without reference to action by the court, and plaintiff does not ask for a property settlement, the court does not, by merely approving the settlement, or even by incorporating it in the decree, order performance of agreement, as regards enforcement thereof by contempt proceedings.

3. Divorce 🔑269(2)

Where a property settlement agreement between parties to a divorce suit contains a provision that agreement shall not go into effect until it is approved by the court, and complaint in divorce suit contains proper allegations and prayer looking toward settlement of property rights of parties, an order of court that terms of agreement be carried out will be implied from incorporation of agreement in decree, either bodily or by reference, as respects enforcement by contempt proceedings.

4. Divorce ⚷269(2)

Where husband's complaint in divorce suit sought an equitable division of community property, and wife's cross-complaint prayed that property be awarded to wife, and during pendency of suit the parties entered into a property settlement agreement whereby husband agreed to make monthly payments to wife in settlement of her right to alimony, and terms of agreement were definite, and agreement was made part of decree awarding divorce to husband, and decree ordered that parties perform their respective duties under agreement, the wife could enforce payments from husband under agreement by contempt proceedings.

5. Divorce ⚷269(2)

Language in a divorce decree ordering that plaintiff and defendant perform their respective rights and duties under a property settlement agreement constituted an express order to husband to make payments to wife according to provisions in settlement agreement, as regards wife's right to compel husband to make payments under agreement by contempt proceedings.

6. Divorce ⚷269(2)

Under provisions of a divorce decree reciting that it was ordered that plaintiff and defendant perform their respective duties under a property settlement agreement, which was made a part of decree, the trial court did not merely state the law but ordered parties to perform acts which by agreement they had undertaken to perform, and hence contempt proceedings were available to wife to compel husband to make monthly payments to wife under agreement.

7. Courts ⚷209(2)

In original mandamus proceedings to compel superior court to hear a contempt proceeding after such proceeding had been dismissed, the District Court of Appeal was not required to consider matters which were not brought to superior court's attention while contempt proceeding was pending therein.

8. Mandamus ⚷172

Where petitioner, who sought a writ of mandamus to compel superior court to hear contempt proceedings against petitioner's former husband based upon a property settlement agreement which had been made part of a divorce decree, had previously filed a complaint in superior court containing alleged causes of action for damages for breach of agreement and for rescission thereof, and petitioner had filed in such action an election to sue for damages, the effect of petitioner's attempted rescission of agreement was a "moot question" in mandamus proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

◆

Original mandamus proceedings by Helen M. Petry against the Superior Court of Los Angeles County to compel respondent court to hear and determine a contempt proceeding.

Peremptory writ of mandate issued.

Merritt D. Jergins and Simon Miller, both of Long Beach, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas DeCoster, Deputy Co. Counsel, and Arthur Redmond, all of Los Angeles, for respondent.

WHITE, Justice.

By this proceeding petitioner seeks a writ of mandate to require the respondent court to hear and determine a contempt proceeding based upon the asserted failure of her former husband to make the monthly payments alleged to be due her under the provisions of a judgment of divorce.

In 1934 petitioner's husband, Frederick Petry, brought an action for divorce against her in the Superior Court of Los Angeles County. In June, 1935, after all pleadings had been filed, but before trial of the cause, the parties entered into a property settlement agreement which provided that the husband pay to the wife the sum of $100 per month for six months and $90 per month thereafter until her death or remarriage, "in full settlement of all rights of alimony". Thereafter, by stipulation, the cause was tried as a default, petitioner herein offering no evidence in support of her answer or cross-complaint, and a divorce was granted to the plaintiff. At the default hearing the plaintiff husband introduced the property settlement agreement in evidence and requested its incorporation in the judgment of divorce. A copy of the agreement was attached to the interlocutory judgment, which, in addition to granting a divorce, provided as follows:

"It is hereby specifically ordered and decreed that the property settlement agreement entered into by and between the parties hereto is hereby approved and made a part of this decree in all its terms, provisions and conditions.

"It is further ordered that the plaintiff and defendant fully perform their respective rights and duties vested in and imposed upon them under and by virtue of the property settlement agreement heretofore made on the 22nd day of June, 1935, which said property settlement agreement has been exhibited during the course of the hearing had in this matter, introduced into evidence, and incorporated into this order."

The final judgment of divorce contained the provision: "That wherein said interlocutory decree makes any provision for alimony or the custody and support of children, said provision be and the same is hereby made binding on the parties affected thereby the same as if herein set forth in full, and that wherein the said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto."

At the hearing of the order to show cause in re contempt the trial court concluded that no order for payment of alimony, support or maintenance was made in either the interlocutory or final judgment, nor did the property settlement agreement provide for alimony or support; that therefore the court was without jurisdiction; and accordingly ordered that the husband be discharged.

Upon presentation of the foregoing facts by the petition of the wife, this court issued an alternative writ of mandate requiring the trial court to reinstate the contempt proceeding, determine whether the husband had wilfully failed to pay petitioner the sum of $90 per month, and to enforce his obligation by punishment for contempt if in fact he had wilfully failed to pay, or to show cause why it should not do so. By its answer to the petition respondent court denied that the judgment contained any order for payment, and further alleged that on May 9, 1941, prior to the issuance of the order to show cause in re contempt, the petitioner herein commenced an action in the Superior Court of Los Angeles County praying, among other things, for a rescission of the property settlement and alleging that "plaintiff offers to and does, rescind said agreement".

[1-3] The question whether a judgment of divorce contains, either expressly or by implication, an order for the payment of money under the terms of a property settlement has frequently come before the courts of this state. See Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868, and cases therein cited. The mere approval of a property settlement, with nothing further, is not such an order. Miller v. Superior Court, supra; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749. If an agreement is complete in itself, without reference to action by the court, and the plaintiff does not ask for a property settlement, the court does not, by merely approving the settlement, or even by incorporating it in the decree, order the performance of the contract. Andrews v. Superior Court, 103 Cal.App. 360, 284 P. 494; De Haven v. Superior Court, 114 Cal.App. 253, 300 P. 95. On the other hand, where a property settlement agreement contains a provision that it shall not go into effect until it is approved by the court, and is therefore rather in the nature of a stipulation of the parties than a final agreement, and the complaint in a divorce action contains the proper allegations and prayer looking toward the settlement of the property rights of the parties, an order of the court that the terms of the contract be carried out will be implied from the incorporation of the agreement in the decree, either bodily or by reference. Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252; Ex parte Weiler, 106 Cal.App. 485, 289 P. 645.

[4] It is urged by respondent that the case at bar does not fall within the latter category for the reason that the property settlement contained no provision that it should become part of a divorce decree and was not referred to in the pleadings. There are present here, however, other distinguishing facts which make it clear, in the opinion of this court, that the parties intended to settle their property rights and invoke the power of the court to enforce them. The plaintiff's complaint in the divorce action alleged that there was com-

munity property belonging to the parties and prayed for an accounting and equitable division thereof, as well as for general relief, and the wife by her cross-complaint prayed that she be awarded the community property. During the pendency of this action the parties settled their conflicting demands by entering into the property settlement, whereby the husband agreed to make payments as specified "in full settlement of all rights of alimony" which the wife might have, and further providing that the wife "waives any and all claims for alimony, attorney's fees, costs of suit * * *". Thereafter they entered into a written stipulation that the case might be tried as a default, the wife offering no evidence. Upon the trial the plaintiff husband requested the approval and incorporation in the decree of the property settlement, and the decree obtained by him expressly directed the parties to "fully perform their respective rights and duties" under the settlement.

[5, 6] A further and distinct ground for upholding petitioner's right to enforce payment by contempt proceedings in the instant case is that the language of the decree hereinabove quoted, "that the plaintiff and defendant fully perform their respective rights and duties vested in and imposed upon them under and by virtue of the property settlement", etc., constitutes an express order to the husband to make the payments according to the provisions contained in the settlement. The terms of the agreement being definite and certain, and the agreement being attached to the decree, made a part thereof, and clearly identified, there is no merit to respondent's contention that the order is too indefinite and uncertain to form a basis for a contempt proceeding. Respondent draws a parallel between the order here under consideration and that involved in the case of Schnerr v. Schnerr, supra, where the decree contained the language: "* * * and the property rights of the said parties established as in said agreement set forth." In that case it was held that the decree was wholly insufficient to support contempt proceedings because no duty whatever was imposed thereby upon the defendant. In the present case, however, the words of the decree constitute an express command, within the jurisdiction of the court to give, and hence enforceable by contempt. Miller v. Superior Court, supra. The court did not, as respondent contends, "merely state the law"; it ordered the parties to perform the acts which by the agreement they had undertaken to perform, and which could be ascertained from an inspection of the decree of divorce.

[7, 8] Although it is unnecessary to consider the effect of petitioner's attempted rescission of the property settlement, since it was not brought to the attention of the trial court, who denied relief on the sole ground that there was no enforceable order, it may be noted that petitioner's complaint contained four causes of action for damages for breach, and one for rescission. A demurrer and a motion to require plaintiff to elect between damages and rescission were filed by the defendant. Although petitioner alleged in her complaint that she "offers to and does rescind", it is obvious that in this case the judgment of a court is required to effect a rescission. Although not admitted as a fact in the pleadings in this court, it appears from petitioner's final brief, and is not denied, that she has filed in her action an election to sue for damages. Such being the case, the point is moot.

It is ordered that a peremptory writ of mandate issue, commanding the Superior Court of Los Angeles County to reinstate said contempt proceeding for further hearing, and upon such hearing to determine whether said Frederick Petry has the present ability to pay and has wilfully and in defiance of the terms of the divorce decree failed to pay petitioner the sum of $90 per month, and to enforce his obligation to make such payments by punishment for contempt of court if he be adjudged guilty thereof.

YORK, P. J., and DORAN, J., concurred.

46 Cal.App.2d 741

BURCK v. BUCHEN et al.

Civ. 12545.

District Court of Appeal, Second District, Division 1, California.

Sept. 17, 1941.

1. Acknowledgment ⚷24

When taking an acknowledgment, notary public should require acknowledging party to appear in person before him, since notary public is required by statute to certify that such party "personally appeared". Civ.Code, § 1189.

2. Acknowledgment ⚷48

A notary public, who acknowledges an instrument without requiring acknowledging party to appear in person before him, would be liable in damages, if it should turn out that instrument was acknowledged by an impostor. Pol.Code, § 801; Civ.Code, § 1189.

3. Acknowledgment ⚷48

In order to render a notary public liable for damages for taking acknowledgment without requiring acknowledging party to appear personally before him, notary's act in thus taking acknowledgment must have been the proximate cause of the damage sustained. Pol.Code, § 801; Civ.Code, § 1189.

4. Acknowledgment ⚷48

Where right of action for damages is founded on negligence of notary public in taking acknowledgment without requiring acknowledging party to appear personally before him, the loss sustained must not have been due to contributory negligence of plaintiff. Pol.Code, § 801; Civ.Code, § 1189.

5. Acknowledgment ⚷48

The right of action for damages allegedly resulting from misconduct or neglect of notary public is not dependent upon a showing that the acts of others have not contributed to the injury, nor does a showing that acts of others have so contributed defeat the right of action, if it appears that party defrauded relied on notary's certificate, since it is not necessary that misconduct or neglect of notary be the sole proximate cause of loss. Pol.Code, § 801; Civ. Code, § 1189.

6. Notaries ⚷10

A notary public, although negligent, is not liable for loss the direct cause of which was the intervening negligence of another. Pol.Code, § 801; Civ.Code, § 1189.

7. Acknowledgment ⚷48

Notary public was guilty of negligence in acknowledging the purported signature of maker on promissory note, without requiring such maker to appear personally before him. Pol.Code, § 801; Civ.Code, § 1189.

8. Acknowledgment ⚷48

Reliance by purchaser of promissory note from payee therein named upon acknowledgment of purported signature of maker, which purchaser knew was taken without requiring maker to appear personally before notary public, constituted negligence which proximately contributed to loss resulting from fact that maker's signature was forged, so as to preclude recovery for notary's negligence. Pol.Code, § 801; Civ. Code, § 1189.

9. Notaries ⚷11

Evidence was insufficient to warrant recovery against notary public and surety on his official bond, based on notary's negligence in acknowledging purported signature of maker on promissory note in the face amount of $25,000, without requiring maker's personal appearance before him, where it appeared that plaintiff purchased such forged note for $22,500 with knowledge that maker had not appeared personally before notary to acknowledge signature. Pol.Code, § 801; Civ.Code, § 1189.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Gail J. Burck against G. C. Buchen and others to recover damages for the alleged negligence of the named defendant in acknowledging the purported signature of maker of promissory note without the personal appearance and acknowledgment by such maker. From a judgment in favor of plaintiff, defendants appeal.

Judgment reversed.

Robert A. Jarrott, of Los Angeles, for appellant Buchen.

Arthur C. Miller and Lee A. Solomon, both of Los Angeles, for appellant Surety Co.

Paul J. Fritz, of Los Angeles, for respondent.

YORK, Presiding Justice.

This action involves a forged promissory note for $25,000 dated March 21, 1938, due ninety days after date with interest at 6 per cent per annum, in favor of George D. Smart and purportedly signed by Louis B. Mayer. On the reverse side of the note was a written guaranty of payment signed by the payee and a certificate of acknowledgment of appellant Buchen, a notary public, to the effect that on March 21, 1938, both Smart and Mayer personally appeared before him and acknowledged the execution of said note. As a matter of fact Mayer was not present when the acknowledgment was taken.

Respondent Burck purchased the note for the sum of $22,500 on April 5, 1938, under the following circumstances: The investment house of Cavanaugh-Morgan Company, of which Emerson Morgan was a partner, had been acting as brokers for respondent in the liquidation of a large block of stock in a closed corporation which was listed only on the Chicago Stock Exchange. This transaction took nearly four months to complete and during this period respondent was in and out of the Cavanaugh-Morgan office consulting with Mr. Grigg, an associate of said company, who introduced him to Mr. Morgan on March 22, 1938. On that day a conversation took place in the office of Mr. Morgan in which respondent, Mr. Morgan and George D. Smart participated, and with respect to which respondent testified as follows: "If I recall it properly, Mr. Morgan first outlined generally the terms of the * * * transaction, which were that Mr. Smart was the personal representative of Mr. Louis B. Mayer, head of the M-G-M Studios; that, as such, Mr. Smart had been commissioned by Mr. Mayer to negotiate a personal contract between the M-G-M Studios and an artist named Charles Laughton, which contract was to contain a personal paragraph making the contract completely subject to Mr. Mayer's personal control. It was stated for that reason Mr. Mayer was taking an unusual method of financing rather than to go to his bankers, for the reason that his own bankers were also officers and directors of M-G-M and it was impossible for them to know his proposed transaction if he expected any success; hence, that Mr. Mayer had executed the note for $25,000, which he had entrusted to Mr. Smart for the purpose of raising moneys to carry out this transaction; that, generally the plan was that Mr. Smart, as Mr. Mayer's agent, would negotiate with Laughton's agent in New York City, with a deposit of the $25,000 in escrow as a good faith covenant, which sum would eventually be turned over to either the agent (or) Mr. Laughton when the contract with the proper transaction in it was duly signed. There was a further problem and consideration in the whole deal, in that Mr. Laughton was at that time subject to certain income tax controversies with the United States Government and was in England and was afraid to come back to the United States until the income tax problems were fixed up. M-G-M Studios were to act as Mr. Laughton's attorneys, that is, their attorneys would act as his attorneys in straightening out that income tax controversy as a further consideration for this contract. Then, Mr. Smart corroborated various details of that plan and exhibited to me at that time various documents indicating his status as the special agent and personal representative of Mr. Mayer, letters purporting to be signed by Mr. Mayer and so forth. The note was then presented to me for my inspection * * * I looked it over and told them that I would consider the proposition and would let them know the next day. Mr. Morgan also at the same time explained to me his connection with the transaction. It seemed that Mr. Smart, as agent who would obtain the contract for M-G-M, would be entitled to the usual ten percent agent's commission. This was to be in large figures and the commission, if I understand it, would run around a hundred thousand dollars; that Smart had agreed with Morgan, in that if Morgan could help him finance this note that he, Smart, would split his commission in some manner which I do not recall with Morgan; in other words that Mr. Morgan was to participate in Smart's commission when and if the transaction was consummated in consideration of Morgan's effort to finance the note. * * * I was to pay $22,500 for the note in full. It was stated that Mr. Morgan, as a part of his own transaction with Mr. Smart, as well as financing the note, was to put up $2500 of his own money * * * as an advance to Smart for necessary immediate expenses and other details of the transaction." He further stated it was his understanding that $22,500 was to be put up by him and $2,500 was to be paid by M..

Morgan, so that Smart received $25,000, the face of the note, and that Mr. Morgan was to receive a cut-in on the commissions or part of the benefits that Smart was to receive for negotiating the contract with Mr. Laughton. Respondent took the note home with him to discuss it with his wife, and the next day returned it to Mr. Morgan and "I told Mr. Morgan that we would not take the deal at that time for the reason that it was too much money involved but that if he wanted us to we would take half of the deal". Respondent was asked regarding any conversation he might have had relative to the acknowledgment which appeared on the promissory note, to which query he made the following response: "It is my recollection that in the first conversation at the time that the note was originally presented to me it was explained the circumstances under which the notarial acknowledgment had been placed on the note. * * * Mr. Morgan stated that * * * Mr. Smart had originally presented to him a similar note on which a notarial seal had been placed but in the form of a verification rather than an acknowledgment and that Morgan's attorney's had advised him that an acknowledgment was the preferable form of notarization, so he had asked Mr. Smart—this was presumably several days prior to the time I had heard about it—to have a new note executed and acknowledged by Mr. Mayer before a notary * * * and Mr. Morgan told me that Mr. Smart had done this the night before I met him, in other words on the 21st of March; that Mr. Smart and Mr. Mayer had arranged the notarization through Mr. G. C. Buchen and that the notarization on the note was that of Mr. G. C. Buchen. * * * I believe they told me something of the details of the time and place it was done. It was done in the evening, so I believe they had to ask Mr. Buchen to come especially to his office for the occasion."

On April 5, 1938, respondent purchased a cashier's check at the Canadian Bank of Commerce in Los Angeles for $22,500 in favor of George D. Smart which he delivered to Mr. Morgan in payment for the note.

Upon cross-examination, respondent admitted he knew Mr. Morgan was continuously investigating the note during the period from March 22d to within a few days of April 5th, and at the time he bought the note "I knew that he (Mayer) had not personally appeared in Mr. Buchen's office. I knew, however, that Mr. Buchen was satisfied with his acknowledgment.

"Q. You did not talk to Mr. Buchen? A. No.

"Q. You mean Mr. Morgan represented to you that Mr. Buchen was satisfied? A. Yes.

"Q. Well, as a matter of fact, prior to April 5, 1938, the date on which you bought the note, you had ascertained that Mr. Morgan was so little satisfied with what Mr. Buchen had told him that he had, in fact, endeavored to contact Louis B. Mayer personally? A. I knew that he did that, yes. * * *

"Q. At least you did not rely on the statements contained in the acknowledgment itself, did you, Mr. Burck, which was to the effect that on this 21st day of March, 1938, before me, G. C. Buchen, a Notary Public in and for the County of Los Angeles, State of California, personally appeared George D. Smart and Louis B. Mayer, known to me to be the persons whose names are subscribed to the within instrument and so forth? A. No; I knew that Mr. Mayer had not personally appeared before Mr. Buchen.

"Q. So you knew that in so far as that statement was concerned in the acknowledgment that it was untrue? A. Yes.

"Q. And that prior to the date that you bought the note? A. Yes."

On July 8, 1938, respondent learned that the signature of Mr. Louis B. Mayer was a forgery, and in a criminal prosecution which was thereafter instituted against George D. Smart, the latter admitted this note was one of a series of notes forged by him.

From the judgment which was entered against the notary public Buchen for $22,500, and against his surety for $5,000, that being the amount of the indemnity bond, this appeal is prosecuted upon the grounds: (1) that the evidence is insufficient to support the findings of the trial court that respondent relied upon the notarial certificate endorsed upon the note by appellant Buchen, and that respondent was not guilty of negligence or contributory negligence directly and proximately causing the damage sustained by him; (2) that respondent was both careless and negligent and guilty of contributory negligence which was the proximate cause of his loss as a matter of law; (3) that the court erred in denying appellants' motion for new trial.

It is urged by appellants in support of their first point that the testimony of respondent "was undisputed. That his admitted knowledge that he had actual notice with respect to the falsity of the recital contained in the acknowledgment, and his statements showing actual notice as to the other things which cast doubt on the authenticity of the signature, definitely contradicts the findings of fact on which the trial court based its judgment herein."

It is contended by respondent that (1) a notary public and his sureties are liable for all damages proximately sustained from official misconduct or negligence of the notary public; (2) a person damaged as a result of the misconduct or negligence of a notary public may recover, even though such misconduct or neglect is not the *sole* proximate cause of the injury. (Emphasis included.)

Section 801 of the Political Code provides: "For the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained."

[1, 2] When taking an acknowledgment, "the officer should require the acknowledging party to appear in person before him, as he is required to certify that such party 'personally appeared'. § 1189, Civ.Code. If an instrument is acknowledged in violation of this rule as where it is acknowledged through a telephone, the officer would undoubtedly be liable in damages if it should turn out that it was acknowledged by an imposter." 1 Cal.Jur. 247.

[3-6] However, in order "to render the officer liable for damages, it is, of course, necessary that his act in taking an acknowledgment be the proximate cause of the damage sustained. (Joost v. Craig, 131 Cal. 504, 63 P. 840, 82 Am.St.Rep. 374; Hatton v. Holmes, 97 Cal. 208, 31 P. 1131), and where the right of action is founded on the negligence of the officer, *that the plaintiff be not guilty of contributory negligence.* Anderson v. Aronsohn, 181 Cal. 294, 184 P. 12, 10 A.L.R. 866; Overacre v. Blake, 82 Cal. 77, 22 P. 979; Oakland Bank of Savings v. Murfey, 68 Cal. 455, 9 P. 843; Brown v. Rives, 42 Cal.App. 482, 184 P. 32. This rule does not render it necessary that the misconduct or neglect of the notary be the *sole* proximate cause of loss. Indeed, an instrument cannot be used as a means of defrauding anyone until used in some transaction entirely outside the official duties of the notary. For this reason, the right of action is not dependent upon a showing that the acts of others have not contributed to the injury, or defeated by a showing that they have so contributed, if it appears that the party defrauded relied on the notary's certificate. Homan v. Wayer, 9 Cal.App. 123, 98 P. 80. On the other hand, if notwithstanding the negligence of the notary, the intervening negligence of another is the direct cause of the loss, the notary is not liable." 1 Cal.Jur. 297, § 51. (Emphasis added.)

Appellant Buchen testified with respect to the circumstances under which he certified the acknowledgment of Louis B. Mayer to the note in question as follows:

"I was called on the telephone * * * around 9:30 that evening (March 21, 1938) by * * * a man that I had known for about fifteen years, and he asked me as a special favor to go to the office, that one of his clients had a party that wanted to meet me there for an acknowledgment that evening and it was a matter that had to be attended to on account of him going to Washington, D. C., and it had to be acknowledged that evening"; that he left his home in Glendale and went to his office at Third and La Brea, Los Angeles, where he met "a man that introduced himself as Mr. Smart", who handed appellant a card which showed he was connected with the sound department of Metro-Goldwyn-Mayer Corporation, but he explained that "he was actually Mr. Mayer's confidential secretary and then he went on to explain about this note and the reason why he was going to Washington, to handle some confidential matters for Mr. Mayer and showed me a letter written on * * * Metro-Goldwyn-Mayer stationery with his (Mayer's) signature attached to it. * * * I told him * * * the promissory note with Mayer's signature on it should be good without an acknowledgment * * * but he (Smart) said in this particular case * * * this note was given him in remuneration for certain services he was to render for Mr. Mayer in Washington and that in case anything happened to Mr. Mayer he wanted the signature acknowledged because there might be some dispute about it because of its confidential nature and that he might not be able to claim on the note if the signature was not acknowledged. That is the reason he gave me. * * * I asked him why he didn't bring Mr. Mayer to the office with him and he said Mr. Mayer was in another important meeting and it would be impossible to get him there but he would contact him by telephone, so I suggested that he call him on the telephone and have me talk to him and he dialed the number and turned the receiver over to me * * * and I asked the party at the other end if he was Louis B. Mayer and he said he was. He said that he was Mr. Mayer and I told him the purpose of the call was to—Mr. Smart was in the office and had a note there to the amount of $25,000, asking for me to acknowledge the signature, and asked him if he had signed the paper and it was o.k. for me to acknowledge it, and he said that that was o.k. but to keep it confidential." The witness Buchen further testified that on either the 22d or the 23d of March, Mr. Morgan walked into his office, "pulled the note out of his pocket and laid it on the desk and asked me if Mr. Mayer was there personally when that note was acknowledged." Mr. Buchen said he then related to Morgan "just the facts as they occurred the night before; that Mr. Mayer was not there personally and that Mr. Smart had come there and asked me to acknowledge that signature and I just explained it as I have here, that I talked to him supposedly on the telephone". Appellant testified that later in the day Mr. Morgan telephoned him and told him his connection with Cavanaugh-Morgan Company and that he was interested in the purchase of the note and wanted to be satisfied before he advanced any money on it, whereupon Mr. Buchen suggested that he would do his best to contact Mr. Mayer personally; however he was unable to reach him personally, and "finally Mr. Morgan told me that they had been able to contact Mr. Mayer; they had been in correspondence with Smart back east and through Mr. Smart's connection here they were able to contact Mayer and that they were satisfied that everything was all right * * * he said that Mr. Smart had made a contact for him with Mr. Mayer by long distance some way and that he had talked to Mr. Mayer and that they were satisfied that the note was o.k. and for me to just forget it".

There was introduced in evidence the deposition of George D. Smart which contained the following testimony: "Mr. Buchen came to his office and I met him there and I presented him with this note and asked him to acknowledge the signature thereon. And he, of course, told me he couldn't do that, because the man wasn't able to make his appearance, but after I talked to him for fifteen or twenty minutes, and explained the inadvisability of a man of this type running around nights to have his signature o.k.'d and so I told Mr. Buchen that I would arrange for him to talk to Mr. Mayer over the telephone, which I did supposedly. I had him call a number, and he thought he was talking to Mr. Mayer. He reluctantly acknowledged the signature as that of Mr. Louis B. Mayer." He also testified that Mr. Morgan "took every precaution that was humanly possible, excepting to contact Mr. Mayer * * * Mr. Morgan had also taken this note, and other notes, to certain banks in Los Angeles who had copies of Mr. Mayer's signature, and they had stated that in their opinion it was Mr. Mayer's signature. * * * Mr. Morgan explained to Mr. Burck that we were attempting, or that I was attempting, rather, to settle back income taxes for Mr. Charles Laughton, who was at that time in England; and that if these taxes could be settled judiciously, and without any trouble, that * * * I would receive a contract from Mr. Laughton which would in turn be given to Mr. Mayer or to Metro-Goldwyn-Mayer, which would involve quite a sum of money; it would be over a period of three years; and for settling these taxes, and for negotiating this contract, I was to receive 10% of the face of the contract * * * to be shared between Mr. Morgan and myself".

With respect to the certificate of acknowledgment on the note, Mr. Morgan testified as follows: "The only investigation I made on that note was after the note was notarized. I dropped by Mr. Buchen's office on a Wednesday or Thursday morning following the March 21 conference and asked Mr. Buchen if that was his notarization. He admitted it was and I asked him if Mr. Mayer was present and he wanted to know who I represented and what my questions were for, whether or not any money had been advanced on the note and I told him a considerable amount of money had been advanced on the note and it was a pretty serious affair if the proper persons had not appeared before him. He refused to give me much information and later that afternoon I called him on the telephone. * * * at which time, I believe, he realized the seriousness of it and I don't know whether it was over the 'phone or whether I dropped in to see him again but at that time he was * * * convinced that a hoax had been played and said that * * * he had not dialed the number himself when he supposedly talked to Louis B. Mayer. I asked him if he would get in touch with Louis B. Mayer for confirmation, at which time he said he would write a letter to Mr. Mayer. I called him several days later and he had had no reply. It was at that time that I called long distance or sent a wire to Mr. Smart (who was then in New York), and he (Smart) called me long distance Friday night and told me that the reason that Mr. Buchen would not make any admission one way or the other was because he was in the employ of Mr. Mayer and had his instructions, but he said if I would go to Mr. Buchen at 10 o'clock Saturday morning, * * * April 2, that Mr. Buchen would talk to Mr. Mayer over the 'phone and confirm the notarization. * * * He said 'Have Mr. Buchen call the Metro-Goldwyn-Mayer Studio and call for L.B. 7646—that is Louis B. Mayer's private number'. I dropped by on a Saturday morning at 9 o'clock and Mr. Buchen was not in his office and I tried again at 9:45 and he was not in his office, so I called from our office—called Republic 0211, which is the Metro-Goldwyn-Mayer number—called for L. B. 7646 and was—got switched onto a voice that purportedly was Louis B. Mayer, at which time Mr. Garrett in our office listened in * * * I asked if he was Mr. Mayer, which he said he was. I stated I was calling in behalf of Mr. Buchen, who was out, regarding authenticity of the note, which he stated—then Mr. Mayer stated was valid and which he would sign." As a matter of fact, it is shown by the record that this telephone conversation was not with Mr. Mayer but with a confederate of George D. Smart.

[7, 8] While it must be conceded that appellant Buchen was guilty of negligence in acknowledging the purported signature of Mr. Mayer without requiring the latter's personal appearance before him, it is admitted by respondent Burck that he had actual notice of this fact before he purchased the note. Respondent's reliance upon the notarial certificate in the face of his actual knowledge that it had been irregularly executed constituted negligence which proximately contributed to his loss.

The entire transaction was surrounded by facts and circumstances sufficient to have aroused the suspicions of any ordinarily prudent person. In the first place, a promissory note is not required by statute to be acknowledged; second, the purported agreement, pursuant to which the note was executed and which was narrated to respondent by Mr. Morgan and Mr. Smart, was one which cast aspersions upon the character and integrity of a man standing practically at the head of the motion picture industry in this state; third, the offer to sell this 90-day note with interest at 6 per cent at a discount of $2,500 was calculated to appeal to the cupidity of prospective purchasers, and thus to allay suspicion as to its authenticity.

[9] The evidence clearly establishes the fact that respondent's negligence proximately contributed to his loss, and is therefore insufficient to support the findings of the trial court which formed the basis of the judgment.

The judgment is reversed.

DORAN and WHITE, JJ., concurred.